LexisNexis

Date and Time: Tuesday, October 17, 2023 9:15:00 AM CST

Job Number: 208207516

Documents (100)

1. [Ceiling & Interior Sys. Supply v. USG Interiors, 878 F. Supp. 1389]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

2. [Balaklaw v. Lovell, 822 F. Supp. 892]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

3. [Maier-Schule GMC v. GMC GMC Truck & Bus Group, 1993 U.S. Dist. LEXIS 21728]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

4. [Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

5. [Adams Insulation Co. v. Orange County Dist. Council of Carpenters, 1993 U.S. App. LEXIS 10522]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

6. *Pennsylvania v. Russell Stover Candies, Inc., 1993 U.S. Dist. LEXIS 6024*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

7. *Caribe BMW v. Bayerische Motoren Werke Aktiengesellschaft, 821 F. Supp. 802*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

8. *Ghem, Inc. v. Mapco Petroleum, Inc., 1993 U.S. App. LEXIS 12064*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

9. *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

10. *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

11. *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

12. *Information Exch. Sys. v. First Bank Nat'l Ass'n, 994 F.2d 478*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

13. *Ortho Diagnostic Sys. v. Abbott Lab., Inc., 822 F. Supp. 145*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

14. *Williamson v. Sacred Heart Hosp., 1993 U.S. Dist. LEXIS 20853*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

15. *Hibernia Nat'l Bank v. Indus. Alloys Co., 1993 U.S. App. LEXIS 40801*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

16. [Virtual Maintenance v. Prime Computer, 995 F.2d 1324]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

17. [Cimarron Pipeline Constr. v. National Council on CompenasationIns., 1993 U.S. Dist. LEXIS 19987]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

18. [Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19970]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

19. [Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19971]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

20. [Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19972]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

21. [Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19973]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

22. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19974*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

23. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19975*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

24. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19976*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

25. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19978*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

26. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19981*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

27. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19982*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

28. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19983*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

29. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19984*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

30. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19985*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

31. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19989*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

32. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19990*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

33. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19991*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

34. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19992*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

35. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19993*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

36. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19994*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

37. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19996*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

38. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19997*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

39. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19998*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

40. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 20001*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

41. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 20002*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

42. *Cimarron Pipeline Constr. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 20003*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

43. [North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 1993 U.S. App. LEXIS 13524]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

44. [Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

45. [Caldwell v. American Basketball Ass'n, 825 F. Supp. 558]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

46. [New York v. Kraft Gen. Foods, 862 F. Supp. 1030]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

47. [Greater Rockford Energy & Technology Corp. v. Shell Oil Co., 998 F.2d 391]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

48. *Great Clips v. Levine, 1993 U.S. Dist. LEXIS 19945*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

49. *Storer Cable Communications v. City of Montgomery, 826 F. Supp. 1338*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

50. *Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

51. *Hartford Fire Ins. Co. v. Cal., 509 U.S. 764*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

52. *In re Catfish Antitrust Litig., 826 F. Supp. 1019*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

53. *United States v. Rubin, 999 F.2d 194*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

54. *Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

55. *Osborn v. Bell Helicopter Textron, 828 F. Supp. 446*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

56. *PPG Indus. v. Pilkington PLC, 825 F. Supp. 1465*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

57. *Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

58. *Tri-State Rubbish v. Waste Management, 998 F.2d 1073*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

59. *Ticor Title Ins. Co. v. FTC, 998 F.2d 1129*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

60. *Ehredt Underground v. Commonwealth Edison Co., 830 F. Supp. 1083*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

61. *Forsyth v. Humana, Inc., 827 F. Supp. 1498*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

62. *Sullivan v. Tagliabue, 828 F. Supp. 114*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

63. *Hertz Corp. v. City of N.Y., 1 F.3d 121*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

64. *Piazza v. Major League Baseball, 831 F. Supp. 420*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

65. *Tacker v. Wilson, 830 F. Supp. 422*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

66. *Alvord-Polk, Inc. v. F. Schumacher & Co., 1993 U.S. App. LEXIS 20329*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

67. *Lee v. Life Ins. Co. of N. Am., 829 F. Supp. 529*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

68. *Rosen v. Hyundai Group (Korea), 829 F. Supp. 41*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

69. *Butterworth v. Nat'l League of Prof'l Baseball Clubs, 622 So. 2d 177*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

70. *Appraisers Coalition v. Appraisal Inst., 1993 U.S. Dist. LEXIS 11770*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

71. *El Cajon Cinemas v. American Multi-Cinema, 832 F. Supp. 1395*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

72. *Helder v. Hitachi Power Tools, 1993 U.S. Dist. LEXIS 13220*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

73. *Computer Assocs. Int'l v. American Fundware, 831 F. Supp. 1516*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

74. [Field v. First Nat'l Bank, 249 Ill. App. 3d 822]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

75. [Houston Mercantile Exch. Corp. v. Dailey Petroleum Servs. Corp., 1993 Tex. App. LEXIS 2358]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

76. [Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc., 251 Ill. App. 3d 17]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

77. [Harris Custom Builders v. Hoffmeyer, 834 F. Supp. 256]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

78. [Howerton v. Grace Hosp., 1993 U.S. Dist. LEXIS 21042]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

79. Flegel v. Christian Hosp. Northeast-Northwest, 4 F.3d 682

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

80. Auto. Prods. v. Tilton Eng'g, Inc., 1993 U.S. Dist. LEXIS 20813

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

81. United States v. Brown Univ., 5 F.3d 658

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

82. Brookeside Ambulance Serv. v. Walker Ambulance Serv., 1993 U.S. Dist. LEXIS 16886

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

83. DR PEPPER/SEVEN-UP COS. v. FTC, 1993 U.S. Dist. LEXIS 15984

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

84. KLM Royal Dutch Airlines v. Amber Air Int'l, Ltd., 1993 U.S. Dist. LEXIS 13878

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

85. *GMC v. N.Y. State Elec. & Gas Corp., 1993 U.S. Dist. LEXIS 21444*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

86. *Transphase Sys. v. Southern Cal. Edison Co., 839 F. Supp. 711*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

87. *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

88. *Lifemark Hosps. v. Liljeberg Enters., 161 B.R. 21*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

89. *Willman v. Heartland Hosp. E., 836 F. Supp. 1522*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

90. Dr Pepper/Seven-Up Cos. v. FTC, 151 F.R.D. 483

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

91. Clorox Co. v. Sterling Winthrop, 836 F. Supp. 983

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

92. Denny's Marina v. Renfro Prods., 8 F.3d 1217

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

93. McCormick v. Bradley, 870 P.2d 599

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

94. Gabriel & Assocs. v. Invisible Fence Co., 1993 U.S. Dist. LEXIS 19907

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

95. Lone Star Indus. v. Compania Naviera Perez Companc (In re New York Trap Rock Corp.), 160 B.R. 876

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

96. Datagate, Inc. v. Hewlett-Packard Co., 1993 U.S. Dist. LEXIS 17707

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

97. AHP Subsidiary Holding Corp. v. Stuart Hale Co., 1993 U.S. Dist. LEXIS 16878

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

98. Coleman v. Cannon Oil Co., 849 F. Supp. 1458

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

99. U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

100. *Teleconnect Co. v. U.S. West Communications, 508 N.W.2d 644*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Oct 01, 1991 to Dec 31, 2022

Ceiling & Interior Sys. Supply v. USG Interiors

United States District Court for the Western District of Washington

April 28, 1993, Decided ; April 28, 1993, ENTERED

No. 91-1588D

Reporter

878 F. Supp. 1389 *; 1993 U.S. Dist. LEXIS 20773 **; 1995-1 Trade Cas. (CCH) P70,942

CEILING & INTERIOR SYSTEMS SUPPLY, INC., a Washington corporation, Plaintiff, v. USG INTERIORS, INC., a foreign corporation, Defendant.

Core Terms

grid, monopolize, termination, distributor, distributorship, antitrust, products, contracts, summary judgment, tying arrangement, breach of contract, Sherman Act, manufactured, probability, dealership, parties, refers, plaintiff's claim, relevant market, three-year, commerce, monopoly, prices

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > General Overview

HN1[] **Judgments, Summary Judgment**

Even though summary judgment is disfavored in complex antitrust litigation, it is not precluded.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Evidentiary Considerations**

When plaintiff bears the burden of proving an element of his case at trial, defendant will prevail on a motion for summary judgment if plaintiff does not come forward with evidence of that element. Moreover, plaintiff's evidence must establish that there is a genuine issue of material fact, not simply show that there is some metaphysical doubt as to the material facts.

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

HN3[] Contract Conditions & Provisions, Waivers

Waiver is the intentional relinquishment of a known right. It is necessary that the person against whom waiver is claimed have intended to relinquish the right, advantage, or benefit and his action must be inconsistent with any other intent than to waive it.

Contracts Law > Contract Interpretation > General Overview

HN4[] Contracts Law, Contract Interpretation

Contract interpretation refers to ascertaining the meaning and intent of the parties in the context of the whole agreement, and may be gleaned from circumstances leading up to the formation and the conduct of the parties before and after formation. Contract construction refers to determining the legal effect of a contract.

Contracts Law > Statute of Frauds > Requirements > Performance

Contracts Law > Statute of Frauds > General Overview

Contracts Law > Statute of Frauds > Requirements > General Overview

HN5[] Requirements, Performance

The statute of frauds defense *Wash. Rev. Code § 19.36.010* is premised on the requirement in Washington that contracts which require more than one year to perform must be in writing.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN6[] Remedies, Damages

Section 2 of the Sherman Act, *15 U.S.C.S. § 2*, criminalizes conduct which creates a monopoly or attempts to monopolize interstate or foreign commerce. Private parties are also given the right to bring civil actions for treble damages. *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

***HN7*[]** **Scope, Monopolization Offenses**

To prove an attempted monopolization, plaintiff must demonstrate (1) specific intent to control prices and destroy competition; (2) predatory or anti-competitive conduct; (3) a dangerous probability of success; (4) causal antitrust injury. Proof of an attempt to monopolize under the Sherman Act, *15 U.S.C.S. § 2*, requires dangerous probability that they would monopolize a particular market and specific intent to monopolize. *15 U.S.C.S. § 2* makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

***HN8*[]** **Attempts to Monopolize, Sherman Act**

There is no liability for attempted monopolization under *§ 2* of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

***HN9*[]** **Monopolies & Monopolization, Attempts to Monopolize**

A plaintiff cannot prove that a single firm attempted to monopolize without defining the relevant market and offering evidence of the dangerous probability that the firm could achieve a monopoly in that market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN10[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Wash. Rev. Code § 19.86.090 permits an action by anyone who is injured in his business or property because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of other antitrust statutes.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN11[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Wash. Rev. Code § 19.86.030 prohibits conspiracies in restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN12[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Wash. Rev. Code §19.86.050 makes it unlawful to agree not to use or deal in commodities where the effect of such may be to substantially lesson competition or tend to create a monopoly in any line of commerce.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Exclusive dealing is not per se illegal. Rather, under the rule of reason, the court must consider all the circumstances of the case to determine if the exclusive arrangement imposes an unreasonable restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN14[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Relevant circumstances for purposes of determining if an exclusive arrangement imposes an unreasonable restraint of trade can include such diverse factors as the defendants' intent and purpose in adopting the restriction; the structure of and competitive conditions within the affected industries; the relative competitive positions of the defendants; the presence of economic barriers inhibiting the ability of competitors to respond and offset the challenged practices; and apparent justifications for the restriction such as enhanced efficiency, protection of product or service goodwill, and inducing dealer loyalty. No single such factor is decisive.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN15[] **Antitrust & Trade Law, Sherman Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement violates *§ 1* of the Sherman Act if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN16[] **Tying Arrangements, Clayton Act**

A manufacturer generally has the right to unilaterally refuse to deal. The refusal to deal with third parties conditioned on failure to purchase other goods or services, however, is not a unilateral refusal. To establish an illegal tying arrangement under the Sherman Act, *15 U.S.C.S. § 2*, the Ninth Circuit requires a plaintiff to demonstrate that: (1) two distinct products or services are in fact tied such that the products are offered as a single package; (2) the defendant has sufficient economic power in the tying market to impose restrictions in the tied product market; (3) the amount of commerce in the tied product is not insubstantial.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN17[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Substantial power for antitrust purposes is the ability to raise prices or to require purchasers to accept burdensome terms that could not be enacted in a completely competitive market.

Counsel: [1]** For PLAINTIFF: David Leiberworth, Esq., Scott G. Warner, Esq., Baron Lieberworth & Warner, Seattle, WA. Harold G. Weinberg, Esq., Weinberg & Siegel, Seattle, WA.

For DEFENDANT: Donald G. Kempf, Jr., Esq., Walter R. Lancaster, Esq., Jeffrey Cashdan, Esq., Kirkland & Ellis, Chicago, IL. Howard (Terry) Hall, Esq., George, Hull, Porter & Kohli, Seattle, WA.

Judges: CAROLYN R. DIMMICK, United States District Judge

Opinion by: CAROLYN R. DIMMICK

Opinion

[*1390] ORDER

This cause of action was brought under both the court's diversity and federal question (antitrust) jurisdiction. With this motion, defendant USG Interiors, Inc. ("USGI") seeks summary judgment dismissal of all of plaintiff's claims except the one for tortious interference. After full consideration of the briefs and affidavits filed by counsel, the Court dismisses all the antitrust claims, but **[*1391]** retains part of plaintiff's breach of contract and its tortious interference claims.[1]

[2]** FACTS

Ceiling and Interior Systems Supply, Inc. ("CISSI") is a distributor of acoustical products in the Northwest. At issue here are two of those products: "Board," an acoustical tile used on ceilings; and "grid," a metal suspension system for holding the board. CISSI sells in a five-state area (Alaska, Washington, Oregon, Idaho and Montana) which it refers to as the "Northwest market."

CISSI was incorporated in 1970 and had been an authorized distributor of board manufactured by Conwed Corporation and grid manufactured by Donn Corporation prior to the time USGI or one of its affiliates acquired Conwed in 1985 and Donn in 1986. Written agreements existed between CISSI and Conwed, and CISSI and Donn, at the time USGI took over the board and grid firms. (These agreements will be discussed in greater detail under the motion to dismiss the breach of contract claim.) In a letter dated November 18, 1986, USGI stated its policy towards its distributor (also arguably a contract). During the relevant period, CISSI also carried competing lines of grid and board.

In May 1991, CISSI's Portland distributor became an Armstrong distributor. The CISSI distributor in Seattle also became an Armstrong **[**3]** distributor in October 1991. USGI argues that these two CISSI distributors became exclusive distributors for Armstrong board. CISSI disputes the exclusivity. In any event, the Armstrong deal appears to have precipitated an offer of an exclusive dealership from USGI requiring CISSI to abandon Armstrong. USGI canceled its dealerships with Portland and Seattle CISSI after CISSI declined the exclusive dealership. USGI's distributorship with CISSI in Boise and Spokane continued. The question for the Court is whether USGI's actions breached the contract with CISSI and/or violated antitrust laws.

CISSI claims follow:

1. Breach of contract.

2. Wrongful interference with economic relationships.

3. Attempted monopolization under Sherman Act *§ 2* and *RCW 19.86.040*.

4. Termination for refusal to accede to exclusionary arrangement in violation of *RCW 19.86.030* & .050, and *RCW 19.86.090*.

5. Termination for refusal to accede to tying arrangement in violation of *RCW 19.86.030* and *RCW 19.86.090*.

Earlier this Court dismissed the claim for breach of duty of good faith and fair dealing, and plaintiff has abandoned claims brought under the Washington Consumer Protection Act and Washington Franchise Investment **[**4]** Act.

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[1] Defendant USGI requested oral argument, but plaintiff CISSI indicated that it was unnecessary. The Court agrees in view of the extensive briefing and the excellent presentation of evidence by both parties.

Plaintiff mistakenly relies on this Court's Order of March 13, 1992, denying defendant's motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*. The Court uses a different standard in addressing a motion pursuant to *Fed. R. Civ. P. 56*. ***HN1***[] Even though summary judgment is disfavored in complex antitrust litigation, it is not precluded. *Betaseed,* at 1207. ***HN2***[] When plaintiff bears the burden of proving an element of his case at trial, defendant will prevail on a motion for summary judgment if plaintiff does not come forward with evidence of that element. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Moreover, plaintiff's evidence must establish that there is a genuine issue of material fact, not "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

DISCUSSION

1. *Breach of Contract*

Defendant USGI is successor to Conwed (board producer) and Donn (grid producer). **[*1392]** Defendant does **[**5]** not argue at this point the contractual validity of the following agreements: Conwed and CISSI agreement, dated July 28, 1978; and Donn and CISSI agreement undated, but apparently sent in 1983. In addition, USGI sent a letter to CISSI dated November 18, 1986 explaining the basis for its continuing distributorship with CISSI. None of these documents set a specific date on which the distributorship would cease.

Plaintiff CISSI insists that the agreements constitute an ongoing commitment with termination to occur only for cause. USGI counters that the distributorship could be canceled at will with 90 days notice which it gave. USGI terminated CISSI as a distributor of its board and grid at CISSI's Seattle and Portland outlets, effective October 18, 1991. The other CISSI outlets continued to sell USGI board and grid.

There are two aspects to the breach of contract issue. The first relates to events occurring more than three years prior to USGI's termination of the contract; the second relates to the termination itself. USGI asserts different defenses to each aspect.

As to the first, CISSI alleges that USGI set up competing distributorships contrary to the written agreements with CISSI: **[**6]** Rose City in Portland in 1987 and Northwest Acoustical Supply in Seattle in July 1988. Additionally, USGI sold directly to customers during that period. All of this was allegedly in breach of the agreements between USGI and CISSI. USGI's defenses to these alleged breaches are (1) the claim is barred by the three-year statute of limitations governing unwritten contracts and (2) CISSI has waived its claims by failing to act.

In arguing that the three-year statute of limitations applies, USGI points out that the contract in question is part oral and part written, thus the three-year statute (rather than the six-year statute for written contracts) applies. *See Cahn v. Foster & Marshall, Inc., 33 Wash. App. 838, 658 P.2d 42 (1983)* ("if resort to parol evidence is necessary to establish any material element, then the contract is partly oral . . . ."). There are no written words defining the length of contract in any of the documents. As will be discussed later, the Court would have to look outside the document were it to reach plaintiff's position that the distributorship could, be terminated only for cause. It would therefore appear that *Cahn* **[**7]** requires application of a three-year statute and CISSI's claims which predate filing by three or more years are foreclosed.

Because the Court concludes that the three-year limitation period applies, it is not necessary to reach the waiver issue. Nonetheless, the Court concludes that USGI has not proved waiver. It is clear that CISSI knew of the competing distributorship but voiced an objection, and had not unequivocally relinquished its rights.

> ***HN3***[] Waiver is the intentional relinquishment of a known right. It is necessary that the person against whom waiver is claimed have intended to relinquish the right, advantage, or benefit and his action must be inconsistent with any other intent than to waive it.

Wagner v. Wagner, 95 Wash. 2d 94, 102, 621 P.2d 1279 (1980), cited in *Central Washington Bank v. Mendelson-Zeller, 113 Wash. 2d 346, 353, 779 P.2d 697 (1989)*.

Next is the second aspect: Was either contract terminable at will or only for cause; and because for more than one year, was it outside the statute of frauds? USGI insists that the contracts in question (earlier Conwed and Donn agreements **[**8]** and USGI letter) are terminable at will, relying on Birkenwald Distributing Co. v. Heublein, Inc., 55 Wash. App. 1, 776 P.2d 721 (1989). The *Birkenwald* case does support USGI's argument with the following language:

> Parties contracting in good faith for a continuing performance presumably *intend* a reasonable time if they do not discuss duration; for this reason, either party may terminate its obligations after a reasonable time has passed.

Birkenwald, at 7 (citations omitted). In *Birkenwald,* however, the contract at issue was an oral contract. Moreover, *Birkenwald* preceded the Washington Supreme Court's discussion on interpreting **[*1393]** contracts in Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990).

In analyzing a contract, the *Berg* court differentiated between contract interpretation and contract construction. ***HN4***[] "Interpretation" refers to ascertaining the meaning and intent of the parties in the context of the whole agreement, and may be gleaned from circumstances leading up to the formation and the conduct of the parties before and after formation. "Construction" refers **[**9]** to determining the legal effect of a contract. Id. at 663-69.

Application of the statute of frauds (RCW 19.36.010) in the midst of this argument is problematic. ***HN5***[] The statute of frauds defense is premised on the requirement in Washington that contracts which require more than one year to perform must be in writing. The contracts at issue here are in writing, but the specific time for their performance is not clearly written.

This Court concludes that pursuant to *Berg,* the written contracts at issue here are subject to extrinsic evidence to explain the meaning and intent of the parties as to termination. The fact that these written contracts do not contain a written date or grounds for termination, however, will not defeat them under the statute of frauds. The Court thus denies summary judgment on the issue of contract termination.

2. *Attempted Monopolization in Violation of Section 2 of the Sherman Antitrust Act*

HN6[] Section 2 of the Sherman Act (15 U.S.C. § 2), criminalizes conduct which creates a monopoly or attempts to monopolize interstate or foreign commerce. Private parties are also given the right **[**10]** to bring civil actions for treble damages. 15 U.S.C. § 15.[2]

CISSI basis its claims of attempted monopolization on the following: (1) USGI's termination of CISSI as both a board and grid distributor because of CISSI's refusal to give up Armstrong and push USGI exclusively; (2) USGI's threats to price CISSI out of the market; (3) USGI's attempt to leverage its dominant position in grid to improve its position in board sales.[3]

[11]** USGI admits to terminating CISSI as a distributor in Portland and Seattle after CISSI declined USGI's offer of an exclusive distributorship in Seattle and one of two distributorships in Portland (agreeing to close one of its company-owned outlets). These actions, according to USGI, were motivated by CISSI's decreasing sales of USGI products.

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[2] Plaintiff's claim also asserts violation of RCW 19.86.040, which essentially follows section 2 of the Sherman Act. The parties rely almost exclusively on federal cases.

[3] Leveraging (use of market power in one market to gain advantage in another market) may violate ***antitrust law***. Key Enterprises of Delaware, Inc. v. Venice Hospital., 919 F.2d 1550 (11th Cir. 1990), *vacated,* 979 F.2d 806 (11th Cir. 1992); *but see* Catlin v. Washington Energy Co., 791 F.2d 1343, 1346 (9th Cir. 1986) (reserving judgment' on the issue of monopoly leveraging as separate antitrust claim).

There are three primary manufacturers of board in the United States: Armstrong (the largest manufacturer of acoustical ceiling products), USGI, and Celotex. There are also three primary manufacturers of grid in the United States: USGI (the largest), National Rolling Mills, and Chicago Metallic Corporation. USGI admits to being the largest national seller of grid, and being second to Armstrong in board sales. USGI holds a patent on its grid design.

HN7[] To prove an attempted monopolization, plaintiff must demonstrate (1) specific intent to control prices and destroy competition; (2) predatory or anti-competitive conduct; (3) a dangerous probability of success; (4) causal antitrust injury. *Pacific Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992) cert. denied U.S. , 121 L. Ed. 2d 686, 113 S. Ct. 814*. **[**12]** Under a very recent Supreme Court holding, proof of *section 2* attempt to monopolize requires "dangerous probability that they would monopolize a particular market and specific intent to monopolize." *Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. Recognizing the distinction between actions of a single firm and concerted activity, the Court reversed the Ninth Circuit and the trial court, **[*1394]** noting that "*section 2* makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Id. at 10* (citation omitted). The Supreme Court thus held as follows:

> We hold that petitioners may not be ***HN8***[] liable for attempted monopolization under section two of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize. In this case, the trial instructions allowed the jury to infer specific intent and dangerous probability of success from the defendants' predatory conduct, without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market. **[**13]** In this respect the instructions misconstrued section two, as did the court of appeals in affirming the judgment of the district court.

CISSI argues that *Spectrum Sports* is a narrow holding and does not require market share analysis to prove dangerous probability. CISSI does not say how else it would be proved, and the Supreme Court pointedly overruled the Ninth Circuit's position that evidence of unfair or predatory conduct obviated the need for market-analysis. This Court's reading of *Spectrum Sports* and its specific reversal of Ninth Circuit precedence means ***HN9***[] that CISSI cannot prove that USGI (a single firm) attempted to monopolize without defining the relevant market and offering evidence of the dangerous probability that USGI could achieve a monopoly in that market. CISSI has not done so.

CISSI implies that the relevant product is board, but offers no analysis of alternative products and the elasticity of price and demand. USGI's evidence indicates that even in grid market (where it admits a dominant position) its price increases are considerably less than the inflation rate for 1989-1992. *See* Watkins Affidavit. CISSI's former president, Don Hagarty, acknowledged **[**14]** that grid is priced competitively and that customers respond to price fluctuation. There is clear evidence that Armstrong is the leading seller of board and no evidence that USGI could overtake Armstrong and achieve a monopoly in board.

Similarly, CISSI has not even attempted to define the relevant geographic market. At various points in its brief, CISSI refers to evidence of a northwest market, a national market, an Alaska market, an Oregon and Eastern Washington market, and a Western Washington market. However, it offers no clear figures to demonstrate market shares for USGI board and grid in a particular geographic market. CISSI refers to a multitude of figures (some based on USGI's internal forecasts) but nowhere settles down to identify the geographic market it accuses USGI of attempting to monopolize.

Because of CISSI failure to define the relevant market which it accuses USGI of attempting to monopolize, and its consequent failure to show dangerous probability that USGI would monopolize, CISSI's *section 2* claim is dismissed.

3. *Plaintiff's Claim of an Attempt to Create an Exclusionary Arrangement in Violation of RCW 19.86.030* & *.050 and RCW 19.86.090*

CISSI contends that **[**15]** USGI's offer of an exclusive distributorship (which was refused by CISSI) was in violation of Washington's antitrust statutes, because it was an attempt to create an exclusionary arrangement. USGI describes the offer as one for a vertical nonprice restraint, which would be examined under ***antitrust law*** as to whether it was an unreasonable restraint on trade ("the rule of reason").

The Washington statute, ***HN10***[] *RCW 19.86.090*, permits an action by anyone who is injured in his business or property "because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of [other antitrust statutes as explained next] . . ." The two statutes plaintiff invokes at this point are ***HN11***[] *RCW 19.86.030*, prohibiting conspiracies in restraint of trade and ***HN12***[] *RCW 19.86.050*, which makes it unlawful to agree not to use or deal in commodities "where the effect of such . . . may be to substantially lesson competition or tend to create a monopoly in any line of commerce." **[*1395]** CISSI argues that this prohibition parallels federal law proscribing exclusive dealing which is anti-competitive.[4]

[16]** Thus this Court looks at exclusive dealing under the "rule of reason," as would a federal court. *Ballo, at 26*. ***HN13***[] Exclusive dealing is not per se illegal. Rather, under the rule of reason, this Court must consider all the circumstances of the case to determine if the exclusive arrangement imposes an unreasonable restraint of trade. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*. One expert described the factors to be considered thusly:

> ***HN14***[] Relevant circumstances can include such diverse factors as the defendants' intent and purpose in adopting the restriction; the structure of and competitive conditions within the affected industries; the relative competitive positions of the defendants; the presence of economic barriers inhibiting the ability of competitors to respond and offset the challenged practices; and apparent justifications for the restriction such as enhanced efficiency, protection of product or service goodwill, and inducing dealer loyalty. No single such factor is decisive.

W. Holmes, *1992* ***Antitrust Law*** *Handbook* **[**17]** § 1.04, at 163-64. The *Holmes* treatise goes on to point out that a rule of reason inquiry necessarily begins with identification of the relevant market.

This takes the Court full circle back to the *section 2* analysis "attempt to monopolize" above and the need for market analysis. This conclusion is supported by *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. In addressing an exclusive contract by a hospital for the services of certain anesthesiologists, the Supreme Court again emphasized the need for market analysis to determine the anticompetitive effects. "There is, however, insufficient evidence in this record to provide a basis for finding that the Roux contract, as it actually operates in the market, has unreasonably restrained competition." *Id. at 29*.[5]

[18]** Similarly, in *Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98 (3d Cir. 1992)*, the court examined an exclusive dealing arrangement in the pharmaceutical field using section 3 of the Clayton Act (*15 U.S.C. § 14*) and *section 1* of the Sherman Act (*15 U.S.C. § 1*). In *Barr,* the relevant market had been defined in the first half of a bifurcated trial, after which the trial court entered summary judgment for defendant. The Court of Appeals affirmed the trial court's conclusion that the exclusive dealing contracts "did not portend an immediate or future anti-competitive backlash." *Id. at 111*.

The Court simply does not have here the basic information for determining that USGI's offer of an exclusive contract (had it been accepted) would have unreasonably restrained competition. This claim is therefore dismissed.

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[4] Washington law recognizes that this statute is patterned after the Sherman Antitrust Act, and that the Legislature "anticipated our courts would be guided by the interpretation given by the federal courts to the corresponding federal statutes. *RCW 19.86.920*." *Ballo v. James S. Black Co., 39 Wash. App. 21, 692 P.2d 182 (1984)*.

[5] In *Jefferson Parish,* the Court's analysis was premised on *section 1* of the Sherman Act. It is well to remember that in the instant case, the Court is examining an *attempted* exclusive dealing as it relates to Washington law. In doing so, it is relying on federal cases relying on federal ***antitrust law***, but an attempt at exclusive dealing would probably fall under *section 2* of the Sherman Act dealing with attempted monopolization, rather than *section 1* (contracts, combinations and conspiracies).

4. *Plaintiff's Claim of an Attempt to Impose an Illegal Tying Arrangement in Violation of RCW 19.86.030 and RCW 19.86.090*

CISSI contends that the agreement offered by USGI (Seattle and Portland exclusive and semi-exclusive dealerships) if **[**19]** consummated would have constituted an illegal tying arrangement. Here again the Court is directed to RCW 19.86.090 governing refusals "to accede to a proposal for an arrangement which, if consummated, would be in violation of . . ." In this instance, CISSI points to RCW 19.86.030, which states as **[*1396]** follows: "Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful."

Again the Court looks to federal law to define a tying arrangement:

> ***HN15***[] A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific RR. Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. Such an arrangement violates *section 1* of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*. **[**20]**

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265, 280 (1992). Here, the tying product is grid, and the tied product is board.

CISSI has offered no direct evidence (and defendants USGI denies that any exists) that USGI required CISSI to purchase board in order to gain access to grid. The only evidence is that USGI tried to make CISSI an exclusive distributor, and when that failed, withdrew the entire USGI product line.[6]

[21]** ***HN16***[] A manufacturer generally has the right to unilaterally refuse to deal. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. The refusal to deal with third parties conditioned on failure to purchase other goods or services, however, is not a unilateral refusal. *Kodak, 119 L. Ed. 2d at 282 n.8*. To establish an illegal tying arrangement [7] under *section 2* of the Sherman Act, the Ninth Circuit requires plaintiff to demonstrate the following:

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[6] The *Kodak* case, *supra,* was analyzed generally under *section 1* (prohibition against contracts, combinations and conspiracies) and unlike this case involved a clear requirement that purchasers of Kodak duplicating machines, purchase Kodak services. Moreover, Kodak had prevented the supply of parts to non-Kodak service agencies. Thus there was an obvious tying arrangement. The issue remanded on the district court's grant of summary judgment, however, was whether or not the tying was illegal -- that is, that it was not justified by business reasons.

[7] Most of the cases refer to "per se" illegal tying arrangement, but not all tying arrangements are declared illegal. In her concurring opinion in *Jefferson, supra*, Justice O'Connor explained the history of this apparent anomaly and argued for abandoning the per se label:

> Some of our earlier cases did indeed declare that tying arrangements serve "hardly any purpose beyond the suppression of competition." *Standard Oil Company v. United States, 337 U.S. 293, 305-306, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)* (dictum). However, this declaration was not taken literally even by the cases that purported to rely upon it. In practice, a tie has been illegal only if the seller is shown to have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . ." *Northern Pacific RR. Co., 356 U.S. at 6*.

466 U.S. at 32.

> (1) two distinct products or services are in fact tied such that the products are offered as a single package; (2) the defendant has sufficient economic power in the tying market to impose restrictions in the tied product market; (3) the amount of commerce in the tied product is not insubstantial.

General Business Systems v. North American Philips Corp., 699 F.2d 965, 977 (9th Cir.1983). Other cases have referred to additional elements, *e.g., Airweld, Inc. v. Airco, Inc., 742 F.2d 1184*, (9th Cir. 1984) (financial interest, **[**22]** coercion); *Betaseed, Inc. v. U & I Inc., 681 F.2d 1203, 1215 (9th Cir. 1982)* ("there must be some modicum of coercion shown -- that is a showing of an onerous effect on an appreciable number of buyers").

[23]** While there is evidence that USGI has a substantial share of the tying market (plaintiff alleges more than 50 percent in different geographic markets), there is no evidence that USGI has ***HN17***[] substantial power in the tying market. Substantial power is the ability to "raise prices or to require purchasers to accept burdensome terms that could not be enacted in a completely competitive **[*1397]** market." *General Business Systems, 699 F.2d at 977*, *(citing U.S. Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 620, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977) (Fortner* II)). Similar statements are made in *Kodak, supra,* 112 S. Ct. at 2981, "the ability of single seller to raise price and restrict output". Here there is no evidence that USGI possessed such power. Rather, the evidence indicates a very competitive market. As noted above USGI's prices for grid increased at a lower rate than inflation, and customers indicate that they would switch to other products if the prices went up.

This Court concludes that the exclusive dealership offered by USGI would not have been a tying arrangement **[**24]** if consummated. As an alternative basis for dismissing CISSI's claim of illegal tying, the Court concludes that USGI did not have sufficient economic power in the tying market to impose its own terms. CISSI's tying claim is thus dismissed.

THEREFORE, defendant USGI's motion for partial summary judgment is GRANTED IN PART: plaintiff CISSI's antitrust claims under federal and state law are DISMISSED, and plaintiff's claim for breach of contract related to events occurring more than three years prior to filing are DISMISSED.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

DATED this 28 day of April, 1993.

CAROLYN R. DIMMICK

United States District Judge

ORDER ON RECONSIDERATION

On motion of plaintiff Ceiling and Interior Systems Supply, Inc., the Court reconsidered its Order of April 28, 1993, granting partial summary judgment. After full consideration of the briefs filed by counsel and the record as a whole, the Court declines to vacate its prior Order.

Plaintiff has pointed to a factual error in the April 28 Order: at page 1391, the Order refers to continuation of the distributorship with CISSI in Boise and Spokane, whereas the distributorships continued in Idaho and Montana. This factual discrepancy is not material to the Court's decision. Nor is the Court's categorization of the USGI offer as an "exclusive dealership" at pages 1394 and 1396 material to the decision. This was an offer to sell all USGI products conditioned on discontinuance of the sale of Armstrong products. CISSI's refusal resulted in USGI withdrawing its products for sale elsewhere.

This Court is not persuaded that its prior legal conclusions were faulty, but recognizes the complexity of the issues before it. The Court is also persuaded that its grant of partial summary judgment should be entered as a final judgment pursuant to Fed.R.Civ.P. 54(b), there being no just reason for delay.

THEREFORE, the Court affirms its grant of partial summary judgment April 28, 1993, and directs the clerk to enter judgment accordingly, dismissing plaintiff's claims for breach of contract related to events occurring more than three years prior to filing suit and dismissing plaintiff's antitrust claims under federal and state law.

June 11, 1993

CAROLYN R. DIMMICK

United States District Judge

[Balaklaw v. Lovell]

United States District Court for the Northern District of New York

April 30, 1993, Decided ; May 5, 1993, Filed

92-CV-817

Reporter

822 F. Supp. 892 *; 1993 U.S. Dist. LEXIS 6074 **; 1993-1 Trade Cas. (CCH) P70,261

LEE A. BALAKLAW, Plaintiff, v. ROBERT M. LOVELL, WESSLEY D. STISSER, DONALD AMES, JOSEPH COMPAGNI, JR., RONALD DENNISTON, DEBORAH GEIBEL, JAMES GIBBS, WILLIAM GREER, DAVID HEMPSON, DAVID HUNSINGER, BONNIE INNERST, DAVID LUNDEEN, DEAN MITCHELL, GENE NACCI, JOAN POSKANZER, CHARLES SPAULDING, CONNIE SWARR, CORTLAND MEMORIAL HOSPITAL INC. and C.M.H. GROUP, INC., Defendants.

Subsequent History: As Amended June 2, 1993.

Core Terms

conspiracy, antitrust, medical staff, anti trust law, Sherman Act, defendants', anesthesia, summary judgment motion, amended complaint, anti-competitive, allegations, conspired, exclusive contract, competitors, geographic, conscious, parties, staff, plaintiff's claim, summary judgment, injunction, privileges, purposes, alleged conspiracy, parallelism, assertions, injuries, lawsuit, genuine issue of material fact, unreasonable restraint

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

See the Sherman Antitrust Act, *15 U.S.C.S. § 1*.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Summary Judgment, Opposing Materials**

A court should grant a motion for summary judgment where there exists no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The mere existence of some alleged factual dispute is not sufficient to defeat a motion for summary judgment. Rather, such a motion may only be defeated if there exists a genuine issue of material fact. A material fact is one which might affect the outcome of the case under the governing law.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3[] **Summary Judgment, Motions for Summary Judgment**

Fed. R. Civ. P. 56(c) limits the information that the court may consider in making its determination on a summary judgment motion. The court is limited to reviewing the pleadings, affidavits, depositions, answers to interrogatories and admissions on file.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] **Summary Judgment, Evidentiary Considerations**

The initial burden of informing the court of the basis for the motion rests with the moving party. In satisfying this burden, the movant must demonstrate that there is no evidence to support the non-movant's case on which that party bears the burden of proof at trial. Should the movant satisfy this burden, the burden then shifts to the non-movant to demonstrate the existence of a genuine issue of material fact. The non-movant must make a preliminary showing establishing all elements of its case on which it would bear the burden of proof at trial. The non-movant must do more than simply show that there is some metaphysical doubt as to the material facts. Speculation, conclusory allegations and mere denials are insufficient to raise genuine issues of fact. To avoid summary judgment, the nonmovant must present sufficient evidence such that a jury could return a verdict in its favor.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN5[] **Entitlement as Matter of Law, Genuine Disputes**

In the context of a claim brought under the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, the Supreme Court holds that, to survive a summary judgment motion, a plaintiff must establish that there is a genuine issue of material fact as to whether the defendants entered into an illegal conspiracy that caused plaintiff to suffer cognizable injury, and that such conspiracy resulted in actual "antitrust injury." Such a conspiracy is not generally susceptible of direct proof, but is generally proven through circumstantial evidence in the form of inferences drawn from the words and conduct of the parties to the alleged agreement and from their course of dealing. Conduct that may be viewed as either permissible competition or an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

To survive a motion for summary judgment, a plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. The plaintiff must proffer direct or circumstantial evidence that reasonably tends to prove a conscious commitment to a common scheme designed to achieve an unlawful objective.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

HN7[] **Justiciability, Standing**

Generally, whether a plaintiff has standing to bring a lawsuit is determined by whether there exists a "case or controversy." In the context of an antitrust action, courts must engage in an analysis of prudential considerations aimed at preserving the effective enforcement of antitrust laws in determining whether standing exists.

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

HN8[] Sherman Act, Remedies

Sections 4 and 16 of the Clayton Act, *15 U.S.C.S. §§ 15* & *26*, set forth the remedies available for a claimed violation of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.* The relief available through § 16 of the Clayton Act differs from that afforded through § 4.

Antitrust & Trade Law > Clayton Act > Claims

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN9[] Clayton Act, Claims

A two-pronged test has evolved for the determination of whether a particular plaintiff is the proper party to enforce a claim under Section 4 of the Clayton Act, *15 U.S.C.S. § 15* (Clayton Act). First, the court must determine whether the plaintiff has suffered actual "antitrust injury" at the hands of the defendant. Second, the court must determine whether the plaintiff is an efficient enforcer of the antitrust laws. Section 4 of the Clayton Act provides that any person who shall be injured in his business or property by reason of anything forbidden in the ***antitrust law*** is entitled to treble damages.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN10[] Remedies, Damages

Under section 16 of the Clayton Act, *15 U.S.C.S. § 26* (Clayton Act), a plaintiff need only establish "threatened" loss or damage, rather than actual loss or damage, in establishing a violation under this section. As a result of these differences, the standing requirement for a section 16 claim is somewhat less demanding: courts are less concerned about whether a plaintiff is an efficient enforcer of the antitrust laws. However, as under section 4, for section 16 injunctive relief, a plaintiff still must allege "antitrust injury" (in the form of threatened loss or damage) as well as the defendant's causal responsibility for that injury. Under section 16 of the Clayton Act, private parties threatened with loss or damage by a violation of the antitrust laws may seek injunctive relief.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN11[] **Private Actions, Remedies**

The United States Supreme Court describes antitrust injury as the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. It should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would likely cause. Proof of an unlawful purpose or an anti-competitive effect will satisfy this requirement of antitrust injury due to the fact that competitors may be unable to prove antitrust injury before they are actually driven from the market, thereby lessening competition.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN12[] **Antitrust & Trade Law, Sherman Act**

While a plaintiff may have an action in tort as a result of the defendant's conduct, not all tort actions are actionable in antitrust.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Sherman Act, Claims**

In order to establish a violation of *section 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.*, a plaintiff must prove (1) the existence of a contract, combination or conspiracy among the defendants; and (2) an unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Antitrust Act, *15 U.S.C.S. § 1 et seq.* does not reach conduct that is "wholly unilateral." Rather, there must be concerted activity, which contemplates the agreement of two or more persons or legal entities. Thus, a parent corporation is not legally capable of conspiring with its unincorporated division, its wholly-owned subsidiary or its affiliated corporations for antitrust purposes, because they have a complete unity of interest. Likewise, officers, directors and employees of a single corporation cannot conspire with each other or with the corporation itself for antitrust purposes.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN15[] Antitrust & Trade Law, Sherman Act

A court should not foreclose an antitrust claim of conspiracy on the basis of the professional titles of the alleged conspirators alone, but rather must analyze their roles in relation to one another in the context of the alleged antitrust violation.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN16[] Antitrust & Trade Law, Sherman Act

In the context of an antitrust violation, the doctrine of "conscious parallelism" provides that when two or more competitors act separately but in a parallel fashion, the court can conclude that they acted in a concerted manner. In order to establish such a cause of action, a party must typically prove the existence of certain factors, known as "plus factors," which indicate that the allegedly wrongful conduct of the defendants was conscious, rather than the result of independent business decisions of the parties.

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] Antitrust & Trade Law, Sherman Act

Plus factors have been found where the alleged action was contrary to the self-interest of any actor who engaged in the action alone. A plus factor has also been found were a plaintiff has proven a high level of inter-firm communications between allegedly culpable parties. However, the mere presence of one or more of these "plus factors" does not necessarily mandate the conclusion that there was an illegal conspiracy between the parties, for a court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of the antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN18[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Even if a plaintiff demonstrates that there was a conspiracy which violated the antitrust laws, he is still required to demonstrate that the purpose or effect of the alleged conspiracy constituted an unreasonable restraint of trade resulting in his antitrust injury. The United States Supreme Court has fashioned two tests for courts to utilize in determining whether a restraint on competition is "unreasonable " and therefore violative of the antitrust laws: (A) the per se test of illegality; and (B) the "rule of reason" test.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN19[] Per Se Rule Tests, Manifestly Anticompetitive Effects

When utilizing the per se test of illegality, the court must analyze the nature of the agreement in order to determine whether it always impacts the market in an anti-competitive manner and has no pro-competitive effect whatsoever. Under this analysis, a plaintiff may prevail even if he fails to prove market power on the part of the defendants. A plaintiff who seeks application of the per se analysis must demonstrate that the challenged activity will likely have predominantly anti-competitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN20[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Regarding the rule of reason test, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN21[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The rule of reason test requires a case-by-case analysis in which the fact finder weighs all of the evidence before it to determine whether there is an unreasonable restraint of trade. The fact finder must balance the pro-competitive and anti-competitive effects of any restraint on the market to determine its reasonableness.

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HN22[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Using the rule of reason test, a plaintiff is required to show that the challenged restraint of trade had an adverse impact upon competition in the relevant market. In the context of an alleged antitrust violation, the relevant market is comprised of the relevant product and geographic markets.

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HN23[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The relevant geographic market when using the rule or reason test, is the geographic area in which there is effective competition in the sale and distribution of particular products or services, and in which persons or entities actually do, or potentially can, compete in the conduct of their business operations.

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Judges: Scullin, Jr.

Opinion by: FREDERICK J. SCULLING, JR.

Opinion

[*895] Frederick J. Scullin, Jr., D.J.:

MEMORANDUM-DECISION AND ORDER

I. Background

Plaintiff Lee A. Balaklaw ("Balaklaw") commenced this action on June 26, 1992. On July 16, 1992, defendant Cortland Memorial Hospital (the "Hospital") moved to dismiss this complaint, and on August 4, 1992, plaintiff moved for a preliminary injunction. Following oral argument on August 28, 1992 in Albany, New York, the Hospital's motion to dismiss was denied and plaintiff's motion for a preliminary injunction was held in abeyance pending a hearing regarding same. This hearing was conducted on October 5 and 6, 1992. Thereafter, in its Memorandum-Decision and Order filed October **[**2]** 16, 1992, this court denied plaintiff's application for a preliminary injunction based upon the court's determination that the plaintiff failed to demonstrate irreparable harm.

Magistrate Judge Gustave J. DiBianco granted plaintiff's motion to amend his complaint, and on December 11, 1992 Balaklaw filed an amended complaint in this action.

On January 20, 1992, the defendants filed the instant motion for summary judgment on plaintiff's amended complaint. In their motions, the defendants allege that the plaintiff lacks standing to bring this lawsuit and that there is insufficient evidence to support a claimed violation of the Sherman Act. The following day, the plaintiff filed a motion for partial summary judgment on the issue of liability. Oral argument on these motions was heard on February 11, 1992. [1]

[3]** *II. The Pleadings*

The plaintiff's amended complaint asserts two causes of action under *section 1* of the Sherman Act. [2] Balaklaw's first cause of action alleges that the defendants engaged in a group boycott of the plaintiff. His second cause of action alleges that the defendants violated the Sherman antitrust act by entering into an exclusive dealing arrangement whereby the defendants, Dr. Delf O. King ("Dr. King"), and a group of anesthesiologists affiliated with Dr. King (the "King Group") agreed to provide anesthetic and related services to the Hospital. Plaintiff's complaint **[*896]** seeks treble damages, and declaratory and injunctive relief for the "threatened and continued injuries to his business, property, trade and profession caused by the defendants' group boycott and conspiracy to deprive [him] of reasonable, fair, equal and full access to the exercise of professional and clinical staff privileges at CORTLAND MEMORIAL HOSPITAL, INC. and elsewhere . . . ." Amended complaint at P 2.

[4]** Defendants deny the principle allegations contained in this complaint, and have interposed six affirmative defenses in their answer. Defendants contend that (i) plaintiff has failed to state a claim upon which relief can be granted under *Section 1* of the Sherman Act; (ii) the actions of which the plaintiff complains are not violative of the Sherman Act; (iii) plaintiff has not suffered any antitrust injury within the meaning of *Section 1* of the Sherman Act and thereby lacks standing to bring this lawsuit; (iv) the amended complaint alleges insufficient facts to establish a horizontal group boycott and therefore does not state a claim of *per se* violation under *Section 1* of the Sherman Act; (v) the decisions and actions of the defendants were in furtherance of legitimate institutional objectives; and (vi) plaintiff is estopped from bringing this lawsuit due to his endorsement of the concept of an exclusive contract for the provision of anesthesia services at the Hospital and his participation in the Request for Proposal process. *See* answer at PP 38-43.

III. Discussion

A. Standard for resolving motions for summary judgment.

Before discussing the merits of the motions **[**5]** before the court, it is instructive to review the standard this court must apply in resolving same.

HN2[] A court should grant a motion for summary judgment where there exists no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. The mere existence of some alleged factual dispute is not sufficient to defeat a motion for summary judgment. *Id.* Rather, such a motion may only be defeated if there exists a *genuine* issue of *material* fact. *Id. at 248, 106 S. Ct. at 2510, 91 L. Ed. 2d 202*. A material fact is one which might affect the outcome of the case under the governing law. *Id.*

HN3[] *Rule 56* limits the information that the court may consider in making its determination on a summary judgment motion. The court is limited to reviewing the pleadings, affidavits, depositions, answers to interrogatories and admissions on file. *Fed. R. Civ. P. 56(c)*. Additionally, the movant's uncontested assertions in **[**6]** its Local Rule 10j statement are deemed admitted for purposes the court's determination on the summary judgment motion.

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[1] In evaluating the merits of these motions, this court also considered the papers submitted by the Hospital Association of the State of New York, the New York State Society of Anesthesiologists and the Medical Society of the State of New York, which were granted permission to file amicus curiae briefs in this action.

[2] ***HN1***[] *Section 1* of the Sherman Act, *15 U.S.C. § 1*, provides, in pertinent 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.

See Rule 10j of the Local Rules for the Northern District of New York; *Glazer v. Formica Corp., 964 F.2d 149 (2d Cir. 1992)*.

HN4[] The initial burden of informing the court of the basis for the motion rests with the moving party. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2558, 91 L. Ed. 2d 265 (1986)*. In satisfying this burden, the movant must demonstrate that there is no evidence to support the non-movant's case on which that party bears the burden of proof at trial. *Id. Should the movant satisfy this burden, the burden then shifts to the non-movant to demonstrate the existence of a genuine issue of material fact. The non-movant must make a preliminary showing establishing all elements of its case on which it would bear the burden of proof at trial. Id. at 322, 106 S. Ct. at 2552, 91 L. Ed. 2d 265*. The non-movant must do more than "simply show that there is some metaphysical doubt as to the material **[**7]** facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*. Speculation, conclusory allegations and mere denials are insufficient to raise genuine issues of fact. To avoid summary judgment, the nonmovant must present sufficient evidence such that a jury could return a verdict in its favor. *Anderson v. Liberty Lobby, Inc., 477 U.S. at 248, 106 S. Ct. at 2510, 91 L. Ed. 2d 202*.

HN5[] In the context of a claim brought under the Sherman Act, the Supreme Court has held that, to survive a summary judgment **[*897]** motion, a plaintiff "must establish that there is a genuine issue of material fact as to whether the [defendants] entered into an illegal conspiracy that caused [plaintiff] to suffer cognizable injury," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 585-86, 106 S. Ct. at 1355, 89 L. Ed. 2d 538*, and that such conspiracy resulted in actual "antitrust injury." *Id. at 586, 106 S. Ct. at 1355, 89 L. Ed. 2d 538*. **[**8]** Such a conspiracy is not generally susceptible of direct proof, but is generally proven through circumstantial evidence in the form of inferences drawn from the words and conduct of the parties to the alleged agreement and from their course of dealing. *See Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 704, 89 S. Ct. 1391, 1393, 22 L. Ed. 2d 658 (1969)*; *American Tobacco Co. v. United States, 328 U.S. 781, 809-10, 66 S. Ct. 1125, 1138-39, 90 L. Ed. 1575 (1946)*. Conduct that may be viewed as either permissible competition or an illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Matsushita Elec. Indus Co. v. Zenith Radio Corp., 475 U.S. at 588, 106 S. Ct. at 1356, 89 L. Ed. 2d 538* (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1470, 79 L. Ed. 2d 775 (1984)*); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. *, , 112 S. Ct. 2072, 2083, 119 L. Ed. 2d 265 (1992)*. **[**9]** ***HN6***[] To survive a motion for summary judgment, a plaintiff must present evidence "that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 588, 106 S. Ct. at 1356, 89 L. Ed. 2d 538* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. at 764, 104 S. Ct. at 1471, 79 L. Ed. 2d 775*); *H.L. Hayden Co. of N.Y., Inc. v. Siemens Medical Sys., Inc., 879 F.2d 1005, 1013 (2d Cir. 1989)*. The plaintiff must proffer direct or circumstantial evidence that reasonably tends to prove a conscious commitment to a common scheme designed to achieve an unlawful objective. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. at 768, 104 S. Ct. at 1473, 79 L. Ed. 2d 775*; *H.L. Hayden Co. of N.Y., Inc. v. Siemens Medical Sys., Inc., 879 F.2d at 1013*.

Before reaching the issue of whether there is a genuine issue of material fact on any of the elements of plaintiff's Sherman Act claim, **[**10]** the court must ascertain whether this plaintiff has standing to bring his antitrust claims.

B. Defendants' motion for summary judgment based upon lack of standing.

HN7[] Generally, whether a plaintiff has standing to bring a lawsuit is determined by whether there exists a "case or controversy." *See Flast v. Cohen, 392 U.S. 83, 94-101, 88 S. Ct. 1942, 1949-53, 20 L. Ed. 2d 947 (1968)*. In the context of an antitrust action, courts must engage in "an analysis of prudential considerations aimed at preserving the effective enforcement of antitrust laws" in determining whether standing exists. *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991)*; *see also Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 535, n.31, 103 S. Ct. 897, 907 74 L. Ed. 2d 723 (1983)*.

HN8[] Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26, set forth the remedies available for a claimed violation of the Sherman Act. The relief available through § 16 of the Clayton **[**11]** Act differs from that afforded through § 4.

HN9[] A two-pronged test has evolved for the determination of whether a particular plaintiff is the proper party to enforce a claim under Section 4 of the Clayton Act. First, the court must determine whether the plaintiff has suffered actual "antitrust injury" at the hands of the defendant. Second, the court must determine whether the plaintiff is an efficient enforcer of the antitrust laws. [3] **[*898]** *See* *Todorov v. DCH Healthcare Auth., 921 F.2d at 1449* (citing *Cargill, Inc. v. Monfort of Colo., Inc.,* 479 U.S. at 110 n.5, 107 S. Ct. at 489 n.5, 93 L. Ed. 2d 427); *see also* *Trepel v. Pontiac Osteopathic Hosp., 599 F. Supp. 1484, 1493 (E.D. Mich. 1984)*, *aff'd, 780 F.2d 1023 (6th Cir. 1985)*. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the ***antitrust law***" is entitled to treble damages.

[12]** HN10[]

Under section 16 of this Act, a plaintiff need only establish "threatened" loss or damage, rather than actual loss or damage, in establishing a violation under this section. *See* *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. at 111, 107 S. Ct. at 489-90, 93 L. Ed. 2d 427*. As a result of these differences, the standing requirement for a section 16 claim is somewhat less demanding: courts are less concerned about whether a plaintiff is an efficient enforcer of the antitrust laws. *Todorov v. DCH Healthcare Auth., 921 F.2d at 1452*. However, as under section 4, for section 16 injunctive relief, a plaintiff still must allege "antitrust injury" (in the form of threatened loss or damage) as well as the defendant's causal responsibility for that injury. *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. at 111-13, 107 S. Ct. at 490-91, 93 L. Ed. 2d 427*. Under section 16 of the Clayton Act, *15 U.S.C. § 26*, private parties "threatened [with] loss or damage by a violation of the antitrust laws" may seek injunctive relief.

In *Brunswick* **[**13]** *Corp. v. Pueblo Bowl-O-Mat, Inc.,* HN11[] the Supreme Court described antitrust injury as:

> Injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. [It] should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations . . . would likely cause.

Id., 429 U.S. 477 at 489, 97 S. Ct. at 697, 50 L. Ed. 2d 701; *see also* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 1889, 109 L. Ed. 2d 333 (1990)*. Proof of an unlawful purpose or an anti-competitive effect will satisfy this requirement of antitrust injury due to the fact that competitors may be unable to prove antitrust injury before they are actually driven from the market, thereby lessening competition. *United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13, 98 S. Ct. 2864, 2873 n.13, 57 L. Ed. 2d 854 (1978)*.

Prior to this lawsuit, Balaklaw **[**14]** claims that he had an arrangement with the defendant Hospital whereby he and a group of fellow anesthesiologists would provide anesthesia services to the patients at the Hospital. After a period of time, the Hospital determined that it wished to enter into an exclusive contract with a group of doctors to provide the Hospital with anesthesia services. The Hospital solicited proposals from various physician groups, including a group headed by Balaklaw. A committee consisting of two members of the Board of Trustees, three members of the Medical Staff and two members of the administration of the Hospital interviewed four of these

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[3] With respect to this second element, there are several factors which a court may consider. These factors include: 1) the potential for duplicative recovery; 2) the existence of more direct victims of the alleged antitrust violation; 3) the directness of the injury; 4) whether the claim for damages rests on some abstract conception or speculative measure of harm; 5) the nature of the plaintiff as a consumer or a competitor in the relevant market; and 6) the causal connection between the asserted antitrust violation and the harm to the plaintiff. *Associated Gen'l Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. at 537-45, 103 S. Ct. at 908-12, 74 L. Ed. 2d 723*; *see also* *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110, 111 n.6, 107 S. Ct. 484, 489, 490 n.6, 93 L. Ed. 2d 427 (1986)*; *Blue Shield of Va. v. McCready, 457 U.S. 465, 474-85, 102 S. Ct. 2540, 2545-51, 73 L. Ed. 2d 149 (1982)*; *Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 250-51 (2d Cir. 1985)*; *Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 247 (2d Cir. 1985)*.

groups, including the group headed by the plaintiff. Since the defendants chose to enter into an exclusive contract for anesthesia services with a group other than one which included the plaintiff, Balaklaw claims he was effectively ousted from his practice at the Hospital.

Defendants contend that Balaklaw does not have standing to assert his claims alleging violations of the antitrust laws because his purported injuries are not "antitrust injuries" as this term has been interpreted by the courts in the context of Sherman Act claims. They claim that Balaklaw **[**15]** was merely a "disappointed competitor" for the subject contract who may not seek redress for his alleged injuries under the antitrust laws. *See generally* Defendants' Memorandum of Law ("Def. Mem.") at 55-57.

[*899] The plaintiff contends that by terminating his *de facto* exclusive contract with the Hospital, the defendants deprived the plaintiff of the opportunity to compete in the relevant market and prevented the plaintiff from competing for the providing of services at the Hospital, thereby causing him antitrust injury. *See* Plaintiff's Memorandum of Law in Support of his Motion for Summary Judgment ("Pl. Mem.") at 46-47.

In considering the injuries and damages alleged by the plaintiff herein and based upon the evidence before the court, the court concludes that such injuries are not of the nature the antitrust laws were intended to prevent. The plaintiff does not claim that the Hospital's ability to enter into exclusive contracts for services violates antitrust laws. Rather, he claims that the manner in which he was ousted from his position at the Hospital and thus precluded from practicing his profession at the Hospital caused him antitrust injury. However, although the **[**16]** plaintiff asserts that defendants' actions have had an anti-competitive impact on Balaklaw, this court, based upon the evidence before it, determines that his allegations of anti-competitive injury are, in reality, merely injury to the plaintiff of a personal nature. ***HN12***[] While the plaintiff may have an action in tort as a result of the defendants' conduct, not all tort actions are actionable in antitrust. *See, e.g., Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989, 999 (N.D. Ga. 1992)* (alleged harm was to individual doctor and not an antitrust injury); *Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc., 725 F. Supp. 669, 677 (N.D.N.Y. 1989)* (plaintiff's radiology practice harmed by defendant's agreement with competitor not an antitrust injury); *Trepel v. Pontiac Osteopathic Hosp., 599 F. Supp. at 1493* (causal connection between radiologist's loss of employment at hospital and intentional restraint of trade by hospital not an antitrust injury). [4]

[17]** In short, the injury alleged by the plaintiff herein does not appear to this court to be the type of injury the antitrust laws were intended to prevent. Since plaintiff has failed to establish an "antitrust injury" within the meaning of that term, the plaintiff lacks standing to assert the antitrust claims alleged in his complaint and his lawsuit must be dismissed.

However, even if the plaintiff possessed the requisite standing to assert his claims, defendants' motion for summary judgment must nevertheless be granted because the plaintiff has failed to establish the substantive elements of his Sherman Act claims.

C. Defendants' summary judgment motion based upon grounds that there is insufficient evidence to support a Sherman Act claim.

HN13[] In order to establish a violation of *section 1* of the Sherman Act, a plaintiff must prove (1) the existence of a contract, combination or conspiracy among the defendants; and (2) an unreasonable restraint of trade. *Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc., 725 F. Supp. at 676* (citation omitted).

1. Existence of a contract, combination or conspiracy.

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[4] The court notes that Balaklaw's allegations regarding the "sham" nature of the due process hearing that was conducted prior to his ouster appear to the court to be more appropriate in the context of a breach of contract or intentional interference with contractual relations action, rather than an antitrust claim. *See, e.g.,* ***Chuz v. St. Vincent's Hosp. & Medical Ctr., 186 A.D.2d 450, 589 N.Y.S.2d 17*** (1st Dep't 1992); ***Saha v. Record, 177 A.D.2d 763, 575 N.Y.S.2d 986, 988*** (3d Dep't 1991); *Giannelli v. St. Vincent's Hosp. & Medical Ctr., 160 A.D.2d 227, 553 N.Y.S.2d 677* (1st Dep't 1990).

In order to determine whether the **[**18]** plaintiff has sufficiently established that there was a contract, combination or conspiracy between the defendants to deprive Balaklaw of equal and full access to the exercise of professional and clinical staff privileges at the Hospital, this Court must initially review the allegations in Balaklaw's amended complaint. Plaintiff has summarized his assertions regarding the alleged group boycott and exclusive dealing conspiracy in this complaint as follows:

> (1) The defendants would invite proposals for an exclusive group anesthesia contract at the HOSPITAL and would rig the selection process to favor KING and his associates **[*900]** and block plaintiff from being the successful applicant. As part of their scheme, defendants would provide secret financial support to co-conspirator KING not offered to plaintiff.
>
> (2) After arranging for the award of the exclusive group anesthesia contract to co-conspirator KING, defendants would then insure that plaintiff . . . would not be permitted to continue to practice at the HOSPITAL or elsewhere through the use of sham Medical Staff Bylaw professional review and appeal proceedings to terminate plaintiff's clinical privileges and limit his staff **[**19]** privileges as an attending physician, thereby preventing him from continuing to practice his profession at the HOSPITAL and damaging his ability to obtain hospital credentials elsewhere.

See amended complaint at P 40. [5]

The defendants assert that plaintiff's amended complaint has failed to assert a legally or factually cognizable conspiracy among the defendants herein. They contend that the conspiracy alleged by Balaklaw is between the Hospital and its medical staff, which defendants submit are but a single entity, and that a single entity is incapable of conspiring with itself. They also argue that even if this court finds that the antitrust laws do apply to the type of conspiracy alleged by plaintiff, Balaklaw has failed to establish sufficient facts to demonstrate that there existed any agreement, or conspiracy, to oust Balaklaw. *See* Def. Mem. at 24-44.

Plaintiff claims that there is ample evidence of a conspiracy on the part of the defendants to **[**20]** deprive him of his alleged right to exercise professional and clinical staff privileges at the Hospital. Initially, Balaklaw claims that the Hospital and the members of its medical staff conspired together to injure the plaintiff. Secondly, plaintiff alleges that Dr. King and his group entered into a conspiracy with the Hospital to deprive Balaklaw of his rights. Finally, plaintiff contends that the defendants and Dr. King violated antitrust laws by engaging in "conscious parallelism." These arguments will be addressed *seriatim.*

(a) Alleged conspiracy between the Hospital and its staff.

HN14[] *Section 1* of the Sherman Act does not reach conduct that is "wholly unilateral." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984)*. Rather, there must be concerted activity, which contemplates the agreement of two or more persons or legal entities. *Brenner v. World Boxing Council, 675 F.2d 445, 451* (2d Cir.), *cert. denied, 459 U.S. 835, 103 S. Ct. 79, 74 L. Ed. 2d 76 (1982)*.

Thus, a **[**21]** parent corporation is not legally capable of conspiring with its unincorporated division, its wholly-owned subsidiary or its affiliated corporations for antitrust purposes, because they have a complete unity of interest. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. at 771, 778, 104 S. Ct. at 2741, 2745, 81 L. Ed. 2d 628*; *Cohen v. Primerica Corp., 709 F. Supp. 63 (E.D.N.Y. 1989)*. Likewise, officers, directors and employees of a single corporation cannot conspire with each other or with the corporation itself for antitrust purposes. *Id. at 769, 104 S. Ct. at 2740-41, 81 L. Ed. 2d 628*; *International Distribution Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 793 n.5* (2d Cir.), *cert. denied, 482 U.S. 915, 107 S. Ct. 3188, 96 L. Ed. 2d 676 (1987)*.

In analyzing the allegations in plaintiff's amended complaint concerning the alleged conspiracy between the Hospital and the members of its Medical Staff, the court must determine whether they are separate entities or a single entity incapable of engaging **[**22]** in a conspiratorial violation of the antitrust laws.

[5] *See generally* amended complaint, PP 21-39.

The Second Circuit has not yet addressed this issue. In the only case within this circuit which discusses this issue, the district court held that, in the appropriate factual setting, a hospital and members of its medical staff are legally capable of conspiring for Sherman Act purposes. *Purgess v. Sharrock, 1992 U.S. Dist. LEXIS 17057* at *6, 1992 WL 349683 at *6 n.7 (S.D.N.Y. 1992).

Turning to the Circuit law that exists on this issue, there is a split among the courts as to whether a hospital and members of its medical staff are a single entity for purposes **[*901]** of allegations claiming an antitrust conspiracy.

In *Weiss v. York Hosp., 745 F.2d 786, 817 (3d Cir. 1984)*, *cert. denied, 470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985)*, the Third Circuit held that "even where the medical staff has economic interests in competition with each other . . . the hospital cannot *as a matter of law* conspire with the medical staff." (emphasis added). Similarly, in *Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605, 614-15* (6th Cir.), *modified on* **[**23]** *rehearing, 927 F.2d 904* (6th Cir.), *cert. denied sub nom. Nurse Midwifery Assoc. v. Hendersonville Community Hosp., U.S. , 112 S. Ct. 406, 116 L. Ed. 2d 355 (1991)*, the Sixth Circuit held that a hospital and its medical staff cannot conspire among one another since they are not competitors. Finally, the Fourth Circuit has held that a hospital is not legally capable of entering into a conspiracy with its medical staff in making peer review decisions. *Oksanen v. Page Memorial Hosp., 945 F.2d 696, 703-05* (4th Cir.) (en banc), *cert. denied, U.S. , 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992)*.

However, both the Ninth and Eleventh Circuits have held that a hospital and its medical staff can enter into a conspiracy among one another. *See* *Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1450 (9th Cir. 1988)*; *Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 819 (11th Cir. 1988)*, *cert. denied, 495 U.S. 924, 110 S. Ct. 1960, 109 L. Ed. 2d 322 (1990)*. **[**24]**

In considering these conflicting authorities, the court finds that the more persuasive reasoning warrants the determination that ***HN15***[] a court should not foreclose an antitrust claim of conspiracy on the basis of the professional titles of the alleged conspirators alone, but rather must analyze their roles in relation to one another in the context of the alleged antitrust violation. *See* McDonald, "Antitrust Conspiracies and Hospital Privileges: Keep It Simple or Keep It Stupid," 6 *A.B.A. Antitrust Section's Antitrust Health Care Chron.* 2-16 (1992); *see also* *Copperweld Corp. v. Independence Corp., 467 U.S. at 772-74, 104 S. Ct. at 2742-43, 81 L. Ed. 2d 628*; *Okusami v. Psychiatric Inst. of Wash., Inc., 295 U.S. App. D.C. 58, 959 F.2d 1062, 1065 (D.C. Cir. 1992)*; *Pudlo v. Adamski, 789 F. Supp. 247, 250-51 (N.D. Ill. 1992)*. Thus, this court must analyze both the structure and the conduct of the Hospital and its medical staff in order to determine whether they could have conspired to act in an anti-competitive fashion.

Cortland hospital has a three-part organizational structure. Its structure **[**25]** consists of the Board of Trustees, the Medical Staff and the Hospital Administration. Defendants' Rule 10j Statement at P 5.

The Board of Trustees is the governing body of the Hospital and has overall responsibility regarding the Hospital's operations. It also establishes general institutional policies. The Board insures that the Hospital complies with state and federal laws and regulations and is accountable for the quality of health care services rendered to its patients. *See* Def. Mem. at 1 (citing State Hospital Code, 10 N.Y.C.R.R. § 405.2). Ultimate decisions regarding Medical Staff membership, clinical privileges and services rendered within the institution are made by the Board of Trustees. *See* Def. Mem. at 3; Defendants' Rule 10j Statement at P 12.

The Medical Staff consists of both individual physicians and health care professionals. Most of the physicians on the Medical Staff are independent practitioners permitted to use the Hospital's facilities. The Medical Staff is responsible for examining and reviewing the credentials of applicants and current members of the Medical Staff, for monitoring the actions of Medical Staff members, for making recommendations **[**26]** to the Board of Trustees regarding the provision of medical services at the institution, and, where necessary, for recommending "corrective action" that should be taken against an individual practitioner. *See id.* at 3 (citing 10 N.Y.C.R.R. §§ 405.4(a)(2), (3) & (4)). The Medical Staff must account to the Board of Trustees for the quality of care rendered at the Hospital. *See id.* at 2 (citing 10 N.Y.C.R.R. § 405.4(a)). It has its own set of bylaws which are approved by the Board of Trustees. Thus, while it is an independent body within the framework of the Hospital structure, its existence is validated by the Board of Trustees.

[*902] The Hospital Administration is the third component of the Hospital's organizational structure. It is currently headed by defendant Robert Lovell, the Chief Executive Officer. He is appointed by the Board of Trustees and is responsible thereto for the day-to-day operations of the facility. *See* Def. Mem. at 2 (citing 10 N.Y.C.R.R. §§ 405.2(d) & 405.3).

In light of this organizational structure, it appears to the court that Cortland hospital, the Medical Staff and the Board of Trustees are all components that comprise a single entity. Thus, **[**27]** whether this decision was actually made by certain members of the medical staff, Cortland hospital's Board of Trustees, and/or the hospital's administration is irrelevant -- these entities comprise only one organization -- the Hospital. Thus, irrespective of any anti-competitive purpose or impact that such a decision may have had on the plaintiff herein, such conduct is not actionable under *section 1* of the Sherman Act because the decision was "unilateral" and therefore not the product of a conspiracy between two separate groups. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. at 761, 104 S. Ct. at 1469, 79 L. Ed. 2d 775*.

Thus, on the facts before it, this court concludes that the Hospital, its Medical Staff and its members are not separate entities and are therefore not legally capable of entering into a conspiracy in violation of the Sherman Act.

(b) Alleged conspiracy between the defendants, Dr. King and his medical group.

The plaintiff also contends that Dr. King and his group were co-conspirators regarding the awarding of the anesthesiologist contract to the King Group, and that the Hospital and/or **[**28]** its Medical Staff conspired with Dr. King and his group to oust plaintiff from his position at the Hospital. *See* Plaintiff's Memorandum of Law in Opposition at 21-29.

Plaintiff makes two general assertions regarding this aspect of his antitrust claim: (i) Dr. King and the defendants conspired to award the exclusive contract to the King Group and not to him; and (ii) Dr. King and the defendants conspired to preclude him membership in the King Group. Balaklaw bases these allegations on the fact that the Hospital and Dr. King entered into the exclusive contract with King's Group -- a group in which Balaklaw was denied membership -- and a letter written by the Hospital's President and the Chairman of the Board of Trustees which approved of the exclusive contract with the King Group. [6]

[29]** Dr. King is an individual separate and apart from the Hospital's infrastructure and, as an anesthesiologist, is plainly a competitor of the plaintiff. However, the evidence proffered by the plaintiff does not tend to exclude the possibility that the defendants and/or Dr. King acted independently by either entering into the exclusive contract at the outset or denying the plaintiff membership in his group. Rather, the testimony heard by this court at the preliminary injunction hearing indicates that the defendants had a legitimate, business reason for entering into the subject contract. The King Group agreed to provide "second call" services for the Hospital -- services which were not provided under the agreement that existed between the Hospital and plaintiff's group. Moreover, the plaintiff was reputedly not permitted to join the King Group due to a conflict which exists between the plaintiff and various other members of the King Group, particularly the two certified registered nurse anesthetists, both of whom had previously been associated with the plaintiff. *See* Defendants' Exhibit 14 at **[*903]** 75. Thus, the facts before the court indicate that the conduct of the defendants **[**30]** was as consistent with permissible competition as with an illegal conspiracy. *See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. at 764, 104 S. Ct. at 1471, 79 L. Ed. 2d*

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[6] The letter of December 5, 1991 which was jointly signed by Mr. Lovell as Hospital President and Mr. Wesley D. Stisser as Chairman of the Board of Trustees and addressed to the members of the Medical Staff, provided, in part, as follows:

> The Board of Trustees, in a specially held meeting on December 3, 1991, approved a resolution that directs the President of the Hospital to elicit proposals from anesthesiologists, both in our community and in a much broader geographic area. The intent of the Board of Trustees is to contract exclusively with one group to provide all anesthesia services at our Hospital. . . .
>
> After the group awarded the exclusive contract is in place, any other anesthesiologists now having privileges at the Hospital will be unable to utilize those privileges to provide anesthesia care at Cortland Memorial. . . .

See Exhibit F of the Seymour Declaration.

775; *see also* Cooper v. Forsyth County Hosp. Auth., Inc., 789 F.2d 278 (4th Cir.), *cert. denied, 479 U.S. 972, 107 S. Ct. 474, 93 L. Ed. 2d 418 (1986)*; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 588, 106 S. Ct. at 1357, 89 L. Ed. 2d 538; H.L. Hayden Co. of N.Y., Inc. v. Siemens Medical Systems, Inc., 879 F.2d at 1006.

(c) Plaintiff's claim of conscious parallelism.

Finally, plaintiff claims that the defendants, Dr. King and the King Group engaged in "conscious parallelism" in violating the alleged rights of the plaintiff.

HN16[] In the context of an antitrust violation, the doctrine of "conscious parallelism" provides that when two or more competitors act separately but in a parallel fashion, the court can conclude that they acted in a concerted manner. Todorov v. DCH Healthcare Auth., 921 F.2d at 1456 & n.30. **[**31]** In order to establish such a cause of action, a party must typically prove the existence of certain factors, known as "plus factors," which indicate that the allegedly wrongful conduct of the defendants was conscious, rather than the result of independent business decisions of the parties. *See id.;* Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954). **HN17**[] Plus factors have been found where the alleged action was contrary to the self-interest of any actor who engaged in the action alone. *See* Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538. A plus factor has also been found were a plaintiff has proven a high level of inter-firm communications between allegedly culpable parties. *See* Apex Oil Co. v. Di Mauro, 822 F.2d 246, 254 (2d Cir.), *cert. denied, 484 U.S. 977, 108 S. Ct. 489, 98 L. Ed. 2d 487 (1987)*. However, the mere presence of one or more of these "plus factors" does not necessarily **[**32]** mandate the conclusion that there was an illegal conspiracy between the parties, for a court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of the antitrust laws. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. at 764, 104 S. Ct. at 1470, 79 L. Ed. 2d 775.

Balaklaw contends that the mere fact that the exclusive contract was executed by the parties herein establishes this conspiracy. Plaintiff argues that the Hospital lacked legitimate business reasons for offering financial subsidies to Dr. King and his group. He also claims that the meetings between Dr. King and members of the Hospital's Board of Directors demonstrated a high level of inter-firm communications between these parties which violated the antitrust laws.

However, since the Hospital and the King Group are not *competitors,* plaintiff may not prevail on his claim alleging conscious parallelism, which requires uniform business conduct on the part of competitors. Todorov v. DCH Healthcare Auth., 921 F.2d at 1456 ("conscious parallelism is **[**33]** uniform business conduct by competitors that permits a court to infer the existence of a conspiracy between these competitors" (citing Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221, 59 S. Ct. 467, 472, 83 L. Ed. 610 (1939).

Based upon the foregoing, this Court finds that the plaintiff has failed to establish sufficient evidence of a "contract, combination or conspiracy" on the part of the defendants.

2. Unreasonable restraint of trade.

HN18[] Even if the plaintiff had demonstrated that there was a conspiracy which violated the antitrust laws, he would still be required to demonstrate that the purpose or effect of the alleged conspiracy constituted an unreasonable restraint of trade resulting in his antitrust injury. *See Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc.,* 791 F.Supp at 964 (citing Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133 (2d Cir.), *cert. denied, 454 U.S. 1083, 102 S. Ct. 639, 70 L. Ed. 2d 618 (1981))*. The Supreme Court has fashioned two tests for courts **[**34]** to utilize in determining whether a restraint on competition is "unreasonable **[*904]** " and therefore violative of the antitrust laws: (A) the *per se* test of illegality; and (B) the "rule of reason" test. *See* Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 342-44, 102 S. Ct. 2466, 2472-73, 73 L. Ed. 2d 48 (1982).

HN19[] When utilizing the *per se* test of illegality, the court must analyze the nature of the agreement in order to determine whether it always impacts the market in an anti-competitive manner and has no pro-competitive effect whatsoever. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562-

63, 60 L. Ed. 2d 1 (1979). Under this analysis, a plaintiff may prevail even if he fails to prove market power on the part of the defendants. FTC v. Superior Trial Lawyers Ass'n, 493 U.S. 411, 432-36, 110 S. Ct. 768, 780-81, 107 L. Ed. 2d 851 (1990). A plaintiff who seeks application of the *per se* analysis must demonstrate that the challenged activity will likely **[**35]** have predominantly anti-competitive effects. *Id.*

With respect to the rule of reason test, in Chicago Bd. of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683, (1918), Justice Brandeis provided the classic discussion regarding this test. He noted that:

> ***HN20***[] The court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238, 38 S. Ct. at 244, 62 L. Ed. 683; *see also* Arizona v. Maricopa County Medical Soc., 457 U.S. at 343 n.13, 102 S. Ct. at 2472 n.13, 73 L. Ed. 2d 48. **[**36]** ***HN21***[] The rule of reason test requires a case-by-case analysis in which the fact finder weighs all of the evidence before it to determine whether there is an *unreasonable* restraint of trade. Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 at 49, 97 S. Ct. 2549 at 2557, 53 L. Ed. 2d 568 (1977). The fact finder must balance the pro-competitive and anti-competitive effects of any restraint on the market to determine its reasonableness. United States Football League v. National Football League, 842 F.2d 1335, 1360 (2d Cir. 1988) (citing National Soc. of Professional Engineers v. United States, 435 U.S. 679, 691 & n.17, 98 S. Ct. 1355, 1365 & n.17, 55 L. Ed. 2d 637 (1978)).

Based upon the evidence before it, this court concludes that plaintiff's claims must fail under either the *per se* or the rule of reason tests. Contrary to plaintiff's assertions, the evidence demonstrates that there was a legitimate basis for the change in anesthesia services at the Hospital. The King Group agreed to provide "second call" services for the Hospital -- services **[**37]** which were not provided under the *"de facto"* contract that existed between the Hospital, the plaintiff and his group. The Hospital considered the provision of these services to be an important aspect of the subject contract. Thus, the agreement between the King Group and the Hospital did not impact the market in an anti-competitive manner. Rather, it fostered competition by awarding such contract to the organization that offered to provide the services needed by the Hospital at the lowest price. Thus, such conduct was not *per se* illegal.

HN22[] Turning to the rule of reason test, Balaklaw was required to show that the challenged restraint of trade had an adverse impact upon competition in the relevant market. Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55 at 73. In the context of an alleged antitrust violation, the relevant market is comprised of the relevant product and geographic markets. *See* Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc., 791 F. Supp. 956 at 965.

[*905] For the purposes of the present motions, this court assumes the relevant product market to be the market requested **[**38]** by Balaklaw, i.e., the job market for anesthesia service positions and the market for anesthesia administered only in connection with operating room services, thus excluding from this market anesthesia services provided in out-patient surgery centers.

HN23[] The relevant geographic market is the geographic area in which there is effective competition in the sale and distribution of particular products or services, and in which persons or entities actually do, or potentially can, compete in the conduct of their business operations. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 1007, 100 L. Ed. 1264 (1956). In the present case, the relevant geographic market is the area where hospitals compete in offering services to patients or where anesthesiologists compete for positions with such hospitals. *Purgess v. Sharrock, 1992 U.S. Dist. LEXIS 17057* at *19, 1992 WL 349683 at *4 (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 1567, 80 L. Ed. 2d 2 (1984)*.

The plaintiff claims that the relevant geographic market herein includes the cities **[**39]** of Syracuse, Ithaca, Binghamton and Norwich, New York. Plaintiff claims that the Hospital has the majority of the market share for inpatient surgical cases in these cities. *See* amended complaint P 9.

The defendants contend that the relevant geographic market is nationwide because the Hospital's services may be provided on a nationwide basis. *See* Def. Mem. at 50 n.25, 54.

This court concludes that, insofar as the relevant product market is found to include the job market for anesthesia service positions, the relevant geographic market is nationwide. Indeed, the plaintiff himself raises the specter of a national market for his services in arguing that the actions of the defendants may preclude him from seeking alternative professional employment at any accredited hospital in the United States. *See* amended complaint at 44; Pl. Mem. at 9-10 & n.3.

Thus, for purposes of plaintiff's antitrust claims, based upon the evidence before it, this court finds the relevant product to be both the job market for anesthesia service positions and the market for anesthesia administered in connection with operating room services only, and the relevant geographic market to be nationwide.

[40]** However, there is no evidence before the court which addresses the issue of whether the defendants' actions have foreclosed competition with respect to Balaklaw's employment in these markets. Therefore, this court cannot make any determination on the issue of the reasonableness, or unreasonableness, of the alleged restraint of trade in this case. Were the court not inclined to grant the defendants' motion for summary judgment on the grounds hereinbefore discussed, this court would require additional submissions from the parties on these issues. However, in light of the aforementioned findings, such submissions are not necessary.

D. Plaintiff's motion for partial summary judgment.

In light of the determinations made above, plaintiff's motion for partial summary judgment on the issue of liability is denied.

IV. Conclusion

The Court finds the plaintiff lacks the requisite standing to assert the subject claims under the Sherman act. The Court also finds that there is insufficient evidence of a "contract, combination or conspiracy" on the part of the defendants as required under *Section 1* of the Sherman Act. For these reasons, the defendants' motion for summary judgment **[**41]** as to both claims is granted. Additionally, due to the lack of evidence before it, this court is unable to determine whether, in considering the relevant product and geographic area, the defendants' actions constituted an unreasonable restraint of trade. However, in light of the foregoing, further submissions on this aspect of plaintiff's claims are unnecessary.

[*906] Plaintiff's motion for partial summary judgment is denied.

IT IS SO ORDERED.

DATED: APRIL 30, 1993

SYRACUSE, NEW YORK

Frederick J. Sculling, Jr.

U.S. District Judge

[Maier-Schule GMC v. GMC GMC Truck & Bus Group]

United States District Court for the Western District of New York

May 3, 1993, Decided

87-CV-1514S

Reporter
1993 U.S. Dist. LEXIS 21728 *

MAIER-SCHULE GMC, INC., Plaintiff, v. GENERAL MOTORS CORPORATION (GMC TRUCK AND BUS GROUP), VOLVO WHITE TRUCK CORPORATION, VOLVO GM HEAVY TRUCK CORPORATION, BUFFALO TRUCK SALES & SERVICE, INC., THAGE BERGGREN, KENNETH KACZMAREK, RICHARD B. GURLEY, NICHOLAS BODNAR, and THOMAS B. BOWEN, Defendants.

Prior History: *[Maier-Schule GMC, Inc. v. General Motors Corp., 1987 U.S. Dist. LEXIS 15880 (W.D.N.Y., Dec. 31, 1987)]*

Core Terms

franchise, trucks, heavy duty, dealer, addendum, termination, plaintiff's claim, summary judgment, damages, summary judgment motion, manufacturers, Sherman Act, conspiracy, Memorandum, alleges, defendants', distributor, calculate, cancelled, Reply, admissible evidence, Stock, cause of action, dealership, papers, anticompetitive, market share, antitrust, adduced, Dealers' Act

Counsel: **[*1]** For Maier-Schule GMC Inc., Plaintiff: F. James Kane, Jr., LEAD ATTORNEY, Damon & Morey, Buffalo, NY.

For General Motors Corporation, GMC Truck and Bus Group, Defendant: Daniel L. Goldberg, LEAD ATTORNEY, Bingham McCutchen LLP, Boston, MA; Thomas S. Wiswall, LEAD ATTORNEY, Phillips Lytle LLP, Buffalo, NY.

For Volvo White Truck Corporation, Defendant: Marilyn A. Hockfield, LEAD ATTORNEY, Kavinoky & Cook, Buffalo, NY.

For Buffalo Truck Sales & Service, Inc., Thomas B Bowen, Defendants: Thomas C. Pares, LEAD ATTORNEY, Buffalo, NY.

For Taige Berggren, Kenneth Kaczmarek, Richard Gurley, Peter Spence, Volvo GM Heavy Truck Corporation, Defendants: Deborah H. Karalunas, LEAD ATTORNEY, Bond, Schoeneck & King, Syracuse, NY; Robert W. Keller, LEAD ATTORNEY, Hodgson, Russ, Andrews, Woods & Goodyear, Buffalo, NY.

For Nicholas Bodnar, Defendant: Lawrence J. Mattar, LEAD ATTORNEY, Mattar, D'Agostino & Gottlieb, LLP, Buffalo, NY; Robert J. Lane, Jr., LEAD ATTORNEY, Hodgson Russ LLP, Buffalo, NY; Robert J. Lane, Sr., LEAD ATTORNEY, Buffalo, NY.

Judges: WILLIAM M. SKRETNY, United States District Judge.

Opinion by: WILLIAM M. SKRETNY

Opinion

DECISION AND ORDER

MAIER SCHULE GMC, INC. v. GENERAL MOTORS CORPORATION, et al. 87-CV-1514S

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INTRODUCTION

Presently **[*2]** before this Court are the following matters: (1) the motions of General Motors Corporation ("GM"), Volvo White Truck Corporation ("White"), and Volvo GM Heavy Truck Corporation ("VGM") for summary judgment pursuant to *Fed. R. Civ. P. 56*; (2) the motions of defendants Berggren, Kaczmarek, and Gurley (the "individual defendants") to dismiss plaintiff's Complaint as against them for lack of personal jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(2)*; and (3) GM's objections to the Report and Recommendation of Hon. Edmund F. Maxwell, United States Magistrate Judge for the Western District of New York, recommending the denial of GM's motion for sanctions against plaintiff for failure to produce expert witness and damages information during discovery.

Plaintiff, Maier-Schule GMC, Inc., has filed a complaint alleging a number of federal and state statutory and state common law causes of action against these defendants. Essentially, these causes of action arise from GM's cancellation of plaintiff's "heavy duty truck addendum", and VGM's failure to award plaintiff a new dealership franchise. This Court has federal question jurisdiction under *28 U.S.C. § 1331*, and jurisdiction over plaintiff's **[*3]** state law claims under this Court's supplemental jurisdiction, *28 U.S.C. § 1367*.

Plaintiff possessed a franchise to distribute GM trucks in Western New York and Northern Pennsylvania. Moreover, plaintiff alleges that it had rights under light, medium, and heavy duty truck "addenda", which permitted plaintiff to distribute these individual grades of trucks. Plaintiff alleges that each addendum constituted a separate and distinct "franchise", as that term is defined in the Automobile Dealers' Day in Court Act[1] and the New York State Franchised Motor Vehicle Act.[2] Plaintiff charges that when GM and Volvo joined to create the joint venture VGM, they unlawfully conspired to terminate plaintiff's rights under the heavy duty addendum in bad faith, and to award a VGM franchise to a competing dealer, Buffalo Truck Sales & Service, Inc. ("Buffalo Truck"). Furthermore, plaintiff seeks to hold defendants jointly responsible for certain actions taken by GM in connection with GM's cancellation of the heavy duty addendum, and its provision of discounts on the sales of heavy duty trucks. Plaintiff asserts claims under the following statutes and common law causes of action: (1) the Franchise Act; (2) **[*4]** the Dealers' Act; (3) New York State General Business Law *§ 197*; breach of contract; Section 1 of the Sherman Act, *15 U.S.C. § 1*; *Section 2* of the Sherman Act, *15 U.S.C. § 2*; Section 3 of the Clayton Act, *15 U.S.C. § 14*; the Robinson-Patman Act, *15 U.S.C. § 13*; New York State General Business Law *§ 340* (the "Donnelly Act"); the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961 et seq.*; the New York State Uniform Commercial Code, *N.Y.U.C.C. § 2-306(2)*; interference with contractual relations; and tortious interference with advantageous business relations.

Defendants respond that they cannot be held jointly liable for the actions of one another. For example, VGM contends that it cannot be held responsible for GM's cancellation of the heavy duty addendum, and GM contends that it cannot be held responsible for VGM's failure to award plaintiff a VGM franchise to sell heavy duty trucks. White argues that it had **[*5]** no part in either of these decisions, and is therefore completely without liability.

Defendants further argue that the heavy duty addendum was not a separate and distinct franchise, but that it merely constituted a product line. They argue that the addendum was part of a Dealer's Sales and Service Agreement ("Agreement"), which enabled GM to discontinue product lines as it wished. In the alternative, they argue that GM acted in good faith in cancelling the heavy duty addendum, as an alternative to liquidation of its heavy duty truck facilities in the face of severe economic hardship. Moreover, defendants argue that each of plaintiff's claims must fail because plaintiff has failed properly to support its claims with admissible evidence in the record. They point to the dearth of citations to the record in plaintiff's responsive papers. They also maintain that plaintiff has failed to state causes of action under its various federal and state law claims.

Finally, defendants argue that summary judgment in their favor is warranted as to each of plaintiff's claims because plaintiff has failed to provide sufficient evidentiary support for its damage claims. On the same issue, GM objects to the **[*6]** Report and Recommendation of Magistrate Judge Maxwell denying its motion for sanctions against plaintiff for plaintiff's failure to produce expert witness and damages information.

The individual defendants argue that plaintiff's complaint must be dismissed as against them for this Court's lack of personal jurisdiction over them. They maintain that, according to the federal Constitution and New York State law, they cannot be subjected to this Court's jurisdiction because they do not have sufficient contacts with New York State, and they committed no tortious act in New York.

GM has submitted the following papers in support of its motion for summary judgment: a Notice of Motion for Summary Judgment ("GM Motion); a Memorandum of Law ("GM Memo") with an Appendix containing a number of affidavits; an Affidavit of Elmo Sergo ("Sergo Affid."); a Statement of Undisputed Material Facts ("GM Facts"); and a Reply Memorandum of Law ("GM Reply").

VGM has submitted the following papers in support of its motion for summary judgment: a Notice of Motion for Summary Judgment ("VGM Motion"); a Memorandum of Law ("VGM Memo"); an Affidavit of Kenneth Kaczmarek ("Kaczmarek Affid."); a Reply Memorandum of Law **[*7]** ("VGM Reply"); a Reply Affidavit of Kenneth Kaczmarek ("Kaczmarek Reply Affid."); a Combined Affidavit and Statement of Material Facts not in Dispute ("VGM Facts");

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[1] Also known as the Automobile Franchise Act, *15 U.S.C. §§ 1221-1225*. For convenience, this Act will be referred to hereinafter as the "Dealers' Act".

[2] *New York Vehicle and Traffic Law § 460 et seq*., referred to hereinafter as the "New York Franchise Act".

and a Reply Affidavit of Richard Wells ("Wells Affid."). VGM has also expressly incorporated the GM Reply into its own opposition papers (VGM Reply, p. 1).

White has submitted the following papers in support of its motion for summary judgment: a Notice of Motion for Summary Judgment ("White Motion"); an Affidavit of Marilyn Hochfield, Esq. ("Hochfield Affid."); and a Reply Memorandum of Law ("White Memo"). White has also expressly incorporated all of GM's and VGM's affidavits, statements, memoranda, and reply memoranda (White Reply, p. 1).

The individual defendants have submitted the following papers in support of their motion to dismiss plaintiff's Complaint: a Notice of Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss"); a Memorandum of Law ("Dismissal Memo"); an Affidavit of Kenneth Kaczmarek ("Kaczmarek Dismissal Affid."); an Affidavit of Thage Berggren ("Berggren Affid."); an Affidavit of Richard Gurley ("Gurley Affid."); a Reply Memorandum of Law ("Dismissal Reply Memo"); a Reply Affidavit of Kenneth Kaczmarek **[*8]** ("Kaczmarek Reply Affid."); an Affidavit of Deborah Karalunas ("Karalunas Affid."); and a Reply Affidavit of Richard Wells ("Wells Affid.").

Plaintiff has submitted the following papers in opposition to defendants' motions for summary judgment and to dismiss plaintiff's complaint: a Memorandum of Law ("P. Memo"); an Affidavit of F. James Kane, Esq. with exhibits ("Kane Affid."); a Statement in Response to GM's Claims of Undisputed Facts ("P. Facts"); and a Response to the Statement of Material Facts Submitted by Volvo GM Heavy Truck Corporation ("P. Response to VGM Facts"). Plaintiff has also purported to resubmit the following papers: its Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction; its Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment; its Reply Memoranda of Law in Response to the Submissions of GM and VGM, the Memorandum of Plaintiff in Opposition to GM's Motion to Amend Order; the Statement of Material Facts submitted by Plaintiff dated May 17, 1990; the Affidavits of Nelson E. Schule sworn to December 10, 1987; and various excerpts from deposition testimony. This second set of papers were originally filed in connection **[*9]** with the many motions that have been made during the protracted course of this litigation.

This Court strongly discourages the practice employed here by plaintiff's counsel of "resubmitting" such a considerable number of documents, without winnowing out redundant or irrelevant portions. In this case, the previously-submitted papers are voluminous, and reiterate many of the arguments raised in plaintiff's latest memorandum. Moreover, although plaintiff's counsel refers to previous papers for "factual support", there is often no factual support to be found. This is inexcusable and professionally irresponsible. Nonetheless, this Court has taken an extraordinary amount of time to review all the "resubmitted" papers, due to the number and the complexity of the issues involved in this case. Some of this material was helpful; much of it was not.

In addition, this Court should note that plaintiff's counsel made it extremely difficult for this Court to find the admissible factual evidence that plaintiff believed precluded summary judgment for defendants. The failure properly to reference such evidence may well have been fatal to plaintiff's opposition, in light of *Rule 56(e)* and governing precedent. **[*10]** See, e.g., *Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034, 274 U.S. App. D.C. 340 (D.C.Cir. 1988)*. This difficulty could have been remedied by plaintiff's counsel simply by including an appendix containing and clearly indexing all affidavits, exhibits, documents, correspondence, and other factual material believed to support plaintiff's position, rather than referring to or incorporating by reference previously filed affidavits or exhibits.

For example, it took approximately one full working day for this Court to find the factual support for plaintiff's critical assertion that heavy duty truck sales and service accounted for approximately 49% of plaintiff's gross sales and 59% of plaintiff's gross profits. This evidence was buried away in papers pertaining to previous motions, and was not referenced in any of the papers relating to the present motions.

Nonetheless, this Court did draw a line at how far it would search for admissible evidence, in keeping with the principle that the Court is not bound to search the entire record for material issues of fact; rather, the burden is on the non-moving party to establish a genuine issue by designating specific facts. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*. **[*11]** For example, plaintiff's Memorandum refers to portions of the deposition of Nelson E. Schule that have never been made a part of the record or, if they have, are not attached to any memorandum or affidavit. This Court has refused to consider those portions as admissible evidence in support of plaintiff's claims.

For the reasons stated below, the motions of GM, VGM, and White will be Granted in part and Denied in part. The motions of the individual defendants to dismiss plaintiff's Complaint as against them will be Granted. Finally, GM's motion for sanctions against plaintiff will be Granted, insofar as plaintiff will be precluded from introducing evidence of damages at trial. In all other respects, this Court will affirm the Report and Recommendation of Magistrate Judge Maxwell, and GM's motion for other sanctions will be Denied.

FACTS

On July 28, 1985 plaintiff and GM executed a Dealer Sales and Service Agreement ("Agreement"), which became effective on November 1, 1985 (Sergo Affid., exh. B). The Agreement consisted of a two page contract, a booklet containing additional provisions that were incorporated into the contract, and various "addenda", including addenda for light, medium, **[*12]** and heavy duty trucks. The Agreement governed the relationship between plaintiff and GM during the times relevant to these motions (GM Facts, ¶ 9; P. Facts, ¶ 9; Sergo Affid., exh. B). The Agreement granted plaintiff the right to identify itself as an "authorized GMC Truck Dealer", and to use GM trade names and trademarks (GM Facts, ¶ 10; VGM Facts, ¶ 11 (c); P. Facts ¶ 10; Sergo Affid., exh. B). It also gave plaintiff the right to sell GM trucks and parts, and to perform authorized warranty and other service on GM trucks (Agreement, p. 1; P. Facts, ¶ 10). Paragraph 1.5 of the Agreement provided, "General Motors may discontinue any product at any time and its only obligation shall be to manufacture and deliver to Dealer accepted orders which Dealer does not elect to cancel." (Agreement, ¶ 1.5; GM Facts, ¶ 11; P. Facts, ¶ 11). The Agreement expired by its own terms on October 31, 1990 (Sergo Affid., exh. B).

The relevant addendum to the Agreement concerning heavy duty trucks ("heavy duty addendum") provided:

> Effective October 9, 1986, Dealer, as an authorized GMC Truck dealer, has a non-exclusive right to buy the following new Heavy Duty Truck Motor Vehicles marketed by GMC Truck Operation **[*13]** of General Motors Corporation:
>
> J8000 and J9500 Brigadier Models N9500 General Models
> D9500 Astro Models
>
> This Motor Vehicle Addendum shall remain in effect unless cancelled or until superseded by a new Motor Vehicle Addendum furnished by GMC Truck. This Motor Vehicle Addendum cancels and supersedes any previous Motor Vehicle Addendum furnished Dealer by GMC Truck.

(Agreement, p. 8; GM Facts, ¶ 12).

The term "heavy duty truck" refers to vehicles with a gross weight capacity over 33,000 pounds. Prior to 1986, GM manufactured and marketed four heavy duty truck models: the "Astro", "General", "Brigadier J-8000", and "Brigadier J-9500" (GM Facts, ¶ 1; P. Facts, ¶ 1).

By 1986, the market for heavy duty trucks in North America had become unprofitable for GM, due to increased competition, declining demand, and other economic factors. GM's market share in heavy duty trucks decreased approximately 50% between 1982 and 1985. GM's involvement in the heavy duty truck business became increasingly unprofitable, and GM suffered a loss of over $50 million in 1985 (GM Facts, ¶ 2; VGM Facts, ¶ 11(g), (h); P. Facts, ¶ 2). GM considered a number of options to improve its profitability. In Europe, GM liquidated **[*14]** its heavy duty truck operations. (GM Facts, ¶ 4; P. Facts, ¶ 4). In the United States, GM entered into a Stock Purchase Agreement with the Swedish company Aktiebolaget Volvo, Volvo Worth America Corporation, and Volvo Lastvagnar AB (together "Volvo"). The Stock Purchase Agreement provided that GM would convey to a newly-formed corporation a certain portion of its assets devoted to the production of heavy duty trucks, together with cash and other consideration. In exchange, GM would receive 24% of the new corporation's stock. The new corporation was VGM, which was a signatory to the Stock Purchase Agreement (GM Facts, ¶ 5; VGM Facts, ¶ 11(i); P. Facts, ¶ 5; Kane Affid., exh. A).

VGM was formed to manufacture and distribute heavy duty trucks in the United States. It was based upon the operations and assets of White, including its management, administrative structure, and manufacturing and distribution facilities. These were contributed by Volvo. (GM Facts, ¶ 6; VGM Facts, ¶ 11 (k), (l); P. Facts, ¶ 6). The Stock Purchase Agreement also provided that for a period of time after the creation of VGM, GM would continue to manufacture and sell the Brigadier model to VGM. The Stock Purchase **[*15]** Agreement stated:

> Until January 1, 1989, or such earlier time as [VGM] is able to begin manufacturing a successor to the GMC Brigadier Heavy Duty Truck, [GM] will continue to manufacture the GMC Brigadier in response to orders from [VGM] if, in the reasonable judgment of [GM], the volume of orders, at sales prices generally comparable to those in 1986, are sufficient to justify its doing so (based upon ability to cover variable costs, calculated in the manner then used generally throughout GM), and [VGM] will purchase those GMC Brigadiers from [GM].

(Stock Purchase Agreement, p. 25; VGM Facts, ¶ 11 (p)).

VGM is not a subsidiary of GM. According to the Stock Purchase Agreement, GM is excluded from the daily operations of VGM, which are under the control of Volvo. Volvo received 76% of the VGM stock. Seven of the ten members of VGM's board of directors were chosen by Volvo (GM Facts, ¶ 7; VGM Facts, ¶ 11(l); P. Facts, ¶ 7).

On August 14, 1986 plaintiff received correspondence from GM stating:

> It is contemplated that [VGM] will market current GMC models from GM's heavy duty truck assembly operation in Pontiac. The management of [VGM] will eventually determine which products will be built, **[*16]** and in what quantities, based on market demand. In any event, both White and GMC identification will be preserved and their market presence preserved. . . . GM light and medium duty truck operations are not included in [VGM].

(Schule February 1988 Affid., ¶ 4, exh. A).

On September 10, 1986, General Motors notified all GM truck dealers, including plaintiff, by letter that it had signed a non-binding memorandum of understanding with Volvo concerning the creation of VGM. The letter stated that "not every GMC truck dealer will be selected to be a part of the new joint venture." (GM Facts, ¶ 13; P. Facts, ¶ 13; Sergo Affid., exh. E). On November 7, 1986, each GM truck dealer with a heavy duty addendum was provided with a new motor vehicle addendum for heavy duty trucks. GM dealers were further notified that "General Motors Corporation will discontinue and will no longer distribute or market heavy duty trucks in the United States. Consequently, it is anticipated that the attached addendum will be cancelled no later than December 31, 1987." (GM Facts, ¶ 14; P. Facts, ¶ 14; Sergo Affid., exh. D).

On December 24, 1986, plaintiff was notified by letter, certified mail, return receipt requested, **[*17]** that on December 9, 1986 GM and Volvo had executed an agreement to form VGM, which was to begin its operations on January 1, 1987. One of the issues addressed in the letter was the selection of dealers to receive a new franchise from VGM. The letter stated that "while preference is being given for experience as a heavy duty truck dealer for GM Truck, Volvo or Volvo-White, it will not be possible for all current dealers to obtain a dealer agreement from the joint venture." The letter also stated that "as a result of the joint venture, GMC Truck will cease offering heavy duty truck products for sale in North America on December 31, 1987." (GM Facts, ¶ 15; P. Facts, ¶ 15; Sergo Affid., exh. C).

Pursuant to the Stock Purchase Agreement, VGM was to give preference to former GM and White truck dealers in awarding VGM franchises. VGM's initial evaluation of dealers was undertaken by a Steering Committee, which was comprised of three representatives from GM and three representatives from White. VGM possessed final authority over the selection of dealers for a new VGM franchise (GM Facts, ¶ 17; VGM Facts, ¶ 11(r); P. Facts, ¶ 17; Hochfield Affid., ¶ 5).

In the Buffalo area, plaintiff and Buffalo **[*18]** Truck were considered and evaluated for the award of a VGM franchise in the area (VGM Facts, ¶ 11(z), (aa)). Buffalo Truck sold and serviced Freightliner vehicles, as well as Volvo vehicles. Plaintiff sold and serviced Mercedes-Benz vehicles, as well as GM vehicles. Furthermore, plaintiff operated a Kenworth dealership in a separate facility that was adjacent to the GM facility. Buffalo Truck represented to the Steering Committee that it would be willing to lease a separate sales facility to handle its Freightliner business if it were to receive the VGM franchise. Plaintiff represented to the Steering Committee that it would be willing to terminate its Mercedes-Benz dealership if it were to receive the VGM franchise. Nevertheless, plaintiff represented that it would not eliminate its Kenworth facility. (GM Facts, ¶ 21; VGM Facts, ¶ 11 (d); Sergo Affid., exhibit F). On June 8, 1987 Leo St. Amour, a GM business manager, recommended to the Steering Committee that plaintiff receive the VGM franchise. (Sergo Affid., exhibit F). However, despite its many qualifications, plaintiff refused to discontinue its Kenworth business, and this was a decisive factor in awarding the VGM franchise to **[*19]** Buffalo Truck. (GM Facts, ¶ 21; VGM Facts, ¶ 11(v), (ee); Complaint, p. 12; P. Response to VGM Facts, ¶ (ff)).

On August 4, 1987 GM sent a ietter to plaintiff notifying it that it had not been selected to receive the VGM franchise (VGM Facts, ¶ 11(w); Kane Affid., exh. G). The letter was accompanied by an "acknowledgement" to be signed by plaintiff and returned to GM (Kane Affid., exh. G). The acknowledgement purported to be an offer by GM to buy back all new, unused, and unsold Brigadiers, Generals and Astros at a price equal to the net prices and charges paid to GM, to buy back tools used to service GM heavy duty trucks, and to provide other "assistance".

Both before and after the formation of VGM, the market for heavy duty trucks, both nationally and in Western New York, has been highly competitive, with a number of large manufacturers competing for sales. None of these manufacturers have possessed a dominant market share. For example, in 1986 five separate manufacturers (Ford, Freightliner, International Harvester, Mack, and Kenworth) had market shares that exceeded those of GM and White. Three manufacturers (Freightliner, International Harvester, and Mack) had market shares that **[*20]** exceeded those of GM and White combined. (GM Facts, ¶ 23; P. Facts, ¶ 23). Neither GM nor Volvo possessed significant market power in the United States market for heavy duty trucks prior to the Stock Purchase Agreement in 1986. Nor has VGM achieved anything near a dominant market share since that time.

GM, White, and VGM accounted for the following percentages of new truck registrations in the United States between 1986 and November 1991 (GM Facts, ¶ 24; VGM Facts, ¶ 11 (oo), (pp); P. Facts, ¶ 24):

	GMC	**Volvo-White**	**Volvo-GM**
1986	6.14%	8.85%	n/a
1987	5.30%	7.87%	n/a
1988	n/a	n/a	8.64%o
1989	n/a	n/a	11.47%
1990	n/a	n/a	11.26%
1991	n/a	n/a	11.27%

GM's share of local sales has also been relatively small. In the local market,[3] GM, White, and VGM heavy duty truck market shares between 1986 and November 1991 were as follows (GM Facts, ¶ 25; P. Facts, ¶ 25):

	GMC	**Volvo-White**	**Volvo-GM**
1986	5.37%	7.34%	n/a
1987	4.78%	8.27%	n/a
1988	n/a	n/a	10.59%
1989	n/a	n/a	16.12%
199	n/a	n/a	13.06%

3 This market is District 42 of GM's New York Marketing Center, which comprises a number of upstate New York and Pennsylvania counties. See Sergo Affid., exh. G.

	GMC	Volvo-White	Volvo-GM
0			
1991	n/a	n/a	13.43%

ultimate purchaser of the truck, such as Ryder. CE was designed to make GM heavy trucks, **[*21]** such as the Brigadier, price competitive with other makes of heavy trucks.

Prior to 1987, GM did not make CE available for Brigadier truck sales to car hauler companies such as Ryder. In May 1987, GM began offering CE on Brigadier trucks ultimately supplied to Ryder. Plaintiff's three competitor dealers, Wink, Byers and General, supplied Brigadier trucks to Ryder in 1987. During 1987 plaintiff supplied no Brigadier trucks to Ryder.

DISCUSSION

Federal Rule of Civil Procedure 56(c) provides in pertinent part that summary judgment is warranted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Under the Rule, the moving party has the burden of showing that a genuine issue as to any material fact is absent. *Adickes v. S.H. Kress and Co., 398 U.S. 144, 156, 90 S.Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970)*. The evidence and the inferences drawn from the evidence must be "viewed in the light most favorable to the party opposing the motion." *id. at 158-59, 90 S.Ct. at 1609*.

Once the moving party has properly supported his motion for summary judgment, the non-moving party must counter with "significant probative evidence tending to support **[*22]** the complaint." *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)*. However, a summary judgment motion will not be defeated merely on the basis of a "metaphysical doubt" about the facts, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*, "or on the basis of conjecture or surmise." *Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991)*.

Rule 56(e) also provides that where the moving party makes a properly supported motion for summary judgment,

> . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

It is also important to note in this case that *Rule 56(e)* also requires that affidavits opposing summary judgment

> shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent **[*23]** to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Under the criteria articulated above, a district court "judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*. This Court has specifically noted that "courts should not be reluctant to grant summary judgment in appropriate cases since '[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims.'" *Maier-Schule GMC, Inc. v. General Motors Corp., 780 F. Supp. 984, 987 (W.D.N.Y. 1991)* (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986))*.

Plaintiff's Claims under the New York Franchise Act, *N.Y. Veh. & Traf. Law § 463(2)(d)(1)*

Applying the foregoing standard to the present facts, this Court finds that plaintiff has adduced sufficient evidence to create the genuine issue of material fact of whether GM cancelled a franchise held by plaintiff without due **[*24]** cause, in contravention of the New York Franchise Act, *N.Y. Veh. & Traf. Law § 463(2)(d)(1)*. This statute provides that it shall be unlawful "[t]o terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer except for due cause, regardless of the terms of the franchise." The central issue is whether GM terminated a "franchise" when it cancelled plaintiff's heavy duty addendum. The New York Franchise Act defines "franchise" as

> . . . a written arrangement for a definite or indefinite period in which a manufacturer or distributor grants to a franchised motor vehicle dealer a license to use a trade name, service mark or related characteristic, and in which there is a community of interest in the marketing of motor vehicles or services related thereto at wholesale, retail, by lease or otherwise and/or pursuant to which a franchised motor vehicle dealer purchases and resells.

N.Y. Veh. & T. Law § 462(6).

Consideration of this issue must be guided by *Arthur Glick Truck Sales, Inc. v. GMC, 865 F.2d 494 (2d Cir. 1989)*, in which the Second Circuit was presented with facts similar to those presented here. In Glick, the court reversed the district court's decision that **[*25]** the heavy duty addendum did not constitute a separate franchise for the purposes of *§ 463*, and held that under certain circumstances the heavy duty addendum could be considered a separate franchise. The court explained that the district court failed properly to consider the following factors: (1) approximately 24% of Glick's gross profits as a dealer were derived from the sale and service of GM heavy duty trucks; (2) GM continued to manufacture the Brigadier iine of vehicles for VGM, and planned to do so until at least January 1, 1989;[6] (3) Glick had made an investment in parts and training service employees; and (4) Glick's heavy duty truck line was directed toward a distinct segment of the market. Therefore, the court held that Glick was entitled to further discovery, or a trial if necessary, to determine whether the heavy duty addendum constituted a distinct franchise. The court also provided some guidelines for such a determination, writing:

> Where a dealer has made an investment in parts and training service employees and where the line of trucks is functionally related to a distinct segment of the market, as heavy-duty trucks appear to be, and where their sale constitutes a substantial **[*26]** part of the dealer's revenues, it may be that the dealer has been given a "franchise."

Id. at 497. Furthermore, the court posed the rhetorical question, "Surely as to those eighty-five or so dealers who had only the heavy-duty truck line, that is a franchise. Should it be different for the dealers like Glick who carried the full line?" Id.

Defendants rely heavily on cases from other Circuits finding that the heavy duty addendum did not constitute a separate franchise. See, e.g., *Central GMC. Inc. v. General Motors Corp., 946 F.2d 327 (4th Cir. 1991)*, cert. denied, *503 U.S. 907, 112 S. Ct. 1265, 117 L. Ed. 2d 493 (1992)* (GM entitled to discontinue production and marketing of trucks listed in heavy duty addendum because addendum not a franchise under Maryland statute). Nevertheless, after undertaking the analysis mandated by *Glick*, this Court concludes that trial is necessary to determine whether the heavy duty truck addendum constituted a franchise and, if so, whether it was wrongfully terminated by GM. Plaintiff has produced evidence that its heavy duty truck addendum was eliminated as of December **[*27]** 31, 1987 (Schule April 1990 Affid., ¶ 4; Kane Affid., exh. G).

Furthermore, plaintiff has produced evidence addressing the concerns that the Second Circuit raised in Glick. In Glick, the court was concerned that approximately 24% of Glide's gross profits as a dealer came from selling and servicing GM heavy duty trucks. Here, there is evidence that approximately 49% of plaintiff's gross sales and 59%

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[6] The court also noted that the Brigadier line accounted for over 70% of GM's heavy duty truck sales in 1987.

of plaintiff's gross profits were derived from heavy duty truck sales and service (Schule April 1990 Affid., ¶ 5; Modaffari December 1987 Affid.).[7]

The Second Circuit was also concerned that Glick's territory for heavy duty trucks differed from its territory for light and medium duty trucks. In this case, **[*29]** plaintiff's territories were different as well (P. Memorandum of Law in Support of Plaintiff's Motion to Join Parties Plaintiff, exh. A).

Furthermore, Glick instructs that the district court should consider the fact that GM continued to produce the Brigadier model through December 1988. This fact is undisputed, and is contained in GM's own Memorandum and supporting affidavits (GM Memo., p. 25, n. 18; Sergo Affid., ¶ 18). If the addendum constituted a franchise under *§ 463*, this fact raises the issue of whether GM terminated such franchise for due cause.[8]

Glick also expresses the Second Circuit's concern that where a dealer has made an investment in parts and training service employees, and where the heavy duty truck line was directed toward a distinct segment of the market, the heavy duty addendum may be considered a franchise. Here, plaintiff has adduced proof of both of **[*30]** these facts in Nelson Schule's December 1991 affidavit:

> There is a limited market for these trucks and repeat business is essential. This is a major purchase for most companies and individuals, these trucks selling for $40,000.00 and up. The truck must be in perfect working order when delivered. Parts must be readily available and service promptly and properly performed. The Maier-Schule name had been built up for over 35 years to represent quality and dependability in heavy duty trucks.

This information indicates that plaintiff has made an investment in the heavy duty truck line, and has directed its activities toward a distinct segment of the truck market. Glick holds that, under such circumstances, the heavy duty addendum may comprise a franchise under the New York Franchise Act.

The Second Circuit's primary concern in Glick was that the district court failed to look to the Act itself to determine whether the addendum was a franchise. After considering the statutory language and intent, this Court concludes that an issue of fact remains as to whether the addendum was a franchise. *Section 460* expresses the legislative finding that regulation of motor vehicle franchises is necessary "to **[*31]** prevent frauds, impositions and other abuses upon [New York State] citizens and to protect and preserve the investments and properties of the citizens of [New York]." If the facts adduced by plaintiff are true, GM may have engaged in a type of activity that the statute was drafted to prevent. Furthermore, the statute defines "franchise" as including a "community of interest in the marketing of motor vehicles or services related thereto . . . Id. Glick indicates that such a community of interest may exist under the facts discussed above. The Second Circuit wrote:

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[7] The Schule affidavit is attached to plaintiff's Notice of Motion for Partial Summary Judgment on plaintiff's Robinson-Patman Act claims, dated May 11, 1990, and has been incorporated by plaintiff in opposition to the present motion (P. Memo., p. 12). The Modaffari affidavit is referenced in plaintiff's opposition papers (P. Memo., p. 34).

Defendants argue that plaintiff has failed to produce evidence sufficient to rebut GM's evidence suggesting that in 1986, the last full year that plaintiff purchased trucks listed in the heavy duty addendum, heavy duty truck sales contributed less than 2% of plaintiff's gross sales, and approximately 2% of plaintiff's **[*28]** gross income (GM Reply, p. 20, Wiswall December 1987 Affid., exh.; Consolidated Affid., exh's. C & D). These same documents indicate that from January through October of 1987 heavy duty truck sales contributed less than 3% of plaintiff's gross sales, and approximately 2% of plaintiff's gross income. However, neither the documents nor the figures upon which defendants rely indicate the profit attributable to parts, or to warranty and non-warranty repairs performed by plaintiff on GM heavy duty trucks. Modaffari's affidavit does address income derived from warranty and other service on heavy duty trucks. Furthermore, there is some evidence that a low sales volume in the heavy duty truck line in late 1986 and 1987 may have been attributable to GM's failure to provide plaintiff with competitive equalization ("CE") during this period (Schule April 1990 Affid., ¶ 21). Therefore, the figures contained in Schule's and Modaffari's affidavits regarding the 49% and 59% figures are sufficient to create a material issue of fact for trial.

[8] See *Glick at 498*, where the Second Circuit noted, "Moreover, GM has not withdrawn completely from the heavy-duty truck business. It continues to manufacture the Brigadier, a successful product so far as appears on the state of this record. Indeed, it is more than just a share-holder in the joint venture with Volvo."

> But here there may have been a "community of interest in the marketing of" heavy-duty trucks and related services, [citation omitted]. There was a written arrangement for a definite period during which General Motors granted the Glick dealership a license to use its trade name, service mark, or a related characteristic. Heavy-duty trucks are a significant segment of the market, calling for a separate addendum to the Dealer Sales and Service Agreement. The heavy-duty truck Addendum itself says that it shall remain in effect "unless cancelled or until superseded by a new Motor Vehicle Addendum furnished Dealer by GMC Truck." Surely **[*32]** as to those eighty-five or so dealers who had only the heavy-duty truck line, that is a franchise. Should it be different for the dealers like Glick who carried the full line? It is significant, too that Glick's territory for the sale of heavy-duty trucks differed from its territory for other trucks.

Glick, 865 F.2d at 497. These are precisely the facts that operate in the present case. Therefore, plaintiff has raised a genuine issue whether the heavy duty addendum constituted a franchise under the Act.

GM exaggerates the significance of Central and other cases holding that the heavy duty addendum cannot be a franchise. Central expressly failed to address GM's continued manufacture of the Brigadier model, and was based primarily on economic considerations. See *Central, 946 F.2d at 333*, where the Fourth Circuit wrote, "We need not delve in this hornets' nest of charges and countercharges because to do so would only obscure the central point of the analysis: the cessation of production of heavy duty trucks was a legitimate, lawful reaction by GMC to unfavorable market conditions." This "purely economic" approach was specifically criticized in *Glick, 865 F.2d at 497*.

Finally, GM's attempt **[*33]** to distinguish this case from Glick because of its procedural posture is unsuccessful. GM argues that Glick was decided before the parties had the opportunity to engage in substantial discovery, whereas discovery has been completed in the present case (GM Memo., p. 24). However, it appears that both the district court and the Second Circuit in Glick were cognizant of the same set of operative facts present here. After considering such facts, this Court cannot say that plaintiff had no franchise in the heavy duty truck line, or that GM terminated any existing franchise for due cause. This is especially so in view of plaintiff's evidence that the heavy duty truck line constituted a significant proportion of plaintiff's business.

For these reasons, this Court holds that material issues of fact exist, precluding summary judgment for GM on plaintiff's cause of action under *N.Y. Veh. & Traf. Law § 463(2)(d)(1)*. This Court cannot say as a matter of law that the heavy duty addendum was not a franchise for the purpose of that statutory section, or that GM terminated any existing franchise for due cause. *Freedman Truck Center v. GMC, 784 F.Supp. 167, 176 (D.N.J. 1992)*(". . . it is a factual issue **[*34]** whether, in any given instance, termination of product lines will amount to termination of a franchise."). See also *C-B Kenworth, Inc. v. General Motors Corp., 706 F.Supp. 952 (D.Me. 1988)*, cited by the Second Circuit in Glick, and holding that the question of a separate franchise under the heavy duty addendum is a factual issue that cannot be resolved on documents submitted on a summary judgment motion.

Plaintiff also asserts claims against VGM and White under the Act, arguing that these defendants acted in concert with GM to terminate its heavy duty addendum and to deny it a new franchise. Specifically, plaintiff has produced evidence that VGM executed the Stock Purchase Agreement providing that GM would terminate all of its existing heavy duty dealers, and that three representatives of White sat on the VGM Steering Committee and recommended dealers to receive a new VGM franchise. VGM and White respond that because they were not parties to a franchise agreement with plaintiff they cannot be held liable under the Act.

Indeed, the Act was intended to provide a cause of action against defendants who are "franchisors" within the meaning of the statute. *Section 463(2)* begins, "It shall **[*35]** be unlawful for any franchisor. . . *Section 462* defines "franchisor" as "any manufacturer, distributor, distributor branch or factory branch which enters into or is presently a party to a franchise with a franchised motor vehicle dealer."

Nevertheless, construction of *§ 463(2)(d)(1)* can be expedited by reference to the statute's federal counterpart, the Dealers' Day in Court Act, *15 U.S.C. § 1221*. As will be discussed below, VGM and White might be held liable as "manufacturers" under the Dealers' Act. Although *§ 463* refers to "franchisors" rather than "manufacturers", this

Court finds that both statutory claims are susceptible to similar analysis, and that summary judgment is not warranted on either claim.

For these reasons, summary judgment will not be awarded to GM, VGM, or White on Count VI of plaintiff's Complaint.

The *Commerce Clause*

This Court is not persuaded by GM's argument that the New York Franchise Act is unconstitutional because it offends the *Commerce Clause, U.S. Const, art. I, § 8, cl. 3*, and that it is preempted by the federal Dealers' Act, *15 U.S.C. § 1221 et seq.*, according to the *Supremacy Clause, U.S. Const, art. VI, cl. 2*.

With respect to the *Commerce Clause*, this **[*36]** Court finds that requiring an automobile franchisor to compensate a franchisee for termination of a franchise without due cause would not unduly regulate or burden interstate commerce. See *Pike v. Bruce Church, Inc.. 397 U.S. 137, 90 S.Ct. 844, 25 L. Ed. 2d 174 (1970)*; *General Motors Corp, v. Gallo GMC Truck Sales, 711 F.Supp. 810, 819-20 (D.N.J. 1989)*.

With respect to the *Supremacy Clause*, this Court finds that: (1) Congress has not expressly preempted state law in this area of the law, *Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977)*; (2) Congress did not intend exclusive federal regulation of this area, *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L. Ed. 2d 664 (1982)*; and (3) there is no conflict between the federal and state statutes, *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L. Ed. 2d 752 (1983)*; *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217-19, 10 L. Ed. 2d 248 (1963)* (conflict exists where compliance with both federal and state statutes is impossible); *Hines v. Davidowitz. 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L. Ed. 581 (1941)* (conflict exists where state law interferes with **[*37]** the "accomplishment and execution" of Congress' regulatory objectives").[9]

Plaintiff's Claims under *§ 463(2)(d)(1)* Are Time Barred

Although this Court has determined that plaintiff has adduced sufficient evidence that the heavy duty addendum constituted a separate and distinct franchise and that plaintiff's claims under *N.Y. Veh. & Traf. Law § 463(2)(d)(1)* must stand, these claims must nevertheless be dismissed because plaintiff failed to meet the time requirements contained in *§ 463(2)(e)*. This section provides that upon receipt of a notice of franchise termination or cancellation, the franchisee has 120 days to seek review of the franchisor's decision in court. On December 24, 1986 GM notified plaintiff that GM would be discontinuing manufacture and **[*38]** sale of the vehicles listed in plaintiff's heavy duty truck addendum, effective December 31, 1987 (GM Facts, ¶ 15; P. Facts, ¶ 15; Sergo Affid., exh. C).[10] The notice, a certified letter, return-receipt requested, expressly provided that no assurances were being made that plaintiff would be chosen as a dealer for VGM. Accepting for the moment that plaintiff believed the heavy duty addendum constituted a distinct franchise, plaintiff must have realized at that point that the franchise was being terminated. Nelson Schule stated in deposition testimony that he realized upon receiving notice of the formation of the joint

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[9] For a full discussion of the impact of the *Commerce Clause* and *Supremacy Clause* on New Jersey's franchise act (which is similar to the New York Franchise Act in relevant respects), see *General Motors Corp. v. Gallo GMC Truck Sales, 711 F.Supp. 810, 819-21 (D.N.J. 1989)*; *Freedman Truck Center v. GMC, 784 F.Supp. 167, 174-75 (D.N.J. 1992)*(agreeing with Gallo decision finding no preemption of New Jersey franchise act by federal Dealers' Act).

[10] See also, Complaint, p. 9, where plaintiff alleges, "Defendant **[*39]** GMC terminated Schule's class 8 truck franchise effective December 31, 1987 stating that same would 'expire' on that date even though same by its express terms did not expire until October 31, 1990" (emphasis added). Thus plaintiff recognized that the letter terminated the alleged franchise, yet failed to bring this action within 120 days.

venture that GM would no longer be selling any heavy duty trucks to plaintiff after the joint venture began its operations, and realized there was a risk that plaintiff would not receive a VGM franchise (Schule Dep., pp. 96-97, 789[11]). Furthermore, Schule stated in his affidavit that he realized as early as June 4, 1987 that the VGM franchise would be offered to Buffalo Truck (pp. 150-152); yet plaintiff failed to take timely action and did not file its Complaint until December 7, 1987 (see also Schule Dep., p. 151).

This Court does not accept plaintiff's argument that the "termination" of the franchise did not occur until August 18, 1987, when plaintiff received official notice from VGM that plaintiff would not receive a new franchise. Plaintiff cannot extend its conspiracy theory to claim that the first letter had no effect without reference to the second. Even if there were a conspiracy involved, each of the documents is clear and unambiguous. The first letter clearly notified plaintiff that GM would cease marketing heavy duty trucks through plaintiff, and if plaintiff believed the heavy duty truck addendum was a franchise, it should have taken prompt action.

Finally, this Court does not accept plaintiff's argument that **[*40]** the filing period should not apply because representatives from GM told plaintiff it was a "shoo-in" for the VGM franchise (P. Memo., p. 27). Plaintiff refers this Court to no admissible evidence to support its argument.

For these reasons, summary judgment will be awarded to the moving defendants on Count VI of plaintiff's Complaint asserting a claim under *N.Y. Veh. & Traf. Law § 463(2)(d)(1)*.

Plaintiff's Claims under the New York Franchise Act, *N.Y. Veh. & Traf. Law § 463(2)(h)*

This Court must now address plaintiff's claims under *N.Y. Veh. & Traf. Law § 463(2)(h)* stemming from the extension of CE discounts on Brigadier trucks sold to Ryder in 1987. Although plaintiff's Complaint does not refer to the specific subsection in *§ 463* upon which it relies, plaintiff maintains that it is relying on *§ 463(2)(h)*, which makes it unlawful for an automobile manufacturer" [t]o sell or offer to sell any new motor vehicle to any person, except a distributor, at a lower actual price therefor than the actual price offered and charged to a franchised motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device which results in such lesser actual price" (P. Memo., pp. 29-30). Although **[*41]** GM has produced evidence that the CE discounts were equally available to any dealer from whom Ryder would buy (Rossow Affid., ¶ 2), plaintiff has countered with evidence tending to show that GM denied plaintiff the same amount of CE discounts that were available through other dealers (e.g., Modaffari Dep., pp. 103-109). The Modaffari Deposition also contains information that GM delayed the award of CE to plaintiff (id., p. 101). There is also evidence that before 1987 plaintiff had been a major supplier to Ryder, but that in 1987 Ryder purchased trucks from Wink, Byers, and General, but not from plaintiff; this is circumstantial evidence that GM adversely affected plaintiff's relationship with Ryder through lower CE discounts. This evidence is sufficient to create the factual issue of whether GM "utilized any device" that resulted in a lesser actual price available to dealers other than plaintiff. See *C-B Kenworth, 706 F.Supp. at 955* (evidence showing GM sold heavy duty trucks to one of plaintiff's competitors at below plaintiff's cost and then faulted plaintiff for falling short in sales created issue of whether GM violated Maine Motor Vehicle Dealer's Act).

It is also important to **[*42]** note that once plaintiff specified the statutory subsection upon which it is relying, that is, *§ 463(2)(h)*, GM did not take the opportunity in its reply memorandum to challenge the viability of plaintiff's claim under that section. GM only addressed *§ 463(2)(g)* (GM Memo., pp. 34-37). Therefore, GM has provided no basis for dismissing plaintiff's claim under *§ 463(2)(h)*.

For these reasons, GM's motion for summary judgment must be denied insofar as it seeks dismissal of Count VI of plaintiff's Complaint alleging a claim under *§ 463(2)(h)*.

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[11] The portions of the Schule deposition referenced in this section have been submitted by GM together with its motion papers (GM Memo., exh. F).

Although plaintiff maintains that VGM had some participation in the approval of CE discounts available to plaintiff, and refers to a notation on a CE approval form that one of plaintiff's requests for CE discounts was allegedly "reviewed with legal, the Joint Venture, Jack Kehl and John Rock" (Kane May 1990 Affid., exh. J), this curious notation is insufficient to impose liability upon VGM for GM's alleged differential award of CE discounts. Plaintiff has not introduced evidence indicating who wrote the notation, and has not otherwise explained the relevance of the notation. For instance, plaintiff does not indicate whether the notation was made before or after GM **[*43]** decided to deny plaintiff greater CE discounts. Nor does plaintiff indicate what type of "review" may have been undertaken by the Joint Venture. Therefore, plaintiff has failed to sustain its burden of proof on the issue of VGM's participation in any differential award of CE discounts. Plaintiff offers no additional evidence implicating White in the CE system. Although these defendants may be liable for lack of good faith in the termination or non-renewal of its heavy duty addendum because they executed the Stock Purchase Agreement and/or participated in the selection of a dealer to receive a new VGM franchise, the CE system is another matter. The award of CE discounts was not contemplated in the Stock Purchase Agreement, nor was any denial of CE discounts a foreseeable result of defendants' agreements. Plaintiff will not be allowed to extend the scope of its conspiracy theory to impose liability on VGM and White under this statute. See *Meredith v. Art Metal Const. Co., 97 Misc. 69, 161 N.Y.S. 1 (1916)*, aff'd, *176 A.D. 945, 162 N.Y.S. 1131 (4th Dept. 1917)* (conspirator liable for actions taken in furtherance and in accordance with the general plan of the conspiracy).

Therefore, summary judgment will **[*44]** be awarded to VGM and White on Count VI of plaintiff's Complaint alleging claims under *§ 463(2)(h)*.

Plaintiff's Claims Under the New York Franchise Act, *N.Y. Veh. & Traf. Law § 463(I)*

In Count VI of its Complaint, plaintiff alleges a cause of action under *N.Y. Veh. and Traf. Law § 463(I)*, which provides that it is unlawful for a franchisor to

> . . . require a franchised motor vehicle dealer to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed under this article, provided that this paragraph shall not be construed to prevent a franchised motor vehicle dealer from entering into a valid release or settlement agreement with a franchisor.

Plaintiff claims that GM required it to release GM from any potential liability arising from the termination of the heavy duty addendum, in exchange for certain termination assistance (see Kane Affid., exh. G).

New York's Vehicle and Traffic Law § 463(2)(o)(2) requires that upon termination of a franchise, the franchisor must repurchase certain equipment and inventory from the franchisee. The "termination assistance" described in Article 5 of the Dealer Sales and Service Agreement is essentially what **[*45]** is required by the statute. If the heavy duty addendum constituted a distinct franchise, it would have been unlawful for GM to have required plaintiff to execute a release in exchange for assistance that was required to be provided by law.

This Court is not persuaded by GM's argument that it did not "require" the release because plaintiff never executed it. The plain meaning of "require" is "to demand as necessary or essential." Webster's Third New International Dictionary 1929 (1986). Here, plaintiff has adduced evidence that GM demanded the release in exchange for termination assistance. If plaintiff proves that termination assistance was contingent upon the execution of the release, it will have proved that GM "required" the release. Therefore, summary judgment will not be awarded to GM on this claim.

Furthermore, the summary judgment motions of VGM and White will be denied. As discussed in relation to plaintiff's claims under *§ 463(2)(d)(1)* and the federal Dealer's Act, these defendants may be liable for actions taken in connection with the termination of plaintiff's heavy duty addendum. Genuine issues of material fact exist regarding the scope of their knowledge of and participation **[*46]** in the decision to seek releases from GM franchisees in return for termination assistance.

Therefore, the moving defendants will not be awarded summary judgment on Count VI of plaintiff's Complaint asserting claims under *§ 463(I)*. See *C-B Kenworth, 706 F.Supp. at 957* ("Plaintiff has generated a genuine issue of fact about whether and under what conditions it was offered compensation for the termination, or 'termination assistance'" under the Maine Motor Vehicle Dealer's Act).

Plaintiff's Claims under *New York General Business Law § 197 et seq*.

In Count V of its Complaint, plaintiff alleges that GM violated *New York General Business Law § 197 et seq*, when it cancelled plaintiff's heavy duty truck addendum.[12] *Section 197* provided:

> No manufacturer or distributor, or any agent of such manufacturer or distributor, shall terminate any contract, agreement, or understanding or renewal thereof for the sale of new motor vehicles to a distributor, as the case may be, except for cause.

Section 197-a further required that the termination must be made in good faith

GM argues that because the Dealer Sales and Service Agreement itself remained in effect, GM cannot be held liable under this statute. Further, GM argues that, even if the heavy duty addendum constituted a separate "contract, agreement, or understanding," GM had good cause to terminate the addendum, and acted in good faith, for the reasons discussed in relation to plaintiff's claim under *N.Y. Veh. & Traf. Law § 463(2)(d)(1)*.

The same facts adduced by plaintiff in support of its claim under Veh. & Traf. Law *§ 463(2)(d)(1)* raise the factual issue of whether the heavy duty addendum constituted a "contract, agreement, or understanding" pursuant to Gen. Bus. Law *§ 197*, Likewise, plaintiff has introduced evidence calling into question the propriety of terminating the addendum and the manner in which the termination was executed. Plaintiff has submitted evidence that GM continued to manufacture the Brigadier model for the joint venture, that GM maintained a degree of control over the joint venture, that GM offered a lower CE discount to plaintiff than to other dealers, **[*48]** and that GM delayed plaintiff's CE application. Thus, "[p]laintiff has introduced sufficient evidentiary support to draw into question [GM's] continued production of heavy-duty trucks, and thereby to raise a genuine factual issue about whether [GM] had good cause, within the meaning of the statute, to terminate Plaintiff's heavy-duty truck addendum." *C-B Kenworth, 706 F.Supp. at 956* (addressing the impact of the Maryland franchise statute on the termination of a heavy duty addendum). See also *id. at 957* ("good faith" and "good cause" are factual issues for the jury to decide). Therefore, summary judgment on plaintiff's claim against GM under Gen. Bus. Law *§ 197* is unwarranted.

Summary judgment is also unwarranted on plaintiff's claims against VGM and White under *§ 197*. As discussed in relation to plaintiff's claims under the New York Franchise Act and the federal Dealers' Act, these defendants may be liable for any wrongful termination of plaintiff's heavy duty addendum on the basis of a putative conspiracy. The language of *§ 197* parallels the language of the New York Franchise Act and dictates a similar result.

Lyon Ford, Inc. v. Ford Mkta. Corp., 337 F.Supp. 691 (E.D.N.Y. 1971), cited **[*49]** by defendants, does not change this result. In Lyon, the franchisee plaintiff alleged a conspiracy between the franchisor and another dealer to terminate plaintiff's franchise and award it to the other dealer. The court wrote, "The purpose of the conspiracy is alleged to have been to deprive plaintiff of its dealership and confer it on [the other dealer], a "favorite son" dealer of Ford Marketing Corporation and [another defendant], who is the district sales manager of Ford Marketing Corporation." *Id. at 693*. Despite plaintiff's conspiracy allegations, the court held, "The General Business Law does not grant a dealer a cause of action against a third party who is neither a manufacturer or distributor, and therefore does not give any rights against [the other dealer]." id.

In the present case, however, VGM and White were not plaintiff's competing dealers; rather, they are "manufacturers or distributors." And although they themselves were not signatories to a franchise agreement with

[12] *Sections 197* and *197-a* were repealed as of April 24, 1988; however, these provisions remain effective as to actions filed before repeal. **[*47]** *N.Y. Gen. Constr. Law § 94*. Defendants agree that these statutes apply to the present action (see, e.g., GM Memo., p. 39 n. 28).

plaintiff, they are alleged to have participated in a conspiracy to terminate plaintiff's dealership and deny plaintiff a new VGM franchise. *Section 197* provides that a party may be liable as an "agent" of **[*50]** a manufacturer or distributor. In *Sherman v. Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979)*, discussed below, the Ninth Circuit explained that, under the federal Dealers' Act, a putative conspiracy may supply the element of agency and extend liability over parties who conspire with an automobile franchisor to terminate a franchise in bad faith. Similarly, the element of agency may be supplied in the present case by VGM's and White's participation in the events surrounding the termination of plaintiff's heavy duty addendum. Consequently, a trial is necessary to determine whether their participation gave rise to liability under *§ 197*.

For these reasons, defendants' motions for summary judgment on Count V of plaintiff's Complaint alleging violations of Gen. Bus. Law *§ 197 et seq*, will be denied.

Plaintiff's Claims under the Federal Dealers' Act

In Count III of its Complaint, plaintiff alleges that the facts supporting its claim under *N.Y. Veh. & Traf. Law § 463(I)* also support its claims under the federal Dealers' Act, *15 U.S.C. §§ 1221 et seq.* This statute provides:

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the **[*51]** United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, that in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

15 U.S.C. § 1222.

The Act defines "automobile manufacturer" as:

> . . . any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

15 U.S.C. § 1221(a). Furthermore, the Act defines "good faith" as

> . . . the duty of each party to any franchise . . . to act in a **[*52]** fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party.

15 U.S.C. § 1221(e).

The courts have interpreted the term "automobile manufacturer" narrowly, and have refused to extend liability to defendants that were not parties to the franchise agreement. For instance, in *Stansifer v. Chrysler Motors Corp., 487 F.2d 59 (9th Cir. 1973)*, the plaintiff was an automobile dealer who entered into a written franchise agreement with defendant Fisher. The agreement provided that it would terminate automatically upon the termination of Fisher's distributorship agreement with its manufacturer, defendant Chrysler Motors Corporation. Fisher and Chrysler agreed to terminate their agreement, which automatically terminated plaintiff's franchise. Thereafter, Chrysler declined to award plaintiff a franchise for the sale of its automobiles. Plaintiff alleged that Fisher and Chrysler conspired wrongfully to terminate his dealership, in violation of *§ 1221*.

The Ninth Circuit explained that a written franchise agreement is a prerequisite to recovery by a plaintiff automobile dealer from an automobile **[*53]** manufacturer. *Id. at 63*. The court held that because there was no written franchise agreement between Chrysler and plaintiff, plaintiff could not recover under *§ 1221*. The court indicated that if plaintiff could somehow have shown that Fisher was a "straw man" or an agent of Chrysler, Fisher could have been considered a "manufacturer" for the purposes of the statute; however, the court found insufficient evidence on that theory to withstand summary judgment in favor of Chrysler. See also *DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 550 F.Supp. 1199 (N.D.Ill. 1982)* (liability may be imposed on a non-signatory if the non-party was acting as an agent of signatory or was a "straw man"); and *Mar-Ren, Ltd. v. Ford Motor Co., 1987 U.S. Dist. LEXIS 15291, 1988 WL 238039, *13 (W.D.Wis. 1987)* (liability may exist against a non-signatory where non-signatory had a "unity of interest with, and was subject to the control of" signatory).

In *Marquis v. Chrysler Corp., 577 F.2d 624 (1978)*, the Ninth Circuit elaborated on Stansifer, holding:

> . . . [T]here being no showing that would make either [defendant] responsible for the acts of the other on an agency theory, and the facts indicating that they are separate legal entities **[*54]** each operating in its own sphere, only the one which has entered into a franchise agreement could be held accountable for performing or complying with it. Since Chrysler Corporation was not a party to the franchise and had no legal responsibility to plaintiffs for the acts of Chrysler Motors, which signed the franchise, it should have been dismissed from the suit and the judgment should not have been entered against it.

Id. at 630.

Finally, in *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 627 F.Supp. 1202 (S.D.N.Y. 1986)*, aff'd, *814 F.2d 90 (2d Cir. 1987)*, the court surveyed the case law defining the scope of *§ 1221* and concluded that the statute "attempts to balance the power of dealers and manufacturers by giving dealers a cause of action against manufacturers, or those under their control . . . *Id. at 1209*.

Therefore, it would initially appear that VGM and White cannot be held liable under the Act because they had no written franchise agreement with plaintiff. Furthermore, there is no evidence that either VGM or White was a "straw man" or an agent of GM.

Nonetheless, plaintiff has adduced evidence that GM, Volvo, and White joined in concerted activity that resulted in the **[*55]** cancellation of plaintiff's heavy duty addendum and the award of a new VGM franchise to Buffalo Truck. Specifically, plaintiff has produced the Stock Purchase Agreement executed by representatives of GM and VGM. This Agreement provided that GM would terminate its existing heavy duty truck dealers, and that VGM would select new franchisees. The Stock Purchase Agreement also provided that GM would continue to manufacture heavy duty trucks for VGM, and would acquire a non-controlling stock interest in VGM. The record contains evidence that GM continued to produce the Brigadier model for sale to VGM through 1988. Finally, although White was not a signatory to the Stock Purchase Agreement,[13] the record shows that three members of White were on the Steering Committee that recommended a dealer to VGM for award of a new franchise. These facts are sufficient to bring VGM and White within the scope of the Act.

In *Sherman v. Leyland Motors. Ltd., 601 F.2d 429 (9th Cir. 1979)*, an automobile marketing organization ("BLM") implemented a program to consolidate its wholesale distribution system by means of a "Rationalization Program." Under the Program, the wholesale distribution of automobiles in the United States would be accomplished through a single organization in each distribution territory. As part of its consolidation, BLM lawfully terminated its distributor in southern California ("LCM"), and replaced it with another distributor ("BMCD"). LCM then became BLM's distributor for northern California. The plaintiff in Sherman ("Vinson") was an automobile dealer who had an automobile franchise from LCM. The terms of that franchise provided that if LCM's distribution contract with BLM were terminated, LCM's franchise with plaintiff would also be terminated.

The distribution agreement executed by BLM and BMCD provided:

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[13] Plaintiff writes that the abbreviation "VTC" in the Stock Purchase Agreement refers to White (Plaintiff's Memorandum, p. 9). On the contrary, as White indicates in its Memorandum (White Memo., p. 3 n. 2), it is clear from the Stock Purchase Agreement that "VTC" refers to Volvo Lastragner **[*56]** AB, a/k/a/ Volvo Truck Corporation, a Swedish corporation (See Stock Purchase Agreement, p. 4).

> Dealer Organization, (a) It is acknowledged that neither party is the successor-in-interest of the other in the territory to be taken over. Neither party shall be deemed to assume any liability **[*57]** under any dealer agreement of the other, or upon any representation made by the outgoing distributor to any of its dealers which exceeds in scope or otherwise differs from the written dealership agreement. . . .
> (b) Without the prior consent of the other party, neither BLM (nor LMS) nor the Distributor [BCMD] will renew or extend any dealer agreement now in force, nor will it appoint any new dealer or make any representations to any dealer as to its future status after transfer of distribution has been effected.

BMCD sent a letter to Vinson and other dealers informing them that BMCD was reviewing dealers in the southern California area with a view toward awarding a new franchise for the sale of BLM automobiles. The letter stated that, in the interim, BMCD would process automobile orders from each of the dealers, and also stated, "Please understand that the enclosed form of agreement is not intended to establish a new dealer arrangement with you, or to renew any agreement that has previously been outstanding." The recipient was asked to sign an acceptance on the bottom of the letter and return it to BMCD. Vincent refused, believing that its relationship with BMCD as successor of LMS would **[*58]** be governed by the terms of the franchise agreement it had with LMS. Vincent continued to receive some automobiles from BMCD. However, Vincent refused to represent the full line of automobiles marketed by BLM. BMCD, on the other hand, wanted a dealer that would carry the full line. Therefore, BMCD did not award a franchise to Vincent, and Vincent's business collapsed. Vincent asserted a claim against BMCD under *§ 1221*, alleging that BMCD, BLM, and LMS had engaged in a conspiracy to eliminate Vincent as a franchised automobile dealer, and to destroy Vincent's business. Vincent alleged that this was accomplished by attempting to coerce Vincent into carrying the full line of BLM vehicles.

Thus in Sherman the Ninth Circuit was confronted with the issues of whether BMCD could be understood as a "manufacturer" for the purposes of the Dealers' Act, and whether BMCD and BLM could be liable for violations of the Act even though they were not signatories to Vincent's franchise agreement. BMCD and BLM argued that the principles contained in Stansifer and Marquis insulated them from liability. Nonetheless, the court held that those defendants could be liable, based on Vincent's evidence of a conspiratorial **[*59]** relationship. The court wrote:

> It is contended by plaintiff that all of the appellees were committed to the effectuation of the Rationalization Program in violation [of] the Dealer's Act . . . and that they conspired to implement that plan by the elimination of Vincent as a dealer, particularly if he did not agree to the "tying arrangement" of a full-line dealership. That the existence of such a unified program with its alleged consequences could not have been properly ruled out by summary judgment has been indicated to us by an independent review of the record . . . .

Id. at 443. The court found that BLM wanted to consolidate its wholesale distribution system through a single organization in each territory that would carry the full line of BLM automobiles. Also relevant was the fact that the franchise agreement contained a reservation of the right on the part of the other defendants to veto BMCD's action in appointing dealers. Therefore, the court explained that

> . . . there was sufficient evidential indication to preclude summary judgment on the issue of whether such appellees were manufacturers who at this stage should be deemed parties to the franchise because the putative conspiracy **[*60]** supplied the element of agency. We are mindful that Stansifer rejected a claim of conspiracy in similar context, but this was upon the basis of insufficiency of the evidence to sustain that theory.

Id. at 444. The court determined that Vincent's injury resulted from

> . . . the concerted action of BLM, LMS, and BMCD in applying to Vincent and its franchise the consequences of the Rationalization Program pursuant to the agreement among them. This coalescence of forces resulted in the nonrenewal of Vincent's Triumph franchise. Accordingly, and in view of the intendments favorable to the nonmovant at this stage, we reject as too much of a "heads we win, tails you lose" proposition, LMS's argument that there was no duty on its part to grant a renewal of Vincent's franchise because its distributorship had been terminated before the expiration of the franchise, and the argument of BMCD that it had no duty under the franchise because it had not signed any agreement. . . .

Id.

Furthermore, the court found that there was an issue whether plaintiff was wrongfully threatened, intimidated, or coerced to accept full-line representation of BLM automobiles. If this were the case, all the defendants would **[*61]** be liable as a result of the putative conspiracy.

Here, plaintiff has produced sufficient facts to create a genuine issue of whether GM, Volvo, and White engaged in concerted activity that resulted in the demise of plaintiff's dealership. As in *Sherman*, there was an agreement to restructure the method of distribution of heavy duty trucks, specifically the Brigadier line. The agreement expressly provided that GM would terminate its existing heavy duty addenda. Therefore, termination of plaintiff's dealership was part of the bargain between GM and Volvo. It was contemplated that new franchises would be awarded, and that GM and White would participate in the recommendation of dealers for award of the new franchises. Finally, GM continued to manufacture the Brigadier for some time, as a subcontractor for VGM.

Plaintiff has also produced facts indicating that it was required to execute a release as a condition of receiving termination assistance to which plaintiff alleges it was entitled under the law and under its Dealer Sales and Service Agreement. As indicated by GM in its Memorandum, coercion may exist if "a dealer faces adverse consequences for failing to comply with a demand to do something **[*62]** it is not obligated to do." (GM Memo., p. 43, citing *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 95 (2d Cir. 1987))*. Here, plaintiff has adduced facts indicating that it faced adverse consequences for failing to sign the release, which, plaintiff argues, it had no obligation to sign. GM fails to address these facts in connection with the Dealers' Act (GM Memo., section E). These facts raise the issue of whether GM acted in "good faith" in its performance and cancellation of the heavy duty addendum. These facts were sufficient to create a genuine issue of material fact in *C-B Kenworth, 706 F.Supp. at 955*, cited by the Second Circuit in Glick. Finally, Sherman indicates that Volvo and White may be held liable for this behavior, due to the concerted activity in which they participated. Therefore, summary judgment will not be awarded to the moving defendants on Count III of plaintiff's Complaint asserting claims under the Dealers' Act.

With respect to plaintiff's claims against VGM, plaintiff alleges that it was coerced to give up it Kenworth dealership as a condition of being awarded a VGM franchise. This aspect of plaintiff's claim must fail. An automobile dealer **[*63]** has no right to a franchise under the Dealers' Act. *Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975)*. Moreover, the Act permits manufacturers to condition the provision of new contract rights upon the dealer's agreement to sell and service the manufacturer's products exclusively. *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co., Inc., 773 F.2d 1193 (11th Cir. 1985)*, cert. denied, *475 U.S. 1122, 106 S. Ct. 1641, 90 L. Ed. 2d 186*, reh'g denied, *476 U.S. 1189, 106 S. Ct. 2929, 91 L. Ed. 2d 557 (1986)*.

Plaintiff had no right to a franchise from VGM. Moreover, VGM had the right to condition the award of a franchise upon plaintiff's agreement to serve as an exclusive dealer. This Court finds "nothing coercive in presenting to a car dealer an opportunity to reap substantial profits from an exclusive dealership in exchange for the expenditures necessary to establish the exclusive dealership." *Id. at 1210*. For these reasons, plaintiff's claim against VGM on this basis must fail.[14]

Plaintiff's Antitrust Claims

Conspiracy to Restrain Trade under § 1 of the Sherman Act

In Count I of its Complaint, plaintiff alleges that the formation of VGM by GM and Volvo constituted an illegal conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. Plaintiff alleges that the

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[14] *Rea v. Ford Motor Co., 497 F.2d 577 (3d Cir.)*, cert. denied, ***419 U.S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 106 (1974)***, relied upon by plaintiff, does not change this result. Rea indicates that a manufacturer's threat to injure the dealer if the dealer **[*64]** does not give up another franchise may be actionable. Nonetheless, there must be a threat to interfere with a right already possessed by the dealer; a threat to withhold rights that the dealer merely expects to be awarded is not the type of coercion targeted by the Act.

conspiracy took the form of a refusal to deal, or group boycott. This category of antitrust activity has, in the appropriate cases, been held a per se violation of the Sherman Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L. Ed. 2d 741 (1959)*. Causes of action for per se violations do not require proof of anticompetitive effect. However, the mere recital of the term "refusal to deal" or "group boycott" does not have the talismanic effect of transforming defendants' conduct into a per se violation.

The Second Circuit has explained that "'certain concerted refusals to deal or group boycotts **[*65]** are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of *§ 1*, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290, 105 S. Ct. 2613, 2617, 86 L. Ed. 2d 202 (1985)*, while others do not 'share with the per se forbidden boycotts the likelihood of predominantly anticompetitive consequences,' *Id. at 295, 105 S.Ct. at 2620*." *Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 73 (2d Cir. 1988)*. Whether a per se violation exists is a question of law that requires considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. *Anesthesia Advantage, Inc. v. Metz Group, 759 F.Supp. 638, 647 (D.Co. 1991)*. See also *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 n. 26, 104 S. Ct. 2948, 2961-62 n. 26, 82 L. Ed. 2d 70 (1984)*. "Plaintiffs may not rely on a naked allegation of group boycott, but must show that the defendants hold 'market power or unique access to a business element necessary for effective competition.'" *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 289-90, 105 S.Ct. 2613, 2617, 86 L. Ed. 2d 202 (1985)*; **[*66]** F*.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 458-59, 106 S.Ct. 2009, 2017-18, 90 L. Ed. 2d 445 (1986)*. Plaintiffs seeking to invoke the per se rule "must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice. . . ." *Northwest Wholesale, 472 U.S. at 295, 105 S.Ct. at 2620*.

Here, VGM has raised the argument that no per se violation of the Sherman Act took place and that, therefore, the "rule of reason" should be applied, and proof of anticompetitive effect should be required. Plaintiff has utterly failed to address this point in its opposing papers or affidavits. (See P. Memo., pp. 45-47). Plaintiff refers this Court to no cases analogous to the present case to justify invocation of the per se doctrine. Furthermore, as will be discussed below, plaintiff has made no showing of market power or unique access to a business element necessary for effective competition. Plaintiff has not even argued that these conditions exist. Consequently, plaintiff has failed to introduce evidence sufficient to trigger per se analysis. See *Northwest Wholesale, 472 U.S. at 297-98, 105 S.Ct. at 2620-21*; **[*67]** *Anesthesia Advantage, 759 F.Supp. at 647* (plaintiffs failed to make the threshold showing necessary to trigger per se analysis).

Moreover, the facts do not reveal the type of "horizontal" group boycott that is typically found to be anticompetitive per se.[15] Arrangements similar to that existing here have been held to be in the "gray area" between horizontal and vertical restraints. See, e.g., *L.J. Dreiling Motor Co. v. Peugeot Motors, 605 F.Supp. 597, 603 (D.Co. 1985)*, aff'd in part, rev'd in part on other grounds, *850 F.2d 1373 (10th Cir. 1988)*.

The facts in *Dreiling* are closely analogous to the facts in the present case. There, plaintiff was an authorized Peugeot dealer, which also held Renault and International Harvester franchises. Peugeot terminated plaintiff's dealership for allegedly submitting fraudulent warranty claims. **[*68]** Meanwhile, Chrysler had acquired a fifteen percent stockholding in Peugeot, S.A., a French corporation that was part of the Peugeot corporate family. Chrysler and Peugeot executed a "Memorandum of Intent," which provided for cooperation in the development and manufacture of a new automobile model, and in the distribution of Peugeot automobiles in the United States and Canada. A short-term loan was also provided to Chrysler by Peugeot. Many of these intentions were formalized. Chrysler agreed to provide consulting services and other assistance to Peugeot in furtherance of Peugeot's goal to expand sales in the United States. Chrysler would also assist Peugeot in the importation and distribution of Peugeot products, and would provide engineering and design assistance. Peugeot would pay Chrysler $300,000.00 per year

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[15] "Horizontal" restraints are "agreements between competitors at the same level of the market structure, and 'vertical' restraints [are] . . . combinations of persons at different levels of the market structure, such as manufacturers and distributors." *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir.)*, cert denied, ***439 U.S. 946, 99 S.Ct. 340, 58 L. Ed. 2d 338 (1978)***.

plus five percent of the net dealer invoice price of each vehicle sold by Peugeot to Chrysler dealers who would become Peugeot dealers during the term of the agreement. The plaintiff in Dreiling claimed that the termination of its Peugeot dealership resulted from a conspiracy between Peugeot and Chrysler systematically to terminate existing Peugeot dealers and replace them **[*69]** with Chrysler dealers. The plaintiff asserted a claim under § 1 of the Sherman Act, alleging a conspiracy in restraint of trade, *Id. at 599-600*.

The court in Dreiling awarded summary judgment to Peugeot and Chrysler on plaintiff's Sherman Act claims, explaining that "plaintiff has not shown, nor even attempted to show, that the alleged agreement has affected competition in a way that constitutes an unreasonable restraint of trade or tends to create a monopoly." *Id. at 601*. The court chose to apply the rule of reason, after posing the preliminary question:

> . . . Dreiling alleges existing Peugeot dealers were to be terminated and replaced with Chrysler-Peugeot dealers. Assuming, arguendo, that the allegation is true, should the agreement be treated as a relatively benign "vertical" restraint, subject to the rule of reason, or as a "horizontal" restraint, potentially subject to per se illegality?

The court concluded that the agreement fell into the "gray area" between horizontal and vertical restraints, largely because "the agreement only involved two of the many automobile manufacturers who sell in the United States market." *id. at 603*. Therefore, the court looked for guidance in cases **[*70]** involving exclusive dealership, another "gray area" where the rule of reason has typically been employed. For instance, in *Ace Beer Distrib., Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir.)*, cert. denied, *375 U.S. 922, 84 S. Ct. 267, 11 L. Ed. 2d 166 (1963)*, the Sixth Circuit awarded summary judgment to the defendant on the ground that, even if a conspiracy existed, "the object to be achieved was not one rendered obnoxious by the Sherman Act":

> The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other [products], is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade.

Id. Similarly, the Fifth Circuit has explained:

> Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.

Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245, 1249 (5th Cir. 1975).

Therefore, **[*71]** the Dreiling court concluded that the rule of reason should be employed. The court determined that the agreement between Peugeot and Chrysler did not fall into the category of "naked restraints of trade with no purpose except stifling competition." *Id. at 604*. Important considerations were that the dealers were independent and were not owned by the manufacturers, *id. at 603, n. 5*, and that competition among distributors of other automobiles was not materially diminished by the agreement.

Similarly, per se analysis is not warranted in the present case. Even if a conspiracy existed, the object of the agreement between GM and Volvo cannot be classified as a naked restraint of trade with no purpose but to stifle competition. Defendants have argued that the agreement was a response to consistent losses attributable to its heavy duty truck business (Sergo Affid., ¶ 14). Indeed, such an agreement may have had a foreseeably better effect on overall competition than a drastic liquidation of GM's heavy duty truck facilities, or the continued market inefficiencies resulting from operational losses. Plaintiff has not countered with any evidence or even arguments that such agreements are "so likely **[*72]** to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of *§ 1*." *Volvo North America Coro, v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 73 (2d Cir. 1988)* (quoting *Northwest Wholesale Stationers. Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290, 105 S. Ct. 2613, 2617, 86 L. Ed. 2d 202 (1985))*. Also important are the facts that plaintiff was an independent dealer not owned by any defendant, and that competition among the various manufacturers of heavy duty trucks was not appreciably diminished.

Finally, although the arrangement between GM and VGM was "horizontal", plaintiff has failed to introduce any evidence of other types of activities that ordinarily trigger per se analysis, e.g., price-fixing (see *Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 104 S.Ct. 1464, 79 L. Ed. 2d 775*, reh'g denied, *466 U.S. 994, 104 S. Ct. 2378, 80 L. Ed. 2d 850 (1984))* or division of markets (see *United States v. Topco Associates, Inc., 405 U.S. 596, 92 S.Ct. 1126, 31 L. Ed. 2d 515 (1972))*. Therefore, plaintiff's Sherman Act § 1 claim will be considered under the rule of reason. See *Beckman v. Walter Kidde & Co., 316 F.Supp. 1321, 1326 (E.D.N.Y. 1970)*, aff'd, *451 F.2d 593 (2d Cir. 1971)*, **[*73]** cert. denied, *408 U.S. 922, 92 S.Ct. 2488, 33 L. Ed. 2d 333 (1972)* (court awarded summary judgment to defendants, explaining that a per se violation of § of the Sherman Act does not exist "whenever there is a conspiracy resulting in a refusal to deal").

To sustain an antitrust claim under the rule of reason, plaintiff must prove: (1) that the defendants entered into a "contract, combination . . . or conspiracy"; and (2) that the conspiracy was "in restraint of trade or commerce among the several States." *Oreck Corp. v. Whirlpool Corp., 639 F.2d 75, 78 (2d Cir. 1980)*, cert. denied, *454 U.S. 1083, 102 S. Ct. 639, 70 L. Ed. 2d 618 (1981)*; *International Distrib. Centers, Inc. v. Walsh Trucking, 812 F.2d 786, 793 (2d Cir.)*, cert. denied, *482 U.S. 915, 107 S. Ct. 3188, 96 L. Ed. 2d 676 (1987)*. Although plaintiff need not prove specific intent to create a monopoly on the part of the conspirators, plaintiff must nevertheless prove that "the conspirators had a unity of purpose or a common design and understanding . . . and that the anticompetitive effects of the alleged conspiracy outweigh its pro-competitive effects." Id. (emphasis added). See also *National Society of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L. Ed. 2d 637 (1978)*(the **[*74]** statute "focuses directly on the challenged restraint's impact on competitive conditions"). In proving anticompetitive effects, it is important to note that the statute was intended to protect competition, not competitors, Id. (citing *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc., 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L. Ed. 2d 701 (1977))*.

Here, plaintiff has failed to adduce any evidence of the type of anticompetitive effect that the statute was intended to prevent. Although plaintiff incorporates arguments contained in its Memorandum of Law in Support of Plaintiff's Motion for A Preliminary Injunction (P. Memo., p. 45), plaintiff never refers to specific facts in the record. Plaintiff has not undertaken to contradict defendants' evidence showing that no anticompetitive impact resulted (Sergo Affid. ¶¶ 27-31; VGM Affid., ¶¶ 3-4). The record is devoid of any facts indicating that VGM had (or was intended to have) any adverse effect on the relevant market shares,[16] or threatened to have any other anticompetitive impact on the Western New York State or national market. Plaintiff argues vociferously that defendants conspired to put it out of business; however, a conspiracy resulting in plaintiff's demise **[*75]** is not necessarily a conspiracy that impacts unreasonably on competition in the relevant market. See *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 842 (2d Cir. 1980)*; *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.)* (en banc), cert. denied, *439 U.S. 946, 99 S.Ct. 340, 58 L. Ed. 2d 338*, reh'g denied, *439 U.S. 1104, 99 S. Ct. 883, 59 L. Ed. 2d 65 (1978)*. Whereas plaintiff has adduced no evidence of VGM's effect on any aspect of either the Western New York or national market, plaintiff's claims under § 1 of the Sherman Act must fail. See *Dreiling, 605 F.Supp. at 604* (summary judgment awarded to defendant on plaintiff's Sherman Act § 1 claim where plaintiff "ha[d] not presented to [the] court even the most basic market representation data.").

Finally, **[*76]** plaintiff argues in its Memorandum:

> A competitive dealer with 1987 gross revenues (its last year of full operation) of $31,807,606 was deliberately put out of business and eliminated from the Buffalo, New York market.[17] What could be more anti-competitive

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[16] Although market share is not the only indicant of anticompetitive impact, a low market share may suggest little market power and, therefore, no unreasonable restrain on trade. See *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 2081, 119 L. Ed. 2d 265 (1992)*; *Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 964-72 (10th Cir.)*, cert. denied, ***497 U.S. 1005 110 S. Ct. 3241, 111 L. Ed. 2d 752 (1990)***.

[17] Here, plaintiff claims that the relevant market is Buffalo, New York, whereas it maintains elsewhere that the relevant market is all of Western New York, or the entire United States.

> than that? What greater antitrust injury could be caused than the total loss of a business with annual revenues of more than $31 million.

(P. Memo., p. 45). Nonetheless, defendants correctly point out that plaintiff continued to operate as a franchisee for Mercedes-Benz and for GM itself under the light and medium duty addenda. These facts suggest that no unreasonable restraint on trade resulted from defendants' activities. In *Diehl & Sons, Inc. v. International Harvester Co., 426 F.Supp. 110 (E.D.N.Y. 1976)*, the court considered similar facts, and found that no unreasonable restraint of trade resulted from the termination of an International Harvester dealer. The court wrote:

> . . . there is no contention in this case that Harvester trucks are not reasonably interchangeable with those of other, larger manufacturers, e.g., Ford, Chevrolet, Dodge and GMC. . . .
>
> Under these circumstances, the termination of Diehl as a Harvester distributor **[*77]** affected only Diehl, not competition.
>
> * * * *
>
> Finally, it is undisputed that there are other sources of supply available to Diehl and in fact Diehl does already sell Mercedes-Benz products and has contracted for a Volvo dealership.

Id. at 119. The court also wrote, "Nor is there any serious contention in this case that Harvester was attempting through the use of predatory tactics to destroy Diehl as a potential distributor for other truck manufacturers." id. n. 13. Therefore, the court held that the termination affected only Diehl, not competition. Here, considering the facts that plaintiff maintained its Mercedes-Benz franchise and continued to operate under its GM light and medium duty addenda, and that plaintiff does not seriously contend that the moving defendants attempted to foreclose it from retaining or acquiring franchises from other manufacturers, this Court finds that plaintiff has failed to make a sufficient showing that defendants' activities resulted in an unreasonable restraint of trade.

For **[*78]** these reasons, summary judgment will be awarded to the moving defendants on Count I of plaintiff's Complaint asserting claims under § 1 of the Sherman Act.

Conspiracy to Monopolize under *§ 2* of the Sherman Act

In Count I of its Complaint, plaintiff alleges that the acts complained of constituted a conspiracy to monopolize, in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. To withstand defendants' summary judgment motions, plaintiff must produce admissible evidence sufficient to support a jury finding of: (1) a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy." *International Distribution, 812 F.2d at 795*. Here, plaintiff does not present a set of facts showing that the defendants joined in a conspiracy with the specific intent to establish a monopoly in the heavy duty truck business, either in the Western New York market, or nationwide. As with plaintiff's claims under § 1 of the Sherman Act, plaintiff never directs this Court's attention to admissible evidence supporting its allegations. Therefore, summary judgment will be awarded to defendants on this **[*79]** claim. "Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal." *Heart Disease Research Found. v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)*.

In addition, although a claim of conspiracy to monopolize under *§ 2* of the Sherman Act does not require a showing of the defendant's power to exclude competition, *Optivision, Inc. v. Syracuse Shopping Ctr. Assoc., 472 F.Supp. 665, 680 (N.D.N.Y. 1979)* (citing *American Tobacco Co. v. United States, 328 U.S. 781, 789, 66 S.Ct. 1125, 1128, 90 L. Ed. 1575 (1946))*, "the absence of any serious likelihood of successfully achieving monopolization is evidence that can be used to support a finding of lack of specific intent, Id. (citing *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co., 510 F.2d 1140, 1144, (2d Cir.)*, cert. denied, *421 U.S. 1011, 95 S. Ct. 2416, 44 L. Ed. 2d 679 (1975))*. Here, defendants have introduced evidence that a monopoly was far beyond their reach (Sergo Affid., ¶¶ 27-31). Plaintiff has not challenged this evidence, nor has it come forward with other admissible evidence that an objective of defendants' actions was **[*80]** to achieve a monopoly in the heavy duty truck business. Therefore, summary judgment is appropriately rendered in defendants' favor on plaintiff's claim of a conspiracy to monopolize under § 2 of the Sherman Act.

Attempt to Monopolize under § 2 of the Sherman Act

The elements of an attempt to monopolize under § 2 of the Sherman Act are: (1) anticompetitive or exclusionary conduct; (2) specific intent to monopolize; and (3) a "dangerous probability" that the attempt will succeed." *H.L. Hayden Co. of N.Y. v. Siemens Medical Systems, 879 F.2d 1005, 1017 (2d Cir. 1989)*. This Court has already concluded that plaintiff has failed to produce substantive evidence regarding the first two elements. This Court now finds that plaintiff has failed to adduce sufficient proof of the third element as well.

In Hayden, the plaintiff was a dealer in dental equipment whose distributorship had been terminated by the manufacturer. The plaintiff alleged that the termination resulted from pressure put on the manufacturer by primary, full-service dealers, and that these actions constituted an attempt to monopolize the markets for the sale of dental equipment and dental x-ray equipment in violation of § 2 of the **[*81]** Sherman Act.

In analyzing the plaintiff's claims, the Second Circuit looked closely at the relevant market shares, and concluded that plaintiffs had made no showing of a dangerous probability that defendants would achieve a monopoly. The defendants had introduced proof that they each commanded approximately 20% of the dental equipment market, and plaintiff failed to challenge these figures on appeal. The district court concluded on the basis of these figures that no dangerous probability of success existed. Although the plaintiff argued on appeal that the district court failed to consider market factors other than market share, the Second Circuit found this argument unpersuasive and held:

> In sum, plaintiffs offer nothing of substance to disturb the district court's conclusion that the twenty percent market share which [defendants] each commanded, in the context of a widely diversified and competitive market, was insufficient to establish the "dangerous probability" of success required to establish a Sherman Act section two attempt to monopolize. See *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841 (2d Cir. 1980)* (one-third market share inadequate): *United States v. ALCOA, 148 F.2d 416, 424 (2d Cir. 1945)* **[*82]** (same); *Levitch v. CBS, 495 F.Supp. 649, 665 (S.D.N.V. 1980)*(same), aff'd. *697 F.2d 495 (2d Cir. 1983)* (per curiam) (adopting district court opinion); see also *International Distribution Centers, 812 F.2d at 792* (seventeen percent market share inadequate); 3 P. Areeda & D. Turner, ***Antitrust Law*** ¶ 835, at 350 (1978) ("[c]laims [of attempted monopolization] involving 30 percent or lower market shares should presumptively be rejected").

Id. at 1018.

This Court is aware that market share is not necessarily determinative of whether a dangerous probability of success existed. *International Distribution, 812 F.2d at 793*. Other relevant factors are "the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand." Id. Nevertheless, the Supreme Court has treated market share as "strong, perhaps presumptive, evidence of the presence or absence of market power, subject to bolstering or rebuttal by other evidence. *Broadway Delivery Corp. v. United Parcel Serv., 651 F.2d 122, 128 (2d Cir.)*, cert. denied, *454 U.S. 968, 102 S. Ct. 512, 70 L. Ed. 2d 384 (1981)* (citing *United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120, 95 S.Ct. 2099, 2118, 45 L. Ed. 2d 41 (1975)*). **[*83]** Moreover, "[w]hen the existence of significant market power is an essential element of a claim for treble damages, the plaintiff's market power evidence, whether consisting of the defendant's market share or of specific conduct indicating the defendant's power to control prices or exclude competition, must be substantial." *Id. at 130* (citing *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696-97, 82 S. Ct. 1404, 1409, 8 L. Ed. 2d 777 & n. 6 (1962)*).

Here, defendants have introduced strong evidence of low market shares (Sergo Affid., ¶¶ 27-31; VGM Affid., ¶¶ 3-4), which has not been contradicted by plaintiff. Defendants also note that GM's market share had been declining steadily during the relevant period (Sergo Affid., ¶ 14)(see *Nifty Foods, 614 F.2d at 841* (evidence of declining market share is relevant in determining dangerous probability of achieving monopoly); *Berkey Photo, Inc. v.*

Eastman Kodak Co., 603 F.2d 263, 273 n.11 (2d Cir. 1979), cert. denied, *444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*(same)). Defendants' evidence also indicates that a competitive market in heavy duty trucks existed; sales were distributed fairly evenly among the major competitors, with International **[*84]** Harvester capturing the largest percentage of business throughout the relevant period (Sergo Affid., ¶ 29; VGM Affid. ¶¶ 3-4). The facts also indicate that consumers had a number of options available to them in purchasing heavy duty trucks. See *Diehl & Sons, Inc. v. International Harvester Co., 426 F.Supp. 110, 122 (E.D.N.Y. 1976)* ("Product competition turns on the reasonable interchangeability of available goods considering price, use and quality). On the other hand, plaintiff fails to specify any market factors indicating that defendants could succeed in achieving a monopoly in heavy duty trucks. Therefore, plaintiff has failed properly to substantiate its claim under *§ 2* of the Sherman Act, and summary judgment will be awarded to defendants. See *Broadway Delivery Corp. v. United Parcel Serv., 651 F.2d 122 (1981)* (summary judgment awarded to defendant where plaintiff failed to introduce evidence of market share, and other evidence failed to indicate that defendant had power to control prices or exclude competition).

This result is consistent with the majority of courts finding no dangerous probability of a monopoly on similar facts. See cases cited in *International Distribution, 812 F.2d at 786*; **[*85]** *Hayden, 879 F.2d at 1018*.

Plaintiff's Claims under § 3 of the Clayton Act

In Count I of its Complaint, plaintiff alleges that VGM wrongfully made its award of a heavy duty truck franchise to plaintiff contingent upon the termination of plaintiff's Kenworth franchise, in violation of § 3 of the Clayton Act, *15 U.S.C. § 14*. Plaintiff's claim must fail. Section 3 provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof . . . or fix a price charged thereof, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line **[*86]** of commerce.

A prerequisite to suit under § 3 is the existence of a contract between plaintiff and defendant, a condition of which is that plaintiff will not deal in the goods of defendant's competitor. It has been held:

> In order to plead a cause of action under § 3, plaintiff must allege that a contract for sale of goods between [defendant] and [plaintiff itself], not [defendant] and others, was conditioned on a promise of not dealing in the goods of a competitor, as is the case in a tying arrangement or in an exclusive dealing transaction. See, e.g., *McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 336 (4th Cir. 1959)*; *Nelson Radio & Supply Co. v. Motorola. Inc., 200 F.2d 911, 913 (5th Cir. 1952)*, cert. denied, *345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356 (1953)*; *Thomas v. Amerada Hess Corp., 393 F.Supp. 58, 76 (M.D.Pa. 1975)*.

In the present case, plaintiff premises its claim on the franchise agreement between VGM and Buffalo Truck. Because no contract existed between VGM and plaintiff itself, plaintiff fails to state a cause of action under § 3. Summary judgment will be awarded to defendants on this claim.

Furthermore, the statute prohibits only those contracts that may "substantially lessen **[*87]** competition or tend to create a monopoly in any line of commerce." Because, as previously indicated, plaintiff has failed to adduce evidence of the likely impact of defendants' conduct on the relevant market(s), or of the danger of any party achieving a monopoly in heavy duty truck sales or service, plaintiff's claim must fail for this reason as well. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L. Ed. 2d 580 (1961)*.

Plaintiff's Claims Under the Robinson-Patman Act, *15 U.S.C. § 13*

By a Decision and Order entered on December 31, 1991, this Court granted summary judgment to defendants GM and VGM on plaintiff's Robinson-Patman Act claims contained in Count I of plaintiff's Complaint. That decision was based upon the fact that plaintiff had failed to establish the "two-purchaser" element of a prima facie case under that statute. See Decision and Order, p. 12. Defendant White did not join in the summary judgment motion; however, White now moves for summary judgment on plaintiff's Robinson-Patman Act claims. For the reasons contained in this Court's Decision and Order of December 31, 1991 awarding summary judgment to GM and VGM, summary judgment will be awarded to White **[*88]** on those claims.

Plaintiff's Claims under New York State's Donnelly Act

Plaintiff relies upon the same set of facts it used to support its Sherman Act claims to assert a cause of action under New York State's Donnelly Act, *N.Y. Gen. Bus. Law § 340*. The Donnelly Act was modeled after the Sherman Act, and "the mode of analysis utilized under the state statute is similar to that developed under the federal legislation. *Optivision, Inc. v. Syracuse Shopping Ctr. Assoc., 472 F.Supp. 665, 681 (N.D.N.Y. 1979)* (citing *State v. Mobil Oil Corp., 38 N.Y.2d 460, 463, 344 N.E.2d 357, 381 N.Y.S.2d 426, 428 (1976))*. Although the Donnelly Act may be broader than the Sherman Act in some respects, *Mobil Oil, 38 N.Y.2d at 464, 381 N.Y.S.2d at 428*, the Act still prohibits only those agreements that constitute unreasonable restraints of trade. *Optivision, 472 F.Supp. at 681*; *Dawn to Dusk, Ltd. v. Frank Brunckhorst Co., 23 A.D.2d 780, 258 N.Y.S.2d 746 (2d Dept. 1965)*. As discussed above, plaintiff has failed to adduce facts demonstrating the effect of defendants' actions on the relevant market(s). For the same reasons that summary judgment will be awarded to defendants on plaintiff's claims under the Sherman Act, summary **[*89]** judgment will be awarded to defendants on plaintiff's claims under the Donnelly Act.

Plaintiff's Failure to Allege Antitrust Injury

Although this Court has addressed plaintiff's failure to produce sufficient admissible evidence to establish the elements of each individual antitrust claim, all of plaintiff's antitrust claims may be disposed of together for a single reason: plaintiff has failed to allege "antitrust injury". Section 4 of the Clayton Act, *15 U.S.C. § 15*, confers a private right of action upon those injured by antitrust activities, and provides treble damages. *Simpson v. Union Oil Co. of California, 377 U.S. 13, 16, 84 S.Ct. 1051, 1054, 12 L. Ed. 2d 98*, reh'g denied, *377 U.S. 949, 84 S.Ct. 1349, 12 L. Ed. 2d 313 (1964)*. Nevertheless, standing to sue for antitrust violations is recognized only where the plaintiff has suffered "antitrust injury". "A private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing 'injury causally linked to an illegal presence in the market." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S.Ct. 1884, 1889, 109 L. Ed. 2d 333 (1990)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L. Ed. 2d 701 (1977))*. "The injury should reflect **[*90]** the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick, 429 U.S. at 489, 97 S.Ct. at 697* (emphasis added). "Self-serving statements by a plaintiff's corporate officers are not, alone, substantial enough evidence of antitrust injury for a plaintiff to survive a motion for summary judgment. *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 714 (11th Cir. 1984)* (citing *H & B Equip. Co., Inc. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978))*. This is consistent with the principle, expressed above, that the antitrust laws were enacted for "the protection of competition not competitors." *Brunswick, 429 U.S. at 488, 97 S.Ct. at 697* (citing *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962))*.

Here, plaintiff has not presented sufficient evidence linking its loss of business to any anticompetitive conditions. The only evidence of damages proffered by plaintiff is contained in Nelson Schule's affidavit sworn to on December 27, 1991, in which Schule claims that plaintiff's business failed as a result of defendants' conduct. However, plaintiff has forwarded no admissible evidence **[*91]** showing that this failure was caused by antitrust conduct. As discussed above, defendants have produced evidence of a fairly neutral impact on the relevant markets; this evidence remains undisputed by plaintiff, which has adduced no admissible evidence of the effect of defendants' conduct on the relevant market(s). In the sections of its Memorandum of Law in Opposition to Summary Judgment and its Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction dealing with its antitrust claims, plaintiff fails to make a single reference to the record to support an allegation of anticompetitive effect or antitrust injury. Therefore, plaintiff's claim for treble antitrust damages under § 4 of the Clayton act must fail. Summary judgment will be awarded to the moving defendants on Count I of plaintiff's Complaint.[18]

Plaintiff's RICO Claims

In Count II of its Complaint, plaintiff asserts a claims against all defendants for violation of the RICO statute, *18 U.S.C. § 1961 et seq. Section 1962(c)* provides that it is unlawful

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

Section 1964(c) enables a private party to bring a cause of action for injury to his business or property resulting from a RICO violation. To establish such a cause of action, a private plaintiff must plead: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" (5) that has caused injury to plaintiff's business or property. **[*93]** *Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985)*. The underlying predicate acts of racketeering activity alleged by plaintiff are mail fraud, *18 U.S.C. § 1341*, and wire fraud, *18 U.S.C. § 1343*. Plaintiff contends that defendants used the mails and interstate telephone calls to further their fraudulent scheme of causing plaintiff's heavy duty truck "franchise" to be "fraudulently and deceitfully" cancelled, and "falsely and fraudulently" representing to plaintiff that it would receive a franchise from VGM (Complaint, ¶ 34).

To establish mail fraud or wire fraud, plaintiff must prove two elements: (1) that defendants participated in a scheme to defraud; and (2) that defendants knowingly used the mails (or wires) in furtherance of the scheme. *Compania Sud-Americana de Vapores v. IBJ Schroder, 785 F.Supp. 411, 424 (S.D.N.Y. 1992)* (citing United States v. Rodolitz, *786 F.2d 77, 80 (2d Cir.)*, cert. denied. *479 U.S. 826, 107 S. Ct. 102, 93 L. Ed. 2d 52 (1986))*. Furthermore, "proof of a fraudulent scheme requires evidence showing a specific intent to defraud." id. Specific intent can be shown by proof that the scheme was "reasonably calculated to deceive persons of ordinary prudence **[*94]** and comprehension." id. (citing *Virden v. Graphics One, 623 F.Supp. 1417, 1422 (C.D.Cal. 1985))*. "The mail fraud [and wire fraud] statute[s] require[ ] some element of deception." *McLaughlin v. Anderson, 962 F.2d 187, 192 (2d Cir. 1992)*. Or, as the Supreme Court has explained, the words "'to defraud' . . . usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally v. United States, 483 U.S. 350, 358, 107 S.Ct. 2875, 2881, 97 L. Ed. 2d 292 (1987)*.

Not only must plaintiff prove a scheme to defraud, but also that plaintiff's injury was proximately caused by racketeering activity. "'A defendant who violates *section 1962* is not liable for treble damages to everyone he might have injured by other conduct,' but only to anyone whose injuries were caused 'by reason of' a violation of *section 1962*." *Sperber v. Boesky, 849 F.2d 60, 64 (2d Cir. 1988)*(citations omitted).

Here, plaintiff has failed to produce sufficient evidence for a jury reasonably to conclude that defendants engaged in a fraudulent scheme, or that plaintiff's loss of business was proximately caused by racketeering activity. Plaintiff has not shown that defendants intended to further a plan to terminate **[*95]** plaintiff's heavy duty addendum by employing misrepresentation or deception in order to induce reliance. See *id. at 191* (plaintiff "has never explained how [defendant's] scheme was furthered by using false statements to lure [plaintiff] into bidding for the project"). Plaintiff argues that although GM told plaintiff that it would cease offering heavy duty trucks for sale in North

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[18] See, supra, this Court's discussion of *Diehl & Sons, Inc. v. International Harvester Co., 426 F.Supp. 110 (E.D.N.Y. 1976)* in connection with plaintiff's claim of a conspiracy to restrain trade, under § 1 of the Sherman Act. Diehl demonstrates that plaintiff's allegations of injury to itself are insufficient to establish anticompetitive effect or injury. Furthermore, **[*92]** defendants have introduced evidence that no such effect resulted, because heavy duty automobiles are interchangeable, and because plaintiff maintained its Mercedes-Benz franchise and continued to operate under the GM light and medium duty addenda. This evidence further indicates that plaintiff has failed to introduce sufficient proof of antitrust injury.

America, GM continued to manufacture the Brigadier model as a subcontractor for VGM. Nevertheless, even if defendants did not specifically explain to plaintiff that GM would continue to produce the Brigadier model for a limited time as a subcontractor for VGM, it did explain that GM would continue to produce heavy duty truck models for VGM. On August 14, 1986 plaintiff received correspondence from GM stating:

> It is contemplated that [VGM] will market current GMC models from GM's heavy duty truck assembly operation in Pontiac. The management of [VGM] wilt eventually determine which products will be built, and in what quantities, based on market demand. In any event, both White and GMC identification will be preserved and their market presence preserved. . . . GM light and medium duty truck operations are not **[*96]** included in [VGM].

(Schule February 1988 Affid., ¶ 4, exh. A). This letter clearly states that GM will continue to produce for VGM. This would indicate to the reasonable person that items covered in the heavy duty addendum would continue to be produced by GM and marketed by VGM. Therefore, no justifiable reliance could have occurred, and defendants cannot be liable for fraud. *Compania Sud-Americana de Vapores v. IBJ Schroder, 785 F.Supp. 411, 424 (S.D.N.Y. 1992)*.

Moreover, the activities described by plaintiff simply do not constitute fraud. There is no evidence that it relied on deception to further its objective, or that deception played any part whatsoever in defendants' actions. As explained above, GM's termination of the heavy duty addendum may have been a breach of contract or a violation of the New York Franchise Act or the federal Dealers' Act; however, this does not mean that it was a RICO violation. *Id. at 192* ("mail fraud statute does not reject all business practices that do not fulfill expectations, nor does it taint every breach of a business contract").

As for plaintiff's allegation that defendants led it to believe that it would receive a VGM franchise, plaintiff has failed **[*97]** to show a fraudulent scheme, or that it suffered any deprivation that was proximately caused by fraud. Plaintiff fails to show that defendants intended to further a plan to award a VGM franchise to Buffalo Truck by employing misrepresentations or deceptions in order to induce reliance. See *id. at 191* (plaintiff "has never explained how [defendant's] scheme was furthered by using false statements to lure [plaintiff] into bidding for the project"). Although plaintiff may have taken certain actions as a result of statements made by defendants, plaintiff has produced no evidence to support an inference that deceit was either necessary or desired by defendants as part of the franchising process. Therefore, plaintiff has failed to make a sufficient showing of intent to defraud, which is an essential element of a RICO cause of action predicated upon the commission of mail fraud or wire fraud.

Furthermore, plaintiff has failed to show that its loss of business was proximately caused by mail fraud or wire fraud. The wrongs complained of are the termination of plaintiff's franchise by GM and the failure to award plaintiff a VGM franchise. Even if defendants did engage in a pattern of racketeering **[*98]** activity, plaintiff cannot trace its injury to mail fraud or wire fraud. The injury was caused by the defendants' simple decisions to terminate the heavy duty addendum and to award the VGM franchise to Buffalo Truck. Deception and misrepresentation did not contribute to the injury, and plaintiff has failed to show that its demise was attributable to any detrimental reliance. Therefore, plaintiff has failed to demonstrate an intent to defraud or a fraudulent scheme on the part of defendants.

In addition, plaintiff has failed adequately to plead its RICO claim. The pleading requirements of *Fed. R. Civ. P. 9(b)* apply to RICO claims where the predicate acts alleged are mail fraud and wire fraud. *Filmtrucks, Inc. v. Earls, 635 F.Supp. 1158, 1163 (S.D.N.Y. 1986)*. Therefore, plaintiff was required to allege with particularity:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) the same, (3) the context of such statements and the manner in which they misled plaintiff and (4) what the defendants "obtained **[*99]** as a consequence of the fraud."

Id. (quoting *Conan Properties, Inc. v. Mattel. Inc., 619 F.Supp. 1167, 1172 (S.D.N.Y. 1985))*. Here, plaintiff has failed to allege the dates and places of the representations that were allegedly made to it, the manner in which it was misled, and what the defendants allegedly obtained as a result of the misrepresentations. Although plaintiff refers to portions of the Nelson Schule deposition to support its allegations, these portions are not attached to plaintiff's memoranda or affidavits, and have not been considered by this Court, pursuant to *Fed. R. Civ. P. 56(e)*.[19]

Finally, summary judgment must be granted on plaintiff's RICO claims because plaintiff has failed to make the requisite showing of a "pattern" of racketeering activity. "[T]o establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they **[*100]** otherwise constitute a threat of, continued racketeering activity." *H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S.Ct. 2893, 2901, 106 L. Ed. 2d 195 (1989)* (emphasis in original). Here, although plaintiff has proffered evidence of an agreement between GM and VGM to terminate heavy duty addenda, plaintiff has made no showing that VGM was a RICO enterprise engaged in continuing illegal behavior. The alleged wrongs of which plaintiff complains took place during a discrete period of time during which the addenda were cancelled and new franchisees were selected. Therefore, plaintiff has failed to establish a RICO pattern, and its claim cannot stand.

For these reasons, summary judgment will be awarded to the moving defendants on Count II of plaintiff's Complaint.

Plaintiff's Breach of Contract Claims

In Count VIII of its Complaint, plaintiff alleges that GM breached the Dealer Sales and Service Agreement when it discontinued the heavy duty truck addendum. Plaintiff indicates that Article 4 of the Agreement contains the reasons for which GM could cancel the Agreement, but that GM's cancellation of the addendum was not based upon any of these reasons. On the other hand, GM points to language in Article **[*101]** 1.5 of the Agreement indicating that GM reserved the right to discontinue any products listed in the addendum at any time.

In Glick, the Second Circuit addressed the plaintiff's breach of contract claim as follows:

> On the breach of contract claim, we agree with Glick that Article 1.5 of the Agreement could be a means of circumventing Article 4's termination provisions: If there were a single Addendum attached to the Agreement, discontinuance of the models covered by that Addendum would, effectively, terminate the entire Agreement. This would contradict the plain language of the contract and render Article 4 meaningless . . . . Glick has, at the very least, raised a genuine issue of material fact as to whether Article 1.5 of this form document permits discontinuance of individual models but not of entire product lines.

Id. at 498.

This Court believes that resolution of this issue is dictated by *Glick*. The contractual language in Glick parallels that in the instant case. The language in Articles 1.5 and 4 of the Agreement creates the issue of whether termination of the heavy duty addendum constituted a breach of contract. Again, plaintiff has adduced evidence that the heavy duty line contributed **[*102]** a significant percentage of plaintiff's business. This is relevant to the question of whether termination of the addendum in this case was tantamount to a breach of the Agreement.

It is true that Glick was decided before substantial discovery had taken place, yet discovery has been completed in the present case. However, upon the present record this Court cannot say as a matter of law that GM did not breach a contract with plaintiff. Furthermore, although GM argues that the decision in Glick was premised upon the erroneous assumption that one-third of GM heavy duty truck dealers sold only heavy duty GM trucks, and that the percentage is closer to eight percent (Sergo Affid., ¶ 9), this factor would not be decisive. The language contained in the Agreement, the continued production of the Brigadier model, and the percentage of business plaintiff derived from the heavy duty line create the issue of whether GM breached a contract with plaintiff, *Id. at 498*. It is also significant that in Glick. as well as the present case, the plaintiff continued to operate under GM's light and medium

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[19] Although leave to re-plead should be freely granted in cases such as this, *Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 653 n. 6 (2d Cir. 1987)*; *Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986)*, leave to re-plead will not be granted in this case because of the other infirmities of plaintiff's RICO claim.

duty addenda. Thus, any "erroneous assumption" as to the percentage of dealers who operated solely under **[*103]** the heavy duty addendum would not dictate a result contrary to Glick. Therefore, GM's motion for summary judgment on Count VIII of plaintiff's Complaint will be denied.

Nevertheless, summary judgment will be awarded to VGM and White on plaintiff's breach of contract claim. Plaintiff has failed to introduce any evidence of a contractual relationship with these defendants. Therefore, the primary element of a claim for breach of contract is lacking, and judgment will be awarded to VGM and White on Count VII of plaintiff's Complaint. The potential liability of these defendants under plaintiff's claim for tortious interference with contractual relations will be addressed below.

Plaintiff's Claims for Interference with Contractual Relations, as Against VGM and White

In Count IX of its Complaint, plaintiff alleges that VGM and White wrongfully interfered with its heavy duty truck dealership by agreeing that GM would terminate its heavy duty addendum and would continue to manufacture the Brigadier model as a subcontractor for VGM.

The elements of the tort of interference with a contractual relationship are: (1) the existence of a valid contract; (2) defendant's knowledge of that contract; (3) **[*104]** defendant's intentional procuring of breach of that contract; and (4) damages. *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., 614 F.2d 832, 839 (2d Cir. 1980)*; *Israel v. Wood Poison Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956)*. *Wegman v. Dairylea Coop., Inc., 376 N.Y.S.2d 728, 731, 50 A.D.2d 108 (4th Dept. 1975)*. It is also necessary for plaintiff to prove that the defendant's actions caused the breach. Sieven v. Kane*, 4 A.D.2d 774, 165 N.Y.S.2d 225 (2d Dept. 1957)*.

The issue of whether the heavy duty addendum constituted a valid contract will be resolved in the same manner as plaintiff's claims under *N. Y. Gen. Bus. Law § 197*. As evidence of VGM and White's interference, plaintiff relies solely on the Stock Purchase Agreement executed by GM and VGM on December 9, 1986 (Kane Affid., exh. A). This evidence alone is sufficient to create the factual issue of whether VGM interfered with plaintiff's heavy duty addendum. The Stock Purchase Agreement expressly provided that GM would cancel all outstanding heavy duty addenda with its dealers. This is evidence that VGM had at least constructive knowledge of plaintiff's relationship with GM, and that it intended to procure GM's termination **[*105]** of the addendum. Although defendants argue that GM intended to terminate the heavy duty truck addenda prior to the formation of VGM (Sergo Affid., ¶ 14), this alone would not extinguish VGM's potential liability for inducement of any breach. The fact that the party who breached the contract contemplated the breach in any event is not controlling where he had not done so at the time of the defendant's actions. *Gold Medal Farms v. Rutland Co. Creamery, 9 A.D.2d 473, 195 N.Y.S.2d 179 (3d Dept. 1960)*. There remains an issue of whether VGM's conduct was a substantial factor in GM's termination of the addendum. See *State Enter. v. Southridge Coop., 18 A.D.2d 226, 238 N.Y.S.2d 724 (1st Dept. 1963)*; *Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954)*. Therefore, VGM's motion for summary judgment on Count IX of plaintiff's Complaint will be denied.

Nevertheless, White will be awarded summary judgment on this claim. Plaintiff has produced no evidence showing White's role in the termination of its heavy duty addendum and, as discussed above, White was not a signatory to the Stock Purchase Agreement. Furthermore, White's participation in the selection of a VGM franchisee is too remote **[*106]** to constitute evidence that White actually procured any breach of a contract between plaintiff and GM.

Finally, GM will be awarded summary judgment on this claim because a party cannot be held liable for inducing a breach of its own contract. *Robbins v. Ogden Corp., 490 F.Supp. 801, 810 (S.D.N.Y. 1980)*; *Ryan v. Brooklyn Eye & Ear Hosp., 46 A.D.2d 87, 360 N.Y.S.2d 912 (2d Dept. 1974)*.

to respond as required by *Rule 56(e)*. There has been a complete failure of proof regarding these claims, and summary judgment must be granted to GM as a matter of law. *Celotex v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552-54, 91 L. Ed. 2d 265 (1986)* (moving party can meet its burden under *rule 56* by showing an absence of evidence to support the non-moving party's case; non-moving party cannot then simply rely on its pleadings to defeat summary judgment). Summary judgment will be entered in GM's favor on Count X of plaintiff's Complaint.

Plaintiff's Claims for Tortious Interference with Advantageous Business Relations

In Count X of its Complaint, plaintiff alleges that defendants' actions "were undertaken deliberately with the calculated purpose of injuring and destroying plaintiff's business and goodwill, and of injuring **[*107]** and destroying plaintiff's business relations with its franchisor, its suppliers, employees and its customers." (Complaint, ¶ 76). The parties have treated this Count as a claim for tortious interference with advantageous business relations. To prevail on this claim, plaintiff must establish that defendants interfered with "business relations existing between the plaintiff and a third party, either with the sole purpose of harming the plaintiff or by means that are dishonest, unfair or in any other way improper." *Schmid, Inc. v. Zucker's Gifts, Inc., 766 F.Supp. 118, 122 (S.D.N.Y. 1991)* (citing *PPX Enter, v. Audio Fidelity Enter., 818 F.2d 266, 269 (2d Cir. 1987))*. "In other words, if the defendant's interference is intended, 'at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct.'" Id.; see also *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 838 (2d Cir. 1980)*.

Here, defendants have proffered a legitimate business motive for the formation of VGM (Sergo Affid., ¶ 14), yet plaintiff has not countered with admissible evidence is support of its claim. Plaintiff's Memorandum contains **[*108]** a single paragraph concerning this cause of action. In that paragraph, there is no reference to any admissible evidence supporting plaintiff's claim. Likewise, there is no reference to admissible evidence in support of this claim in any of plaintiff's supporting affidavits. And although page 50 of Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction contains a number of allegations attributing malicious motives to certain individuals, these allegations are not supported by reference to admissible evidence. Therefore, although defendants may not have acted with the "due cause" or good faith required by the New York Franchise Act and the federal Dealers' Act, plaintiff has offered no evidence that their conduct falls within the scope of this common law tort. Summary judgment will be awarded to the moving defendants on Count X of plaintiff's Complaint to the extent that it states a claim for tortious interference with advantageous business relations.

Plaintiff's Claim under *N.Y. U.C.C. § 2-306(2)*

In Count VII of its Complaint, plaintiff alleges a claim against GM for breach of *New York's Uniform Commercial Code § 2-306(2)*. This statute provides, "A **[*109]** lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale." Under an exclusive dealing contract, the principal is "expected . . . to refrain from supplying any other dealer or agent within the exclusive territory." *N.Y. U.C.C. § 2-306*, Official Comment 5. "Agreement" is defined by the U.C.C. as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance . . . ." *N.Y. U.C.C. § 1-201(3)*.

Plaintiff's claim under *§ 2-306(2)* must fail. By the express terms of the Dealer Sales and Service Agreement and the heavy duty addendum itself, plaintiff was not an exclusive dealer of GM products. Article 1 of the Agreement gives plaintiff the non-exclusive rights to purchase GM products and to use the GM name in connection with its dealership. The language is unambiguous and can only be understood to mean that GM had the right to award similar rights to other dealers in plaintiff's geographical **[*110]** area. Plaintiff argues that exclusivity did not extend to the heavy duty addendum; however, the addendum itself provides that plaintiff has the "non-exclusive right to buy" the products listed in the addendum. Furthermore, there was obviously no duty on plaintiff's part to deal only in GM products, since plaintiff also sold Mercedes-Benz and Kenworth automobiles.

Plaintiff argues that the course of dealing between the parties indicates that plaintiff was the sole dealer of heavy duty trucks in its geographic area (P. Memo., p. 55). Plaintiff's Memorandum contains a number of allegations that there could only be one heavy duty dealer in any given area; however, GM introduces contrary evidence (Sergo Affid., ¶ 11), and plaintiff refers this Court to no admissible proof in this regard. And although there is some indication that VGM sought only one dealer of such trucks in a given area (St. Amour Memo., p. 1), this does not mean that GM was contractually bound to do so.

Therefore, neither the Dealer Sales and Service Agreement nor the heavy duty addendum falls within the scope of *N.Y. U.C.C. § 2-306(2)*, and summary judgment will be awarded to GM on Count VII of plaintiff's Complaint. Plaintiff's **[*111]** arguments regarding GM's good faith vel non in the termination of the addendum are more appropriately directed toward plaintiff's claims for breach of contract and for violation of the New York Franchise Act and the federal Dealers' Act, which are addressed above.

Personal Jurisdiction Over the Individual Defendants

Defendants Berggren, Kaczmarek, and Gurley move for dismissal of plaintiff's Complaint as against them due to this Court's lack of personal jurisdiction. For purposes of a motion to dismiss for lack of personal jurisdiction, the plaintiff must meet the burden of making a prima facie showing of jurisdiction over the defendants. *United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir.)*, cert. denied. *384 U.S. 919, 86 S.Ct. 1366, 16 L. Ed. 2d 440*, reh'g denied, *384 U.S. 982, 86 S.Ct. 1858, 16 L. Ed. 2d 693 (1966)*. Ultimately, the plaintiff must bear the burden of proving jurisdiction over the person by a preponderance of the evidence. However, on a motion to dismiss pursuant to *Rule 12(b)(2)* the plaintiff will be held to the preponderance burden only if a pretrial evidentiary hearing has been held. If the motion is decided on the pleadings and affidavits, the prima facie burden applies. *CutCo Indus., Inc. v. Naughton, 806 F.2d 361 (2d Cir. 1986)*. **[*112]** Here, the parties have submitted affidavits, but no evidentiary hearing has been held. Therefore, plaintiff need make only a prima facie showing of personal jurisdiction to defeat defendants' motions to dismiss.

Personal jurisdiction over a non-domiciliary in a diversity action is governed by the law of the forum state. *Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963)*. Plaintiff in this case has not indicated what statute subjects the individual defendants to personal jurisdiction; however, plaintiff writes, "The defendants have at least tacitly conceded that they have transacted business within New York State making them amenable to long-arm jurisdiction under *CPLR § 302(a)*" (P. Memo., p. 66). Therefore, plaintiff appears to be relying upon New York's Civil Practice Law and Rules ("CPLR") *§ 302(a)(1)*, which provides:

> (a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:
>
> > (1) transacts any business within the state or contracts anywhere to supply goods or services in the state. . . .

The *Due Process Clause of the federal Constitution* requires **[*113]** that the transaction of business within the state must meet the "minimum contacts" test set forth in *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)*, such that maintenance of the suit would not offend "traditional notions of fair play and substantial justice." In *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958)*, the Supreme Court held that this requirement is satisfied when "the defendant purposefully avails itself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its law."

This Court does not agree with plaintiff's conclusory statement that there has been a "tacit agreement" by the individual defendants that they have transacted business in New York State. Moreover, plaintiff fails to note that more than simply transacting business is required. The cause of action alleged must arise from the business transacted by the defendants. Here, plaintiff fails to make a prima facie showing of any substantial business transacted by the defendants in New York State that gave rise to plaintiff's claims. Nowhere in plaintiff's Complaint, affidavits, or Memorandum does plaintiff indicate **[*114]** when or where or which of the individual defendants were in the State; plaintiff fails to describe the "business" conducted by defendants; and plaintiff refers in certain instances to communications with the "Committee" without specifying which individuals were involved. Uncontradicted evidence exists showing that defendant Gurley was not even a member of the Steering Committee

(Kaczmarek Reply Affid., ¶ 2). Hence, plaintiff has failed to establish "the existence of facts lending themselves to personal jurisdiction over the defendants." *Maier-Schule, Inc. v. General Motors Corp., 1988 U.S. Dist. LEXIS 16078, 1988 WL 128602 (W.D.N.Y. 1988)*(Elfvin, J.). In that earlier decision in this case, Judge Elfvin dismissed plaintiff's Complaint against certain members of the Steering Committee pursuant to *Fed. R. Civ. P. 12(b)(2)*, due to plaintiff's failure to make a prima facie showing of personal jurisdiction under *CPLR § 302(a)(1)*. Judge Elfvin indicated that plaintiff had failed to allege the types of facts listed above. It appears that plaintiff has not learned its lesson during the course of this matter.[20]

On the other hand, the individual defendants have submitted affidavits refuting plaintiff's assertion of jurisdiction. See *Bialek v. Racal-Milgo, Inc., 545 F.Supp. 25 (S.D.N.Y. 1982)*(to defeat plaintiff's prima facie showing of personal jurisdiction prior to trial, defendant must refute, not simply rebut, plaintiff's allegations). These affidavits show that the defendants have never transacted business in New York on their own behalf; they have never visited any of plaintiff's facilities or met with any of plaintiff's officers or employees within New York State; they have never conferred directly by telephone or correspondence with any of plaintiff's officers or employees, and any actions relating to plaintiff **[*116]** took place outside New York. Moreover, the decision to award the VGM franchise to Buffalo Truck was, in fact, made in North Carolina (Kaczmarek Reply Affid., ¶ 8). These affidavits are uncontradicted by plaintiff.

Therefore, plaintiff has failed to show that any of its causes of action arose from the individual defendants' activities within New York State; plaintiff has failed to show that the defendants individually and "purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson, 357 U.S. at 253, 78 S.Ct. at 1240*.

Indeed, courts have extended jurisdiction over individual defendants who travelled to New York actually to negotiate the contract at issue, see, e.g., *Philipp Bros., Inc. v. Schoen, 661 F. Supp. 39 (S.D.N.Y. 1987)*; however, the courts have not extended personal jurisdiction on contacts as tenuous as those suggested here. See *Apicella v. Valley Forge Mil. Academy, Etc., 103 A.D.2d 151, 478 N.Y.S.2d 663 (2d Dept. 1984)*, Plaintiff's causes of action do not arise out of the acts alleged. Indeed, plaintiff alleges no individual acts by the moving defendants. Therefore, plaintiff's **[*117]** Complaint will be dismissed as against defendants Berggren, Kaczmarek, and Gurley.

Defendants' Motions for Summary Judgment on the Issue of Damages

Defendants move for summary judgment due to plaintiff's failure to substantiate its claim of damages throughout the course of this action. Furthermore, on January 24, 1992 GM moved for sanctions against plaintiff, alleging failure to respond to its interrogatories on the issue of damages. GM argued that plaintiff had flagrantly disregarded *Fed. R. Civ. P. 26* and *37*, and this Court's orders to produce expert witness information and damage calculations. GM sought the following sanctions: (1) dismissal of plaintiff's Complaint; (2) preclusion of expert witness testimony; (3) preclusion of evidence regarding damages; (4) contempt; and (5) costs and attorney fees. GM's motion for sanctions was referred to the Hon. Edmund F. Maxwell, United States Magistrate Judge for the Western District of New York, for a report and recommendation, pursuant to *28 U.S.C. § 636(b)(1)(B)*. On July 29, 1992 Magistrate Judge Maxwell issued a Report and Recommendation that GM's motion be denied. On August 13, 1992 GM filed objections to the Report and Recommendation. **[*118]** The parties have submitted papers on this issue.

With regard to their summary judgment motion, defendants emphasize the point that plaintiff has failed to retain an expert witness, although this case has been pending since 1987. Defendants argue that plaintiff has failed to support its damage claim with admissible evidence, and that the affidavit prepared by Nelson Schule outlining

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[20] In fact, plaintiff offers even less support for its claim of personal jurisdiction over the defendants than it **[*115]** did in connection with that earlier decision. Judge Elfvin's decision refers to an affidavit of Nelson Schule indicating that the individual defendants made personal visits to plaintiff in New York and conducted written and telephonic communications with it, in connection with GM's decision to terminate its "franchise" and the subsequent decision by VGM to award its new franchise to Buffalo Truck. This Court is referred to no similar documentation in plaintiff's responsive papers.

alleged damages is insufficient to prove damages (Appendix to GM's Notice of Motion for Sanctions, exh. D). Plaintiff replies that it cannot afford an expert witness to calculate damages, but that such a witness will be retained when a final trial date is set (Appendix to GM's Notice of Motion for Sanctions, exh. P). Plaintiff argues that the Schule Affidavit of December 1991 sufficiently outlines damages to defeat summary judgment, because it refers to a settlement letter dated October 31, 1991, in which damages are "calculated." (GM Memo., Appendix, exh. 0).

This Court will award summary judgment to the moving defendants on the issue of damages because, once again, plaintiff has failed to produce admissible evidence sufficient to create a genuine issue of material fact for trial. In *Karetsos v. Cheung, 670 F.Supp. 111 (S.D.N.Y. 1987)*, **[*119]** the plaintiff tried to defeat summary judgment by arguing that she would "establish at the time of trial that she had a definite earning capacity and a market for her items. . . " and that "it is for the trier of the facts to determine from the evidence presented at trial as to the amount of her lost profits, . . . plaintiff need not produce the evidence which would determine the amount of her lost profits, if any, as indicated above." *Id. at 115*. The court disagreed with plaintiff, and granted summary judgment to defendant on the issue of damages. The court held that the plaintiff had failed properly to respond to the summary judgment motion, and had failed to "set forth specific facts showing that there is a genuine issue for trial." Id. (quoting *Fed. R. Civ. P. 56(e)*).

This Court believes that plaintiff's failure to produce facts indicating its damages warrants a result similar to *Karetsos*. In its Memorandum, plaintiff states, "Maier-Schule is a dealer with a proven track of selling heavy duty GMC trucks and GMC breached its 5 year contract to supply those trucks after only two years. Therefore, Maier-Schule is entitled to its lost profits for the remainder of the contract period." **[*120]** (P. Memo., p. 61). This is not fact, this is argument. This Court has also considered the Schule Affidavit regarding damages, and the settlement letter prepared by plaintiff on October 31, 1991, to which GM referred in its motion papers (GM Memo., Appendix, exh. 0); however this Court finds that the information contained therein is wholly insufficient to defeat summary judgment.

Although a plaintiff "need only demonstrate the amount of damages with reasonable certainty, and a wrongdoer has no right to insist upon a mathematically precise evaluation of damages suffered," *Contemporary Mission, Inc. v. Bonded Mailings, 671 F.2d 81, 84 (2d Cir. 1982)*, "[p]ure speculation or guesswork and estimates based on false or unreasonable assumptions are unacceptable." *Martin Motor Sales v. Saab-Scania of America, 452 F.Supp. 1047, 1052 (S.D.N.Y. 1978)*, aff'd, *595 F.2d 1209 (2d Cir. 1979)* (citing *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L. Ed. 652 (1946))*. Here, plaintiff's documentation does not even approach reasonable certainty, and plaintiff's estimates are based upon sheer speculation. In the Contemporary Mission case, which involved breach of a contract to perform mailing **[*121]** services and in which plaintiff alleged approximately $200,000.00 in damages, the court held that the plaintiff "provided sufficient documentation—comparisons of sales and costs of late mailings with test mailing of the publications as well as overhead—to permit the jury to reach a reasonable estimate of damages." *Id. at 84-85*. But here, where there is an allegation of many millions of dollars in damages, plaintiff fails to provide similar documentation.

The Affidavit of Nelson Schule offers insufficient factual support for plaintiff's claim of damages. *Rule 56(e)* requires that affidavits opposing summary judgment

> shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

The settlement letter to which the Schule Affidavit refers would not be admissible at trial, pursuant to *Fed. R. Evid. 802*. Moreover, it is not a sworn document, and is based solely upon the opinions of Schule and Farner, who are not parties to this **[*122]** action. In his Affidavit, which is more full of argument than it is admissible evidence, Schule states only that "I believe the proposal letter states an accurate picture of damage suffered by the Schule enterprise. . . . " (Schule December 1991 Affid., ¶ 4). Furthermore, the affidavit refers only to certain examples from the letter. More importantly, the damage figures are based upon a 15 year period, which Schule describes as "the balance of my remaining work life, I believe that succession was available and as my father and I had carried on this business for 35 years before defendants destroyed it, I believe that it could have gone on for the next 35 years easily." (Schule December 1991 Affidavit, ¶ 5). Again, Schule is not the plaintiff here; therefore, there is no proof that the 15 year period based upon Schule's "work life" expectancy is appropriate. Compare *Garvin v. American Motor Sales Corp., 202 F.Supp. 667 (W.D.Pa. 1962)*, rev'd on other grounds, *318 F.2d 518 (3d Cir. 1963)*, holding that mortality tables referring to the plaintiff himself may be used to calculate future damages.

Although the gross and net profit figures and rental payments contained in the letter are allegedly **[*123]** "based upon financial statements which are already in the hands of the defendants, having been acquired in discovery proceedings in this case," (Schule December 1991 Affid., ¶ 6) this is entirely irrelevant. What is critical is that plaintiff has submitted none of these documents to this Court in connection with the present motion, so that this Court could determine whether plaintiff's damage estimates were "reasonably certain." *Contemporary Mission, 671 F.2d at 84*. This is contrary to *Rule 56(e)*, which requires that " [s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Even the settlement proposal letter was not attached to the Schule Affidavit, let alone the documents to which the letter refers.

Furthermore, plaintiff's figures include damages for lost salary for individuals who are not parties to this action. Plaintiff admittedly does not have a copy of an updated appraisal done on the corporate property, but Nelson Schule states that he "will attempt to locate one." (Schule December 1991 Affid., ¶ 7). This is entirely insufficient to defeat summary judgment. There is no way to determine whether the **[*124]** portion of damages that plaintiff claims is attributable to loss of real property is accurate. Plaintiff bases damage calculations on past performance and business conditions, but fails to explain how or whether these calculations may change in response to future performance and business conditions. Finally, plaintiff admits that there are a number of other elements of damages "now known to exist, but not yet completely quantified" (Schule December 1991 Affid., ¶ 12). Thus plaintiff has utterly failed to substantiate its damage claims with admissible evidence.

Most importantly, the letter underlying the Schule Affidavit was prepared by Schule himself, with the assistance of William Farner, plaintiff's general counsel. Although Schule appears to have been in the heavy duty truck business for some time, there is no indication that either he or Farner has the requisite expertise or experience to appraise real estate, computers, office furniture, and corporate goodwill with "reasonable certainty." In fact, Schule repeatedly confessed in deposition testimony that he could not value the worth of his business because he was neither an accountant, nor was he an expert in valuating businesses **[*125]** (see, e.g., Schule Dep., pp. 1104-1105). This contradicts *Fed. R. Evid. 702*, and *Fed. R. Civ. P. 56(e)*, which provides that an affidavit "shall show affirmatively that the affiant is competent to testify to the matters stated therein." Perhaps this is the reason for the consistently round figures that are bandied about in Schule's Affidavit, and in the settlement proposal letter, e.g., the "1,000,000.00 added to net profit over 15 years," the office equipment worth $800,000.00, the loan interest reduction, about which Schule says "there is little doubt that these interest amounts would have been reduced by approximately $500,000.00 per year," $100,000.00 in corporate goodwill, and the claim that plaintiff was a "$35,000,000.00 per year business."

With respect to the proposal letter, there is a serious question whether the figures contained therein are even presumed by plaintiff to be accurate. The letter states that "in order the [sic] calculate damages, it will be necessary to value the entire Schule-Kenworth business as a going concern. It will also be necessary to calculate the damages to Nelson E. Schule and Martin Modaffari, principals of plaintiff who have lost their livelihood **[*126]** and, through foreclosure, have lost the equity in the real property on which the businesses were conducted which was owned by them in their individual names." Nonetheless, the proposal letter does not undertake such a valuation. In fact, the letter further states, "For the purposes of this proposal, we have calculated damages. . . " (emphasis added). This language, and the fact that the letter begins with the phrase, "**WITHOUT PREJUDICE FOR SETTLEMENT PURPOSES ONLY**" (emphasis in original), indicate that the letter was not intended to be an accurate calculation of plaintiff's total damages. Furthermore, by including damages inuring to Schule, Modaffari, and the Kenworth business, the letter is of even less evidentiary value. Finally, the proposal letter lists the indefinite totals of $450,000.00 in damages, and $500,000.00 in attorney fees, and states that recent sales had been "between the 35 to 40 million dollar mark." Plaintiff offers no documentary support for these amounts, and the use of such multi-million dollar figures only decreases the veracity of plaintiff's calculations. In the same vein, plaintiff states that "a sales estimate of $50,000,000.00 for the next 15 years would **[*127]** not be out of line. Presumably, a logical argument could be made that gross sales would increase over time as well, thus, further supporting this conservative estimate." Again, no documentary evidence has been produced to substantiate these pie-in-the-sky figures.

In *Hodge v. Caterpillar, Inc., 1992 U.S. Dist. LEXIS 6566, 1992 WL 98415 (E.D.Pa. 1992)*, the court awarded summary judgment to defendant corporation where plaintiff failed to provide sufficient evidence of damages. Hodge was a product liability action in which plaintiff was claiming damages for necessary medical treatments and lost earning capacity. The court ordered plaintiff to obtain expert reports to substantiate his claims of liability and damages; however, plaintiff failed to do so. Therefore, the court entered summary judgment against him, finding that neither a liability determination or a calculation of damages could properly be done without an expert witness. With regard to liability, the court wrote, "Notwithstanding [plaintiff's allegations] and the provisions of the Court's scheduling order, plaintiff 'has offered neither competent evidence nor expert testimony to establish the essential elements in this products liability action.' . . . **[*128]** Plaintiff's failure to do so entitles Caterpillar to summary judgment in its favor." *1992 U.S. Dist. LEXIS 6566, [WL] at *2* (citing *Woelpper v. Scott Aviation, 1991 U.S. Dist. LEXIS 12913, 1991 WL 183774 (E.D.Pa. 1991) at *3)*. With regard to the issue of damages, the court wrote:

> The foregoing principles apply with equal force to plaintiff's failure to produce reports of opinions from medical and vocational experts. Because this is a personal injury action, Hodge must prove, inter alia, that the medical treatments he received were necessary and that the charges for those treatments were reasonable [citation omitted] . . . . Establishing those facts involves special skills and training not common to the ordinary lay person, and Hodge can only do so through expert opinion testimony. Additionally, Hodge cannot prevail on his claims that he has not fully recovered and may require additional medical treatment without the opinion of a medical expert [citations omitted] . . . .
>
> Similarly, any claims by Hodge that he has suffered diminution in his future earning capacity must be founded upon the expert opinion of an economist or a vocational specialist. It is clearly beyond the skill and knowledge of the average juror to calculate "future lost earning **[*129]** capacity" or "work life expectancy", calculations which are virtual necessities in presenting a claim for wage loss damages.
> Hodge's failure to produce medical, economic or vocational expert witness reports makes it impossible for him to sufficiently establish the existence of those elements of his case. Accordingly, Caterpillar is entitled to summary judgment for these independent reasons.

*1992 U.S. Dist. LEXIS 6566, [WL] at *3*.

Similarly, in *Schroeder v. Barth, 969 F.2d 421 (7th Cir. 1992)*, the Seventh Circuit upheld an award of summary judgment to defendant on the issue of damages where plaintiffs failed to provide sufficient admissible evidence of damages, and failed to show the basis for their damage calculations. Schroeder involved a breach of warranty action brought by the purchasers of a mobile home. Plaintiffs alleged that product defects had rendered the mobile home worthless, and one of the plaintiffs submitted an affidavit to that effect. Nevertheless, plaintiffs failed to explain the method by which they determined the mobile home's worthlessness. The court held that plaintiffs had failed to create a genuine issue of fact regarding damages, writing:

> Nowhere in the two-inch thick record of the seven years **[*130]** of proceedings below do the Schroeders indicate under which of [the] alternative methods they calculate their damages. They simply, adamantly, insist their damages are $146,705, which coincidentally is the price of the motor home. . . . And despite repeated opportunities to offer more, the only evidence of damages they proffered was Lester Schroeder's subjective opinion that the motor home was worthless. . . . The problem with [the affidavit] is that it offers only subjective opinion, not the kind of documentary evidence [contemplated by *Fed. R. Civ. P. 56*]. Although Lester's opinion may be competent evidence of the value of the motor home to the Schroeders, it is not sufficient to meet their burden of proving damages. . . .

Id. at 424.

Although plaintiff was not explicitly ordered to retain an expert witness, calculation of damages in this case is beyond the ken of the average juror, and appears to have been beyond the ken of Nelson Schule as well. As discussed above, calculation of antitrust damages is a particularly formidable task, and one at which plaintiff has entirely failed.

Aside from expert witness reports, plaintiff was ordered during discovery to produce itemized damage statements, **[*131]** and to indicate the documents supporting its damage calculations. Plaintiff has failed to do so. Instead, plaintiff has submitted conclusory damage estimates that include damages for individuals who are not parties to this litigation, and that do not indicate the method of calculation. Therefore, plaintiff has utterly failed to support its damage claims by admissible evidence. This Court finds that defendants have thereby been prejudiced in their preparation of this case for trial, and for the present motions. Summary judgment will therefore be awarded to defendants on the issue of damages. See *Peugeot Motors v. Eastern Auto Distrib., 892 F.2d 355, 360 (4th Cir. 1989)*. cert. denied, *497 U.S. 1005, 110 S. Ct. 3242, 111 L. Ed. 2d 752 (1990)* ("We first note that Eastern has acknowledged that it can prove no damages with respect to that claim, so any part of the claim relating to damages will not be litigated.").

Plaintiff has been instructed on a number of occasions to substantiate its alleged damages with further precision and to provide defendants with expert witness information. In June of 1990, GM served interrogatories upon plaintiff that pertained to expert witness testimony regarding damages. The interrogatories **[*132]** requested the name and qualifications of any expert witness plaintiff had retained. Interrogatory 7 requested information on the amount of damages plaintiff demands, the detail of the calculation of each component of such damages, and an identification of "all documents relied on, used, or created by plaintiff, or by any expert retained by plaintiff, in making such calculations." When plaintiff failed to respond to these interrogatories, GM moved for an order to compel discovery, and Magistrate Judge Maxwell issued such an order on February 2, 1991, giving plaintiff until 45 days after a decision on plaintiff's motion for partial summary judgment on its Robinson-Patman Act claims was issued. This Court issued a Decision and Order denying plaintiff partial summary judgment on July 31, 1991; plaintiff failed to answer the interrogatories, as ordered. On October 2, 1991 this Court extended plaintiff's time to answer the interrogatories until October 31, 1991. On November 1, 1991 plaintiff served an "Answer to Interrogatory" stating simply that "As of this date, October 31, 1991, plaintiff has not retained any expert witness. Plaintiff accepts this interrogatory as a continuing demand **[*133]** and will notify defendants immediately upon retaining an expert witness."

By a letter dated November 1, 1991 GM objected to the vagueness of plaintiff's Answer, and indicated that *Fed. R. Civ. P. 33(a)* requires that answers to interrogatories be answered separately and fully. By an order entered on December 24, 1991 this Court directed plaintiff to supplement its Answer on or before December 31, 1991, and deemed discovery otherwise to be closed. In ordering plaintiff to respond to Interrogatory 7, this Court considered the expense involved, the burden to plaintiff, and the importance of the issue of damages in litigation such as this, pursuant to *Fed. R. Civ. P. 26(b)(1)*. This Court concluded that plaintiff needed to produce information concerning damages that was more substantial than that which plaintiff had already provided.

On December 26, 1991 GM sent a letter to plaintiff's counsel explaining precisely what information it requested with respect to Interrogatory 7. On December 28, 1991 GM received Nelson Schule's Affidavit dated December 27, 1991, which purported to be a supplemental answer to Interrogatory 7, and which purported to detail plaintiff's alleged damages. On December **[*134]** 31, 1991 GM sent a letter to plaintiff's counsel objecting to the Schule Affidavit as incomplete and inaccurate. This Court agrees with such a characterization of Schule's Affidavit.

This Court recognizes that plaintiff may not be able to afford an expert witness. Nevertheless, plaintiff has alleged throughout the course of litigation that it will retain an expert once a trial date has been set (Kane February 1992 Affid., ¶¶ 3, 8). In any event, plaintiff's lack of an expert witness does not justify the type of incomplete and inaccurate responses to discovery requests that plaintiff has made over the last two years. Even without an expert witness, plaintiff was required to set forth the calculations for each element of its alleged damages. It did not do so. Plaintiff was required to supply documentary support for its damage calculations. It did not do so. Plaintiff's failure to retain an expert does not justify plaintiff's failure to adhere to the orders of this Court directing plaintiff otherwise to answer defendants' interrogatories fully and accurately. It does not justify plaintiff's disregard for *Fed. R. Civ. P. 13(b)*, *26(b)(4)(A)(1)*, the Local Rules in this District, and this **[*135]** Court's calendar guidelines regarding discovery orders.

To date, plaintiff has failed to supply defendants with all the damages information they requested. More importantly, however, plaintiff has failed to produce sufficient information for this Court to find a genuine issue of fact regarding damages. Perhaps plaintiff could have adduced sufficient evidence without retaining an expert witness. Regardless, plaintiff has brought this extremely complex litigation and should have been prepared to produce evidence on each of the issues involved. One of those issues is damages. In *Martin Motor Sales*, a case that is factually similar to the present case, the court explained that "in this type of case, where the proof of damages is so difficult and speculative under the best of circumstances, plaintiff is obligated to offer the court the best evidence available in proving its damages." The court further explained that where the plaintiff fails to produce records indicating its damages, damages may not be awarded due to "speculation and conjecture." Id. (citing *Cecil Corley Motor Co., Inc. v. General Motors Corp., 380 F.Supp. 819 (M.D.Tenn. 1974))*. Although Martin Motor Sales arose in a trial **[*136]** context, the principle enunciated is equally applicable in the summary judgment context. Here, plaintiff has failed to produce sufficient admissible evidence to create a genuine issue of fact regarding damages. Plaintiff has not even produced the documentation it claims to have disclosed during discovery. Consequently, summary judgment will be awarded to defendants on the issue of damages.

Likewise, GM's motion for sanctions will be granted to the extent that plaintiff will be precluded from introducing evidence of damages. In all other respects, this Court adopts the findings and conclusions contained in Magistrate Judge Maxwell's Report and Recommendation of July 29, 1992, and denies GM's motion for various other sanctions.

CONCLUSION

For the reasons stated above, the motions of GM, VGM, and White will be Granted in part and Denied in part. The motions of the individual defendants to dismiss plaintiff's Complaint as against them will be Granted. Finally, GM's motion for sanctions against plaintiff will be Granted, insofar as plaintiff will be precluded from introducing evidence of damages at trial. In all other respects, this Court will affirm the Report and Recommendation of Magistrate **[*137]** Judge Maxwell, and GM's motion for other sanctions will be Denied.

ORDER

IT HEREBY IS ORDERED as follows:

COUNT I

The summary judgment motions of GM, VGM, and White on plaintiff's claims under §§ 1 and *2* of the Sherman Act, § 3 of the Clayton Act, and the Robinson-Patman Act are GRANTED, pursuant to *Fed. R. Civ. P. 56*.

COUNT II

FURTHER, that the summary judgment motions of GM, VGM, and White on plaintiff's claims under RICO are GRANTED, pursuant to *Fed. R. Civ. P. 56*.

COUNT III

FURTHER, that the summary judgment motions of GM, VGM, and White on plaintiff's claims under the federal Dealers' Act are DENIED, pursuant to *Fed. R. Civ. P. 56*.

COUNT IV

FURTHER, that the summary judgment motions of GM, VGM, and White on plaintiff's claims under New York's State's Donnelly Act are GRANTED, pursuant to *Fed. R. Civ. P. 56*.

COUNT V

FURTHER, that the summary judgment motions of GM, VGM, and White on plaintiff's claims under *New York Gen. Bus. Law § 197 et seq*., are DENIED, pursuant to *Fed. R. Civ. P. 56*.

COUNT VI

FURTHER, that the summary judgment motions of GM, VGM, and White on plaintiff's claims under the New York State Franchise Act, *N.Y. Veh. & Traf. Law § 463(2)(d)(1)* are GRANTED, pursuant to *Fed. R. Civ. P. 56*, **[*138]** insofar as plaintiff's claims are time barred.

FURTHER, that the summary judgment motion of GM on plaintiff's claim under the New York State Franchise Act, *N.Y. Veh. & Traf. Law § 463(2)(h)* is DENIED, pursuant to *Fed. R. Civ. P. 56*.

FURTHER, that the summary judgment motions of VGM and White on plaintiff's claims under the New York State Franchise Act, *N.Y. Veh. & Traf. Law § 463(2)(h)* are GRANTED, pursuant to *Fed. R. Civ. P. 56*.

FURTHER, that the summary judgment motions of GM, VGM, and White on plaintiff's claims under the New York State Franchise Act, *N.Y. Veh. & Traf. Law § 463(1)* are DENIED, pursuant to *Fed. R. Civ. P. 56*.

COUNT VII

FURTHER, that the summary judgment motion of GM on plaintiff's claim under *New York U.C.C. § 2-306(2)* is GRANTED, pursuant to *Fed. R. Civ. P. 56*.

FURTHER, that the summary judgment motion of GM on plaintiff's breach of contract claim is DENIED, pursuant to *Fed. R. Civ. P. 56*.

FURTHER, that the summary judgment motions of VGM and White on plaintiff's breach of contract claims are GRANTED, pursuant to *Fed. R. Civ. P. 56*.

COUNT IX

FURTHER, that the summary judgment motion of VGM on plaintiff's claim for interference with contractual relations is DENIED, pursuant to *Fed. R. Civ. P. 56*.

FURTHER, **[*139]** that the summary judgment motions of GM and White on plaintiff's claims for interference with contractual relations is GRANTED, pursuant to *Fed. R. Civ. P. 56*.

COUNT X

FURTHER, that the summary judgment motion of GM on plaintiff's claim for interference with a contractual relationship is GRANTED, pursuant to *Fed. R. Civ. P. 56*.

FURTHER, that the summary judgment motions of VGM and White for tortious interference with advantageous business relations are GRANTED, pursuant to *Fed. R. Civ. P. 56*.

MOTIONS OF INDIVIDUAL DEFENDANTS TO DISMISS PLAINTIFF'S COMPLAINT

FURTHER, that the motions of defendants Berggren, Kaczmarek, and Gurley to dismiss plaintiff's Complaint as against them for lack of personal jurisdiction are GRANTED, pursuant to *Fed. R. Civ. P. 12(b)(2)*.

DAMAGES AND SANCTIONS

FURTHER, that the summary judgment motions of GM, VGM, and White on plaintiff's claim for damages is GRANTED, pursuant to *Fed. R. Civ. P. 56*. FURTHER, that GM's motion for sanctions precluding plaintiff from introducing evidence of alleged damages at trial is GRANTED, pursuant to *Fed. R. Civ. P. 26* and *37*. In all other respects, this Court accepts the Report and Recommendation of Magistrate Judge Maxwell denying **[*140]** various other sanctions.

FURTHER, that counsel for the remaining parties shall appear before this Court on Thursday, May 27, 1993 at 2:00 p.m. in Part IV, Mahoney State Office Building, 65 Court Street, Buffalo, New York for a status conference.

SO ORDERED.

Dated: May 3, 1993

Buffalo, New York

/s/ William M. Skretny

WILLIAM M. SKRETNY

United States District Judge

End of Document

Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.

Supreme Court of the United States

November 2, 1992, Argued ; May 3, 1993, Decided

No. 91-1043

Reporter

508 U.S. 49 *; 113 S. Ct. 1920 **; 123 L. Ed. 2d 611 ***; 1993 U.S. LEXIS 3121 ****; 26 U.S.P.Q.2D (BNA) 1641; 61 U.S.L.W. 4450; Copy. L. Rep. (CCH) P27,089; 1993-1 Trade Cas. (CCH) P70,207; 93 Cal. Daily Op. Service 3198; 93 Daily Journal DAR 5465; 7 Fla. L. Weekly Fed. S 223

PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL., PETITIONERS v. COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *944 F. 2d 1525*, affirmed.

Core Terms

sham, lawsuit, probable cause, antitrust, competitor, immunity, baseless, sham exception, anticompetitive, genuine, merits, cases, summary judgment, infringement, motivation, objectively reasonable, government action, videodiscs, courts, copyright infringement, realistically, motion picture, Sherman Act, proceedings, repetitive, subjective intent, judicial process, anti trust law, collateral, discovery

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN1[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Under the "sham" exception to the doctrine of antitrust immunity, as that doctrine applies in the litigation context, activity "ostensibly directed toward influencing governmental action" does not qualify for Noerr immunity if it is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Litigation cannot be deprived of Noerr immunity as a sham unless the litigation is objectively baseless.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

Copyright Law > ... > Civil Infringement Actions > Summary Judgment > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

HN3[] **Conspiracy to Monopolize, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. *Section 2* punishes every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Scope, Exemptions**

Those who petition government for redress are generally immune from antitrust liability. The Supreme Court first recognized in Noerr that the Sherman Act does not prohibit persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN5[] **Scope, Exemptions**

Immunity is withheld from "sham" activities under Noerr where application of the Sherman Act would be justified when the petitioning activity, ostensibly directed toward influencing governmental action, is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr doctrine is extended to the approach of citizens to administrative agencies and to courts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN7[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

An objectively reasonable effort to litigate cannot be sham under the Noerr doctrine regardless of subjective intent.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN8[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN9[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Recourse to agencies and courts should not be condemned as sham until a reviewing court has discerned and drawn the difficult line separating objectively reasonable claims from a pattern of baseless, repetitive claims which leads the factfinder to conclude that the administrative and judicial processes have been abused. The Supreme Court's recognition of a sham in California Motor Transport signifies that the institution of legal proceedings "without probable cause" will give rise to a sham if such activity effectively bars competitors from meaningful access to adjudicatory tribunals and so usurps the decisionmaking process.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN10[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The legality of objectively reasonable petitioning "directed toward obtaining governmental action" is not at all affected by any anticompetitive purpose the actor may have had.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN11[] **Higher Education & Professional Associations, Colleges & Universities**

Neither Noerr immunity nor its sham exception turns on subjective intent alone.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN12[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The United States Supreme Court has a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under the second part of the definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon. This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Evidence > Inferences & Presumptions > General Overview

HN13[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Even a plaintiff who defeats the defendant's claim to Noerr immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN14[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation. The court must remember that even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN15[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means actually having the reputed or apparent qualities or character. "Genuine" in this sense governs *Fed. R. Civ. P. 56*, under which a "genuine issue" is one that properly can be resolved only by a finder of fact because it may reasonably be resolved in favor of either party. On the other hand, "genuine" also means sincerely and honestly felt or experienced. To be sham, therefore, litigation must fail to be "genuine" in both senses of the word.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Torts > ... > Elements > Lack of Probable Cause > Determinations of Probable Cause

HN16[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings, requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication. Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN17[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

When a court has found that an antitrust defendant claiming Noerr immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Therefore, a proper probable-cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to Noerr immunity.

Lawyers' Edition Display

Decision

Copyright infringement action held not to be "sham," within exception to antitrust exemption for efforts to influence government action, where copyright holders had probable cause for suit.

Summary

Several motion picture studios, alleging that the operators of a resort hotel had infringed the studios' copyrights in various films by renting videodiscs to guests for viewing in hotel rooms, filed an action against the operators in the United States District Court for the Central District of California. The operators filed a counterclaim charging the studios with violations of 1 and 2 of the Sherman Act (*15 USCS 1*, *2*), based in part on the allegation that the studios' copyright action was a mere sham which cloaked underlying acts of monopolization and conspiracy to restrain trade. The District Court entered summary judgment in favor of the operators on the studios' copyright claim (*228 USPQ 743*), and the United States Court of Appeals for the Ninth Circuit affirmed (*866 F2d 278*). On remand, the District Court granted the studios' motion for summary judgment on the operators' antitrust counterclaim, on the grounds that (1) the studios had clearly sought and expected a favorable judgment on the copyright claim and had had probable cause to bring such an action; and (2) the copyright action therefore was not a "sham" and was entitled to antitrust immunity under the "Noerr-Pennington" doctrine as a legitimate effort to influence governmental action (*1990-1 CCH Trade Cases 68,971*). The Court of Appeals, affirming, (1) characterized "sham" litigation as involving either misrepresentations in the adjudicatory process or the pursuit of a pattern of baseless, repetitive claims instituted without probable cause and regardless of the merits; and (2) noted that the operators had neither alleged that the copyright action involved misrepresentations nor challenged the District Court's finding of probable cause, but had argued only that the action was a sham because the studios had not honestly believed the action to be meritorious (*944 F2d 1525*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Thomas, J., joined by Rehnquist, Ch. J., and White, Blackmun, Scalia, Kennedy, and Souter, JJ., it was held that (1) regardless of the subjective intent of a litigant, an objectively reasonable effort to litigate cannot be a "sham" for purposes of the Noerr-Pennington doctrine; (2) in order for litigation to be a "sham," (a) the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (b) only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation to determine whether the lawsuit conceals an attempt to interfere directly with the business relationships of a competitor; (3) the existence of probable cause to institute legal proceedings--as understood and applied in the common-law tort of wrongful civil proceedings--precludes a finding that an antitrust defendant has engaged in sham litigation; and (4) in the case at hand, even though the studios' copyright action was unsuccessful, the studios had had probable cause to bring such an action because the law was then unclear as to whether the operators' videodisc rental activities intruded on the studios' copyrights.

Souter, J., concurred, expressing the view that the court's opinion was not intended to transplant every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal ***antitrust law***, but used "probable cause" merely as shorthand for a reasonable litigant's realistic expectation of success on the merits.

Stevens, J., joined by O'Connor, J., concurred in the judgment, expressing the view that (1) the court correctly held that an objectively reasonable effort to litigate cannot be a "sham" regardless of subjective intent; but (2) the court's opinion was unnecessarily broad, as there might be lawsuits (a) in which a reasonable litigant could realistically expect some form of success on the merits, but (b) which would be objectively unreasonable and thus would be shams.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- Noerr-Pennington doctrine -- sham exception -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]

Regardless of the subjective intent of a litigant, an objectively reasonable effort to litigate cannot be a "sham" for purposes of the Noerr-Pennington doctrine--(1) the Noerr-Pennington doctrine providing that efforts to influence governmental actions qualify for antitrust immunity, and (2) the sham exception providing that activity that is ostensibly directed toward influencing governmental action, but is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor, does not qualify for antitrust immunity; the legality of objectively reasonable petitioning directed toward obtaining governmental action is not affected by any anticompetitive purpose the actor may have had; in order for litigation to be a "sham," (1) the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation to determine whether the lawsuit conceals an attempt to interfere directly with the business relationships of a competitor; the existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation, as a finding of probable cause compels the conclusion that a reasonable litigant could realistically expect success on the merits of the challenged lawsuit and irrefutably demonstrates that the antitrust plaintiff has not proved the objective prong of the sham exception. (Stevens and O'Connor, JJ., dissented in part from this holding.)

COPYRIGHT AND LITERARY PROPERTY §3 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > antitrust immunity -- Noerr-Pennington doctrine -- sham exception -- motion pictures -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]***LEdHN[2D]***[] [2D]***LEdHN[2E]***[] [2E]

Summary judgment is properly issued in favor of motion picture studios with regard to a counterclaim by the operators of a resort hotel, who allege that the studios violated 1 and 2 of the Sherman Act (*15 USCS 2*, *2*) by bringing a copyright infringement action against the operators for renting videodiscs of copyrighted movies to hotel guests for in-room viewing, because (1) the studios' antitrust immunity cannot be pierced, under the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action, in the absence of proof that the copyright action was objectively baseless or frivolous; (2) even though the copyright action was unsuccessful, the studios had had probable cause to bring such an action, given that (a) under *17 USCS 106(4)*, the studios enjoyed the exclusive right to perform their copyrighted movies publicly, (b) the studios acquired this statutory right for motion pictures, as original audiovisual works of authorship fixed in a tangible medium of expression under *17 USCS 102(a)(6)*, regardless of whether they intended any monopolistic or predatory use, and (c) at the time a Federal District Court entered summary judgment for the operators on the copyright infringement claim, the law was unclear as to whether the operators' videodisc rental activities intruded on the studios' copyrights; and (3) the existence of probable cause eliminates any genuine issue of material fact for purposes of *Rule 56(c) of the Federal Rules of Civil Procedure*.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- > Headnote:
LEdHN[3][] [3]

Those who petition government for redress are generally immune from antitrust liability.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- sham exception -- > Headnote:
LEdHN[4][] [4]

The institution of legal proceedings without probable cause will give rise to a "sham," for purposes of the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action, if such activity effectively bars competitors from meaningful access to adjudicatory tribunals and so usurps the decisionmaking process.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- sham exception -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

A winning lawsuit is by definition a reasonable effort at petitioning for redress and is therefore not a "sham," for purposes of the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action; however, an ultimately unsuccessful lawsuit is not necessarily unreasonable or without foundation for purposes of the "sham" exception.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- sham exception -- > Headnote:
LEdHN[6][] [6]

In a private action under the federal antitrust laws, a plaintiff who defeats a claim of antitrust immunity with respect to an allegedly anticompetitive lawsuit by the defendant, by demonstrating both the objective and the subjective components of the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action, must still prove a substantive antitrust violation, because proof of a sham merely deprives the defendant of immunity and does not relieve the plaintiff of the obligation to establish all other elements of the antitrust claim.

MALICIOUS PROSECUTION §1 > probable cause -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]

The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings--frequently called "malicious prosecution," which, strictly speaking, governs the malicious pursuit of criminal proceedings without probable cause--requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose; because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense; probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication, and a showing of malice alone will neither entitle the plaintiff in a wrongful civil proceedings action to prevail nor permit the factfinder to infer the absence of probable cause; the threshold for showing probable cause is no higher in the civil context than in the criminal context.

TRIAL §92 > question of law or fact -- probable cause -- > Headnote:
LEdHN[8][] [8]

For purposes of determining whether there was probable cause to institute a legal proceeding, a court may decide probable cause as a matter of law where there is no dispute over the predicate facts of the legal proceeding.

DEPOSITIONS AND DISCOVERY §29 > antitrust actions -- > Headnote:
LEdHN[9][] [9]

A Federal Court of Appeals--in reviewing a Federal District Court's granting of summary judgment in favor of motion picture studios with regard to a counterclaim by operators of a resort hotel, who allege that the studios violated 1 and 2 of the Sherman Act (*15 USCS 1*, *2*) by bringing a copyright infringement action against the operators for renting videodiscs of copyrighted movies to hotel guests for in-room viewing--properly refuses the operators' request for further discovery on the economic circumstances of the underlying copyright litigation, which request was also refused by the District Court, because (1) the studios' antitrust immunity cannot be pierced, under the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action, in the absence of proof that the copyright action was objectively baseless or frivolous; and (2) the District Court thus had no occasion to inquire whether (a) the studios were indifferent to the outcome on the merits of the copyright suit, (b) any damages for infringement would be too low to justify the studios' investment in the suit, or (c) the studios had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process.

Syllabus

Although those who petition government for redress are generally immune from antitrust liability, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523*, such immunity is withheld when petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly" with a competitor's business relationships, *id., at 144*. Petitioner resort hotel operators (collectively, PRE) rented videodiscs to guests for use with videodisc players located in each guest's room and sought to develop a market for the sale of such players to other hotels. Respondent major motion picture studios (collectively, Columbia), **[****2]** which held copyrights to the motion pictures recorded on PRE's videodiscs and licensed the transmission of those motion pictures to hotel rooms, sued PRE for alleged copyright infringement. PRE counterclaimed, alleging that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade in violation of *§§ 1* and *2* of the Sherman Act. The District Court granted summary judgment to PRE on the copyright claim, and the Court of Appeals affirmed. On remand, the District Court granted Columbia's motion for summary judgment on PRE's antitrust claims. Because Columbia had probable cause to bring the infringement action, the court reasoned, the action was no sham and was entitled to *Noerr* immunity. The District Court also denied PRE's request for further discovery on Columbia's intent in bringing its action. The Court of Appeals affirmed. Noting that PRE's sole argument was that the lawsuit was a sham because Columbia did not honestly believe its infringement claim was meritorious, the court found that the existence of probable cause precluded the application of the sham exception as a matter of law and rendered irrelevant any **[****3]** evidence of Columbia's subjective intent in bringing suit.

Held:

1. Litigation cannot be deprived of immunity as a sham unless it is objectively baseless. This Court's decisions establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Id., at 140*. Thus, neither *Noerr* immunity nor its sham exception turns on subjective intent alone. See, *e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503, 100 L. Ed. 2d 497, 108 S. Ct. 1931*. Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition a court should focus on whether the baseless suit conceals "an attempt to interfere directly" with a competitor's business relationships, *Noerr, supra, at 144*, through the "use **[****4]** [of] the governmental *process* -- as opposed to the *outcome* of that process -- as an anticompetitive weapon," *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 113 L. Ed. 2d 382, 111 S. Ct. 1344*. This two-tiered process requires a plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Pp. 55-61.

2. Because PRE failed to establish the objective prong of *Noerr's* sham exception, summary judgment was properly granted to Columbia. A finding that an antitrust defendant claiming *Noerr* immunity had probable cause to sue compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Here, the lower courts correctly found probable cause for Columbia's suit. Since there was no dispute over the predicate facts of the underlying legal proceedings -- Columbia had the exclusive right to show its copyrighted motion pictures publicly -- the court could decide probable cause as a matter of law. A court could reasonably conclude that Columbia's action was an objectively **[****5]** plausible effort to enforce rights, since, at the time the District Court entered summary judgment, there was no clear copyright law on videodisc rental activities; since Columbia might have won its copyright suit in two other Circuits; and since Columbia would have been entitled to press a novel claim, even in the absence of supporting authority, if a similarly situated reasonable litigant could have perceived some likelihood of success. Pp. 62-65.

3. The Court of Appeals properly refused PRE's request for further discovery on the economic circumstances of the underlying copyright litigation, because such matters were rendered irrelevant by the objective legal reasonableness of Columbia's infringement suit. Pp. 65-66.

Counsel: *Patrick J. Coyne* argued the cause for petitioners. With him on the briefs was *James R. Loftis III.*

Andrew J. Pincus argued the cause for respondents. With him on the brief were *Richard J. Favretto, Roy T. Englert, Jr.*, and *Stephen A. Kroft.* [*]

[**6]**

Judges: THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, SCALIA, KENNEDY, and SOUTER, JJ., joined. SOUTER, J., filed a concurring opinion, post, p. 66. STEVENS, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, post, p. 67.

Opinion by: THOMAS

Opinion

[1642] **[*51]** **[***618]** **[**1923]** JUSTICE **THOMAS** delivered the opinion of the Court.

LEdHN[1A][] [1A] ***LEdHN[2A]***[] [2A]This case requires us to define the "sham" exception to the doctrine of antitrust immunity first identified in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, as that doctrine applies in the litigation context. ***HN1***[] Under the sham exception, activity "ostensibly directed toward influencing governmental action" does not qualify for *Noerr* immunity if it "is a mere sham to cover . . . an attempt to interfere directly with the business relationships **[****7]** of a competitor." *Id., at 144*. We hold that ***HN2***[] litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless. The Court of Appeals for the Ninth Circuit refused to characterize as sham a lawsuit that the antitrust defendant admittedly had probable cause to institute. We affirm.

I

Petitioners Professional Real Estate Investors, Inc., and Kenneth F. Irwin (collectively, PRE) operated La Mancha Private Club and Villas, a resort hotel in Palm Springs, California. Having installed videodisc players in the resort's

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[*] *Solicitor General Starr, Acting Assistant Attorney General James, Deputy Solicitor General Wallace, Michael R. Dreeben, Catherine G. O'Sullivan*, and *James M. Spears* filed a brief for the United States as *amicus curiae* urging affirmance.

hotel rooms and assembled a library of more than 200 motion picture titles, PRE rented videodiscs to guests for in-room **[*52]** viewing. PRE also sought to develop a market for the sale of videodisc players to other hotels wishing to offer in-room viewing of prerecorded material. Respondents, Columbia Pictures Industries, Inc., and seven other major motion picture studios (collectively, Columbia), held copyrights to the motion pictures recorded on the videodiscs that PRE purchased. Columbia also licensed the transmission of copyrighted **[****8]** motion pictures to hotel rooms through a wired cable system called Spectradyne. PRE therefore competed with Columbia not only for the viewing market at La Mancha but also for the broader market for in-room entertainment services in hotels.

[1643] In 1983, Columbia sued PRE for alleged copyright infringement through the rental of videodiscs for viewing in hotel rooms. PRE **[**1924]** counterclaimed, charging Columbia with violations of *§§ 1* and *2* of the Sherman Act, 26 Stat. 209, as amended, *15 U.S.C. §§ 1-2*, [1] and various state-law infractions. In particular, PRE alleged that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.

[**9]** The parties filed cross-motions for summary judgment on Columbia's copyright claim and postponed further discovery on PRE's antitrust counterclaims. Columbia did not dispute that PRE could freely sell or lease lawfully purchased videodiscs under the Copyright Act's "first sale" doctrine, see *17 U.S.C. § 109(a)*, **[***619]** and PRE conceded that the playing of videodiscs constituted "performance" of motion pictures, see *17 U.S.C. § 101 (1988 ed. and Supp. III)*. As a result, summary judgment depended solely on whether rental of videodiscs for in-room viewing infringed Columbia's exclusive right to **[*53]** "perform the copyrighted work[s] publicly." *§ 106(4)*. Ruling that such rental did not constitute public performance, the District Court entered summary judgment for *PRE. 228 U.S.P.Q. (BNA) 743 (CD Cal. 1986)*. The Court of Appeals affirmed on the grounds that a hotel room was not a "public place" and that PRE did not "transmit or otherwise communicate" Columbia's motion pictures. *866 F.2d 278 (CA9 1989)*. See *17 U.S.C. § 101 (1988 ed. and Supp. III)*.

On remand, Columbia sought **[****10]** summary judgment on PRE's antitrust claims, arguing that the original copyright infringement action was no sham and was therefore entitled to immunity under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra.* Reasoning that the infringement action "was clearly a legitimate effort and therefore not a sham," 1990-1 Trade Cases P 68,971, p. 63,242 (CD Cal. 1990), the District Court granted the motion:

> "It was clear from the manner in which the case was presented that [Columbia was] seeking and expecting a favorable judgment. Although I decided against [Columbia], the case was far from easy to resolve, and it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well. I find that there was probable cause for bringing the action, regardless of whether the issue was considered a question of fact or of law." *Id.*, at 63,243.

The court then denied PRE's request for further discovery on Columbia's intent in bringing the copyright action and dismissed PRE's state-law counterclaims without prejudice.

The Court of Appeals affirmed. *944 F.2d 1525 (CA9 1991)*. **[****11]** After rejecting PRE's other allegations of anticompetitive conduct, see *id., at 1528-1529*, [2] the court focused on **[*54]** PRE's contention that the copyright

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[1] ***HN3***[] *Section 1* of the Sherman Act prohibits "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. *Section 2* punishes "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

[2] The Court of Appeals held that Columbia's alleged refusal to grant copyright licenses was not "separate and distinct" from the prosecution of its infringement suit. *944 F.2d at 1528*. The court also held that PRE had failed to establish how it could have suffered antitrust injury from Columbia's other allegedly anticompetitive acts. *Id., at 1529*. Thus, whatever antitrust injury Columbia inflicted must have stemmed from the attempted enforcement of copyrights, and we do not consider whether Columbia could have made a valid claim of immunity for anticompetitive conduct independent of petitioning activity. Cf. *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-708, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*.

action was indeed sham and that Columbia could not claim *Noerr* immunity. The Court of Appeals characterized "sham" litigation as one of two types of "abuse of . . . judicial processes": either "'misrepresentations . . . in the adjudicatory process'" or the pursuit of "'a pattern of baseless, repetitive claims'" instituted "'without probable cause, and regardless **[**1925]** of the merits.'" *944 F.2d at 1529* (quoting *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513, 512, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972))*. PRE neither "allege[d] that the [copyright] lawsuit involved misrepresentations" nor "challenge[d] the district court's **[***620]** finding that the infringement action was brought with probable cause, i.e., that the suit was not baseless." *944 F.2d at 1530*. Rather, PRE opposed summary judgment solely by arguing that "the copyright infringement lawsuit [was] a sham because [Columbia] did not honestly believe that **[****12]** the infringement claim was meritorious." *Ibid.*

The Court of Appeals rejected PRE's contention that "subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Ibid.* Instead, the court **[****13]** reasoned that the existence of probable cause "preclude[d] the application of the sham exception as a matter of law" **[1644]** because "a suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine." *944 F.2d at 1531, 1532*. Finally, the court observed that PRE's failure to show that "the copyright infringement action was baseless" rendered irrelevant any "evidence of [Columbia's] subjective intent." *Id., at 1533*. It accordingly rejected PRE's request for further discovery on Columbia's intent.

[*55] The Courts of Appeals have defined "sham" in inconsistent and contradictory ways. [3] We once observed that "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508, n.10, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*. The array of definitions adopted by lower courts demonstrates that this observation was prescient.

[**14]** II

PRE contends that "the Ninth Circuit erred in holding that an antitrust plaintiff must, as a threshold prerequisite **[*56]** . . . , establish that a sham lawsuit is baseless as a matter of law." Brief for Petitioners 14. It invites us to adopt an approach under **[***621]** which either "indifference to . . . outcome," *ibid.*, or failure to prove that a petition for redress of grievances "would . . . have been brought but for [a] predatory motive," Tr. of Oral Arg. 10, would expose a defendant to antitrust liability **[**1926]** under the sham exception. We decline PRE's invitation.

LEdHN[3][] [3]***HN4***[] Those who petition government for redress are generally immune from antitrust liability. We first recognized in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed.*

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[3] Several Courts of Appeals demand that an alleged sham be proved legally unreasonable. See *McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560, and n.12 (CA11 1992)*; *Litton Systems, Inc. v. American Telephone & Telegraph Co., 700 F.2d 785, 809-812 (CA2 1983)*, cert. denied, *464 U.S. 1073, 79 L. Ed. 2d 220, 104 S. Ct. 984 (1984)*; *Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171, 1177 (CA10 1982)*; *Federal Prescription Service, Inc. v. American Pharmaceutical Assn., 214 U.S. App. D.C. 76, 85, 89, 663 F.2d 253, 262, 266 (1981)*, cert. denied, *455 U.S. 928, 71 L. Ed. 2d 472, 102 S. Ct. 1293 (1982)*. Still other courts have held that successful litigation by definition cannot be sham. See, *e.g., Eden Hannon & Co. v. Sumitomo Trust & Banking Co., 914 F.2d 556, 564-565 (CA4 1990)*, cert. denied, *499 U.S. 947, 113 L. Ed. 2d 467, 111 S. Ct. 1414 (1991)*; *South Dakota v. Kansas City Southern Industries, Inc., 880 F.2d 40, 54 (CA8 1989)*, cert. denied *sub nom. South Dakota v. Kansas City Southern R. Co., 493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 726 (1990)*; *Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154, 161 (CA3 1984)*.

Other Courts of Appeals would regard some meritorious litigation as sham. The Sixth Circuit treats "genuine [legal] substance" as raising merely "a *rebuttable* presumption" of immunity. *Westmac, Inc. v. Smith, 797 F.2d 313, 318 (1986)* (emphasis added), cert. denied, ***479 U.S. 1035, 93 L. Ed. 2d 838, 107 S. Ct. 885 (1987)***. The Seventh Circuit denies immunity for the pursuit of valid claims if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (1982)*, cert. denied, ***461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 (1983)***. Finally, in the Fifth Circuit, "success on the merits does not . . . preclude" proof of a sham if the litigation was not "significantly motivated by a genuine desire for judicial relief." *In re Burlington Northern, Inc., 822 F.2d 518, 528 (1987)*, cert. denied *sub nom.* ***Union Pacific R. Co. v. Energy Transportation Systems, Inc., 484 U.S. 1007, 98 L. Ed. 2d 652, 108 S. Ct. 701 (1988)***.

2d 464, 81 S. Ct. 523 (1961), that "the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with **[****15]** respect to a law that would produce a restraint or a monopoly." Id., at 136. Accord, Mine Workers v. Pennington, 381 U.S. 657, 669, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). In light of the government's "power to act in [its] representative capacity" and "to take actions . . . that operate to restrain trade," we reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes." Noerr, 365 U.S. at 137. Nor did we "impute to Congress an intent to invade" the First Amendment right to petition. 365 U.S. at 138.

Noerr, however, withheld **HN5**[] immunity from "sham" activities because "application of the Sherman Act would be justified" when petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." Id., at 144. In *Noerr* itself, we found that a publicity campaign by railroads seeking legislation **[****16]** harmful to truckers was no sham in that the "effort to influence legislation" was "not only genuine but also highly successful." *Ibid.*

LEdHN[1B][] [1B]In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972), we elaborated on *Noerr* in two relevant **[*57]** respects. First, we extended **HN6**[] *Noerr* to "the approach of citizens . . . to administrative agencies . . . and to courts." 404 U.S. at 510.Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers "sought to bar . . . competitors from meaningful access to adjudicatory **[1645]** tribunals and so to usurp that decisionmaking process" by "institut[ing] . . . proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." Id., at 512 (internal quotation marks omitted). We left unresolved the question presented by this case -- whether litigation may **[****17]** be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that **HN7**[] an objectively reasonable effort to litigate cannot be sham regardless of subjective intent. [4]

[**18]** **[***622]** Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness. *Noerr* rejected the contention that an attempt "to influence the passage and enforcement of laws" might lose immunity merely because the lobbyists' "sole purpose . . . was to destroy [their] competitors." 365 U.S. at 138. Nor were we persuaded by a showing that a publicity campaign "was intended to and did in fact injure [competitors] in their relationships with the public and with their customers," since such "direct injury" was merely "an incidental effect of the . . . campaign to influence governmental action." Id., at 143. **[*58]** We reasoned that "the right of the people to **[**1927]** inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." Id., at 139. In short, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." Pennington, 381 U.S. at 670.

LEdHN[4][] [4] **[****19]** Nothing in *California Motor Transport* retreated from these principles. Indeed, we recognized that **HN9**[] recourse to agencies and courts should not be condemned as sham until a reviewing court has "discern[ed] and draw[n]" the "difficult line" separating objectively reasonable claims from "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused." 404 U.S. at 513. Our recognition of a sham in that case signifies that the institution of legal proceedings "without probable cause" will give rise to a sham if such activity effectively "bar[s] . . . competitors from meaningful access to adjudicatory tribunals and so . . . usurp[s] the decisionmaking process." Id., at 512.

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[4] *California Motor Transport* did refer to the antitrust defendants' "purpose to deprive . . . competitors of meaningful access to the . . . courts." 404 U.S. at 512. See also id., at 515 (noting a "purpose to eliminate . . . a competitor by denying him free and meaningful access to the agencies and courts"); id., at 518 (Stewart, J., concurring in judgment) (agreeing that the antitrust laws could punish acts intended "to discourage and ultimately to prevent [a competitor] from invoking" administrative and judicial process). **HN8**[] That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.

LEdHN[1C][] [1C]Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component. We have described a sham as "evidenced by repetitive lawsuits carrying the **[****20]** hallmark of *insubstantial* claims." *Otter Tail Power Co. v. United States, 410 U.S. 366, 380, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)* (emphasis added). We regard as sham "private action that is not genuinely aimed at procuring favorable government action," as opposed to "a valid effort to influence government action." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. at 500, n.4*. And we have explicitly observed that a successful "effort to influence governmental action . . . certainly cannot be characterized as a sham." *Id., at 502*. See also *Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 645, 53 L. Ed. 2d 1009, 97 S. Ct. 2881 (1977)* (BLACKMUN, J., concurring **[***623]** in result) (describing a successful lawsuit as a "genuine attempt to use the . . . adjudicative process legitimately" **[*59]** rather than "'a pattern of baseless, repetitive claims'"). Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. See, **[****21]** *e.g., FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 424, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990)*; *NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913-914, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982)*. Cf. *Vendo, supra, at 635-636, n.6, 639, n.9* (plurality opinion of REHNQUIST, J.); *id., at 644*, n., 645 (BLACKMUN, J., concurring in result). Indeed, by analogy to *Noerr's* sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." *Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743-744, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983)*. Our decisions therefore establish that ***HN10***[] the legality of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Noerr, 365 U.S. at 140*, quoted in *Pennington, supra, at 669*. **[****22]**

Our most recent applications of *Noerr* immunity further demonstrate that ***HN11***[] neither **[1646]** *Noerr* immunity nor its sham exception turns on subjective intent alone. In *Allied Tube, supra, at 503*, and *FTC v. Trial Lawyers, supra, at 424, 427*, and n.11, we refused to let antitrust defendants immunize otherwise unlawful restraints of trade by pleading a subjective intent to **[**1928]** seek favorable legislation or to influence governmental action. Cf. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101, n.23, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* ("Good motives will not validate an otherwise anticompetitive practice"). In *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*, we similarly held that challenges to allegedly sham petitioning activity must be resolved according to objective criteria. We dispelled the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's "purposes were to **[****23]** delay [the **[*60]** plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate . . . administrative and legislative fora." *Id., at 381* (internal quotation marks omitted). We reasoned that such inimical intent "may render the manner of lobbying improper or even unlawful, but does not necessarily render it a 'sham.'" *Ibid.* Accord, *id., at 398* (STEVENS, J., dissenting).

In sum, fidelity to precedent compels us to reject a purely subjective definition of "sham." The sham exception so construed would undermine, if not vitiate, *Noerr*. And despite whatever "superficial certainty" it might provide, a subjective standard would utterly fail to supply "real 'intelligible guidance.'" *Allied Tube, supra, at 508, n.10*.

[*624]** III

LEdHN[1D][] [1D] **LEdHN[5A]**[] [5A] **LEdHN[6]**[] [6]***HN12***[] We now outline a two-part definition **[****24]** of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. [5] Only if challenged litigation is objectively meritless may a court examine the litigant's

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[5] ***HN14***[] A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding" that an ultimately unsuccessful "action must have been unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-422, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978)*. Accord,

subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere **[*61]** *directly* with the business relationships of a competitor," Noerr, supra, at 144 (emphasis added), through the "use [of] the governmental *process* -- as opposed to the *outcome* of that process -- as an anticompetitive weapon," Omni, 499 U.S. at 380 (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Of course, **[****25]** **HN13**[] even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

LEdHN[5B][] [5B]

[**26]** Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham." See Omni, supra, at 382; Allied Tube, 486 U.S. at 500, n.4; Noerr, supra, at 144; Vendo Co. v. Lektro-Vend Corp., supra, at 645 (BLACKMUN, J., concurring in result). **HN15**[] The word "genuine" has both objective and subjective connotations. On **[**1929]** one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may *reasonably* be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (emphasis added). On the other hand, "genuine" also means "sincerely and honestly felt or experienced." Webster's Dictionary, *supra*, at 948. **[****27]** To be sham, therefore, litigation must fail to be **[***625]** "genuine" in both senses of the word. [6]

[1647] **[****28]** **[*62]** IV

LEdHN[2B][] [2B]We conclude that the Court of Appeals properly affirmed summary judgment for Columbia on PRE's antitrust counterclaim. Under the objective prong of the sham exception, the Court of Appeals correctly held that sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief. See 944 F.2d at 1529.

LEdHN[1E][] [1E]**LEdHN[7A]**[] [7A]**HN16**[] The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings, [7] requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. **[****29]** Stewart v. Sonneborn, 98 U.S. 187, 194, 25 L. Ed. 116 (1879); Wyatt

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Hughes v. Rowe, 449 U.S. 5, 14-15, 66 L. Ed. 2d 163, 101 S. Ct. 173 (1980) *(per curiam)*. The court must remember that "even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Christiansburg, supra, at 422.

[6] In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." California Motor Transport, 404 U.S. at 512-513. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. Cf. Fed. Rule Civ. Proc. 60(b)(3) (allowing a federal court to "relieve a party . . . from a final judgment" for "fraud . . . , misrepresentation, or other misconduct of an adverse party"); Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 176-177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965); id., at 179-180 (Harlan, J., concurring).

[7] This tort is frequently called "malicious prosecution," which (strictly speaking) governs the malicious pursuit of *criminal* proceedings without probable cause. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 120, p. 892 (5th ed. 1984). The threshold for showing probable cause is no higher in the civil context than in the criminal. See Restatement (Second) of Torts § 674, Comment e, pp. 454-455 (1977).

v. Cole, 504 U.S. 158, 176, 118 L. Ed. 2d 504, 112 S. Ct. 1827 (1992) (REHNQUIST, C. J., dissenting); T. Cooley, Law of Torts *181. Cf. Wheeler v. Nesbitt, 65 U.S. 544, 549-550, 16 L. Ed. 765 (1861) (related tort for malicious prosecution of criminal charges). Probable cause to institute civil proceedings requires no more than a "reasonable belief that there is a chance that [a] claim **[*63]** may be held valid upon adjudication" (internal quotation marks omitted). Hubbard v. Beatty & Hyde, Inc., 343 Mass. 258, 262, 178 N.E.2d 485, 488 (1961); Restatement (Second) of Torts § 675, Comment e, pp. 454-455 (1977). Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. See Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., 120 U.S. 141, 149, 30 L. Ed. 614, 7 S. Ct. 472 (1887); Wheeler, supra, at 551; Liberty Loan Corp. of Gadsden v. Mizell, 410 So. 2d 45, 48 (Ala. 1982). **[****30]** Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr's* sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause. Stewart, supra, at 194; Wheeler, supra, at 551; 2 C. **[**1930]** Addison, Law **[***626]** of Torts § 1, P 853, pp. 67-68 (1876); T. Cooley, *supra*, at *184. ***HN17***[] When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Under our decision today, therefore, a proper probable-cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.

LEdHN[7B][] [7B]

[**31]** ***LEdHN[2C]***[] [2C]***LEdHN[8]***[] [8]The District Court and the Court of Appeals correctly found that Columbia had probable cause to sue PRE for copyright infringement. Where, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law. Crescent, supra, at 149;Stewart, supra, at 194;Nelson v. Miller, 227 Kan. 271, 277, 607 P.2d 438, 444 (1980);Stone v. Crocker, 41 Mass. 81, 84-85 (1831); J. Bishop, Commentaries on Non-Contract Law § 240, p. 96 (1889). See also Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28, 68 L. Ed. 146, 44 S. Ct. 52 (1923) ("The question is not whether [the defendant] thought the facts to **[*64]** constitute probable cause, but whether the court thinks they did"). Columbia enjoyed the "exclusive right . . . to perform [its] copyrighted" motion pictures "publicly." 17 U.S.C. § 106(4). Regardless of whether it intended **[****32]** any monopolistic or predatory use, Columbia acquired this statutory right for motion pictures as "original" audiovisual "works of authorship fixed" in a "tangible medium of expression." § 102(a)(6). Indeed, to condition a copyright upon a demonstrated lack of anticompetitive intent would upset the notion of copyright as a "limited grant" of "monopoly privileges" intended simultaneously "to motivate the creative activity of authors" and "to give the public appropriate access to their work product." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984).

LEdHN[2D][] [2D]When the District Court entered summary judgment for PRE on Columbia's copyright claim in 1986, it was by no means **[1648]** clear whether PRE's videodisc rental activities intruded on Columbia's copyrights. At that time, the Third Circuit and a District Court within the Third Circuit had held that the rental of video cassettes for viewing in on-site, private screening rooms infringed on the copyright owner's right of public performance. Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (1984); **[****33]** Columbia Pictures Industries, Inc. v. Aveco, Inc., 612 F. Supp. 315 (MD Pa. 1985), aff'd, 800 F.2d 59 (1986). Although the District Court and the Ninth Circuit distinguished these decisions by reasoning that hotel rooms offered a degree of privacy more akin to the home than to a video rental store, see 228 U.S.P.Q. (BNA) at 746; 866 F.2d 278, 280-281, copyright scholars criticized both the reasoning and the outcome of the Ninth Circuit's decision, see 1 P. Goldstein, Copyright: Principles, Law and Practice § 5.7.2.2, pp. 616-619 (1989); 2 M. Nimmer & D. Nimmer, Nimmer on Copyright § 8.14[C][3], pp. 8-168 to 8-173 (1992). The Seventh Circuit expressly "decline[d] to follow" the Ninth Circuit and adopted instead **[***627]** the Third Circuit's definition of a "public place." *Video* **[*65]** Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020, cert. denied, *502 U.S. 861 (1991)*. In light of the unsettled condition of the law, Columbia plainly had probable cause to sue.

Any reasonable copyright owner in Columbia's position could have believed that it had some chance of winning **[****34]** an infringement suit against PRE. Even though it did not survive PRE's motion for summary judgment, Columbia's copyright action was arguably "warranted by existing law" or at the very least was based on an objectively "good faith argument for the extension, modification, or **[**1931]** reversal of existing law." *Fed. Rule Civ. Proc. 11*. By the time the Ninth Circuit had reviewed all claims in this litigation, it became apparent that Columbia might have won its copyright suit in either the Third or the Seventh Circuit. Even in the absence of supporting authority, Columbia would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success. A court could reasonably conclude that Columbia's infringement action was an objectively plausible effort to enforce rights. Accordingly, we conclude that PRE failed to establish the objective prong of *Noerr's* sham exception.

LEdHN[2E][] [2E] ***LEdHN[9]***[] [9]Finally, the Court of Appeals properly refused PRE's request for further **[****35]** discovery on the economic circumstances of the underlying copyright litigation. As we have held, PRE could not pierce Columbia's *Noerr* immunity without proof that Columbia's infringement action was objectively baseless or frivolous. Thus, the District Court had no occasion to inquire whether Columbia was indifferent to the outcome on the merits of the copyright suit, whether any damages for infringement would be too low to justify Columbia's investment in the suit, or whether Columbia had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process. Contra, *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (CA7 1982)*, cert. denied, *461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 (1983)*. Such matters concern Columbia's **[*66]** economic motivations in bringing suit, which were rendered irrelevant by the objective legal reasonableness of the litigation. The existence of probable cause eliminated any "genuine issue as to any material fact," *Fed. Rule Civ. Proc. 56(c)*, and summary judgment properly issued.

We affirm the judgment of the Court of Appeals.

So ordered.

Concur by: **[****36]** SOUTER; STEVENS

Concur

JUSTICE **SOUTER**, concurring.

The Court holds today that a person cannot incur antitrust liability merely by bringing a lawsuit as long as the suit is not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Ante*, at 60. The Court assumes that the District Court and the Court of Appeals were finding this very test satisfied when they concluded that Columbia's suit against PRE for copyright infringement was supported by "probable **[***628]** cause," a standard which, as the Court explains it in this case, requires a "reasonable belief that there is a chance that [a] claim may be held valid upon adjudication." *Ante*, at 62-63 (internal quotation marks omitted). I agree that this term, so defined, is rightly read as expressing the same test that the Court announces today; the expectation of a reasonable litigant can be dubbed a "reasonable belief," and realistic expectation of success on the merits can be paraphrased as "a chance of being held valid upon adjudication."

Having established this identity of meaning, however, the Court proceeds to discuss the particular facts **[****37]** of this case, not in terms of its own formulation of objective baselessness, but in terms of "probable cause." Up to a point, this is understandable; the Court of Appeals used the term "probable cause" to represent objective reasonableness, and it **[1649]** seems natural to use the same term when reviewing that court's conclusions. Yet as the Court acknowledges, *ante*, at 63, since there is no dispute over the facts underlying the suit **[*67]** at issue here, the question whether that suit was objectively baseless is purely one of law, which we are obliged to consider *de novo*. There is therefore no need to frame the question in the Court of Appeals's terms. Accordingly, I would prefer to put the question in our own terms, and to conclude simply that, on the undisputed facts and the law as it stood when Columbia filed its suit, a reasonable litigant could realistically have expected success on the merits.

My preference stems from a concern that other courts could read today's opinion as **[**1932]** transplanting every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal ***antitrust law***. I do not understand the Court to mean anything **[****38]** of the sort, however, any more than I understand its citation of *Rule 11 of the Federal Rules of Civil Procedure*, see *ante*, at 65, to signal the importation of every jot and tittle of the law of attorney sanctions. Rather, I take the Court's use of the term "probable cause" merely as shorthand for a reasonable litigant's realistic expectation of success on the merits, and on that understanding, I join the Court's opinion.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

While I agree with the Court's disposition of this case and with its holding that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent," *ante*, at 57, I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court's opinion. Specifically, I disagree with the Court's equation of "objectively baseless" with the answer to the question whether any "reasonable litigant could realistically expect success on the merits." [1] **[****40]** There might **[***629]** well be lawsuits that fit the latter definition **[*68]** but can be shown to be objectively *unreasonable*, and thus shams. It might not be objectively reasonable **[****39]** to bring a lawsuit just because some form of success on the merits -- no matter how insignificant -- could be expected. [2] With that possibility in mind, the Court should avoid an unnecessarily broad holding that it might regret when confronted with a more complicated case.

As the Court recently explained, a "sham" is the use of "the governmental *process* -- as opposed to the *outcome* of that process -- as an anticompetitive weapon." *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*. The distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court's decision whether a particular filing, or series of filings, is a sham. The label "sham" is appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless **[****41]** sought to impose a collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to governmental agencies. It might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries **[*69]** imposed on its competitor by the legal process alone. Litigation filed or pursued for such collateral purposes is fundamentally different from a case in which the relief sought in the litigation itself would give the plaintiff a competitive advantage or, perhaps, exclude a potential competitor from entering a market with a product that either infringes the plaintiff's patent or copyright or violates an exclusive franchise granted by a governmental body.

[1933]** The case before us today is in the latter, obviously legitimate, category. There was no unethical or other improper use of the judicial system; instead, respondents invoked the federal court's jurisdiction to determine **[1650]** whether they could lawfully restrain competition with petitioners. The relief they sought in their original action, **[****42]** if granted, would have had the anticompetitive consequences authorized by federal copyright law. Given that the original copyright infringement action was objectively reasonable -- and the District Court, the Court of Appeals, and this Court all agree that it was -- neither the respondents' own measure of their chances of success

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[1] *Ante*, at 60. See also *ante*, at 62: "Sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief"; *ante*, at 60: "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr* . . . ." But see *ante*, at 62: "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." And see *ante*, at 65: "Columbia's copyright action was arguably 'warranted by existing law'" under the standards of *Federal Rule of Civil Procedure 11*. These varied restatements of the Court's new test make it unclear whether it is willing to affirm the Court of Appeals by any of these standards individually, or by all of them together.

[2] The Court's recent decision in *Farrar v. Hobby, 506 U.S. 103, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992)* makes me wonder whether "10 years of litigation and two trips to the Court of Appeals" to recover "one dollar from one defendant," *id., at 116* (O'CONNOR, J., concurring), would qualify as a reasonable expectation of "favorable relief" under today's opinion.

nor an alleged goal of harming petitioners provides a sufficient basis for treating it as a **[***630]** sham. We may presume that every litigant intends harm to his adversary; moreover, uncertainty about the possible resolution of unsettled questions of law is characteristic of the adversary process. Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek a competitive advantage in a doubtful case. Thus, the Court's disposition of this case is unquestionably correct.

I am persuaded, however, that all, or virtually all, of the Courts of Appeals that have reviewed similar claims (involving a single action seeking to enforce a property right) would have reached the same conclusion. To an unnecessary degree, therefore, the Court has set up a straw man to justify its elaboration of **[****43]** a two-part test describing all potential shams. Of the 10 cases cited by the Court as evidence of **[*70]** widespread confusion about the scope of the "sham" exception to the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, and *Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, see *ante*, at 55, n.3, 5 share three important characteristics with this case: The alleged injury to competition was defined by the prayer for relief in the antitrust defendant's original action; there was no unethical conduct or collateral harm "external to the litigation or to the result reached in the litigation"; [3] **[****44]** and there had been no series of repetitive claims. Each of those courts concluded, as this Court does today, that allegations of subjective anticompetitive motivation do not make an otherwise reasonable lawsuit a sham. [4]

In each of the five other cases cited by the Court, the plaintiff alleged antitrust violations more **[****45]** extensive than the filing of a single anticompetitive lawsuit. In three of those cases the core of the alleged antitrust violation lay in the act of petitioning the government for relief: One involved the repetitive filing of baseless administrative claims, [5] **[****47]** another involved **[*71]** extensive evidence **[**1934]** of anticompetitive motivation **[***631]** behind the lawsuit that followed an elaborate and unsuccessful lobbying effort, [6] **[****48]** and in the **[1651]** third a

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[3] *Omni Resource Development Corp. v. Conoco, Inc., 739 F.2d 1412, 1414 (CA9 1984)* (Kennedy, J.).

[4] See *McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552 (CA11 1992)* (unsuccessful action to enjoin alleged violations of Alabama's Motor Fuel Marketing Act not a sham); *Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171 (CA10 1982)* (unsuccessful action alleging misappropriation of trade secrets not a sham); *Eden Hannon & Co. v. Sumitomo Trust & Banking Co., 914 F.2d 556 (CA4 1990)* (successful action imposing constructive trust on profits derived from breach of nondisclosure agreement not a sham); *Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (CA3 1984)* (successful copyright infringement not a sham); *South Dakota v. Kansas City Southern Industries, Inc., 880 F.2d 40 (CA8 1989)* (successful action to enjoin breach of contract not a sham; the court was careful to point out, however, that success does not "categorically preclude a finding of sham." *Id., at 54, n.30*).

[5] *Litton Systems, Inc. v. American Telephone & Telegraph Co., 700 F.2d 785 (CA2 1983)*, cert. denied, ***464 U.S. 1073, 79 L. Ed. 2d 220, 104 S. Ct. 984 (1984)***. The Second Circuit found that AT&T's continued filing of administrative tariffs long after those claims had become objectively unreasonable supported a jury's sham finding. AT&T's anticompetitive actions were in fact so far removed from the act of petitioning the government for relief that Chief Judge Oakes and Judge Meskill also held, in reliance on *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*, and *Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)* (plurality opinion), that tariff filings with the Federal Communications Commission were acts of private commercial activity in the marketplace rather than requests for governmental action, and thus were not even arguably protected by the *Noerr-Pennington* doctrine. *Litton Systems, 700 F.2d at 806-809*.

[6] *Westmac, Inc. v. Smith, 797 F.2d 313 (CA6 1986)*, cert. denied, ***479 U.S. 1035, 93 L. Ed. 2d 838, 107 S. Ct. 885 (1987)***. Although the Sixth Circuit did hold that the genuine substance of an anticompetitive lawsuit creates a rebuttable presumption of objective reasonableness, given the facts of that case -- in which the antitrust plaintiff had presented strong evidence that the defendants' lawsuit, which followed a long and unsuccessful lobbying effort, had been motivated solely for the anticompetitive harm the judicial process would inflict on it -- that modest reservation was probably wise. Evidence of anticompetitive animus in *Westmac* was in fact so great that Chief Judge Merritt thought that the plaintiff *had* successfully rebutted the presumptive reasonableness of defendants' lawsuit. The delay from the defendants' combined lobbying and litigation attack had allegedly sent the plaintiff into bankruptcy, and memos from one defendant to its attorney had stated, "'If this [lobbying activity] doesn't succeed, start a lawsuit -- bonds won't sell,'" *797 F.2d at 318*, and (in a statement repeated to a codefendant), "'if nothing else,

collateral lawsuit was only one of the many ways in which the antitrust defendant had allegedly tried to put the plaintiff out of business. [7] In each **[*72]** of these cases the court showed appropriate deference to our opinions in *Noerr* and *Pennington*, in which we held that the act of petitioning the government (usually in the form of lobbying) deserves especially broad protection from antitrust liability. The Court can point to nothing in these three opinions that would require a different result here. The two remaining cases -- in which the Courts of Appeals did state that a successful lawsuit could be a sham -- did not involve lobbying, but did contain much broader and more complicated allegations than petitioners **[****46]** presented below. [8] Like the three opinions described above, these decisions should not be expected to offer guidance, nor be blamed for spawning confusion, in a case alleging that the filing of a single lawsuit violated the Sherman Act.

[**49]** **[***632]** Even in this Court, more complicated cases, in which, for example, the alleged competitive injury has involved something more than the threat of an adverse outcome in a single **[*73]** lawsuit, have produced less definite rules. Repetitive filings, some of which are **[**1935]** successful and some unsuccessful, may support an inference that the process is being misused. *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*. In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive. Moreover, a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market and to interfere with a potential competitor's financing without any interest in the outcome of the lawsuit itself, see *Otter Tail Power Co. v. United States, 410 U.S. 366, 379, n.9, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*; *Westmac, Inc. v. Smith, 797 F.2d 313, 322 (CA6 1986)* (Merritt, C. J., dissenting). It is in more complex cases that courts have required a more sophisticated **[****50]** analysis -- one going beyond a mere evaluation of the merits of a single claim.

In one such case Judge Posner made the following observations about the subtle distinction between suing a competitor to get damages and filing a lawsuit only in the hope that the expense and burden of defending it will make the defendant abandon its competitive behavior:

> "But we are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law. Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit -- its chances of winning, or the damages it could hope to get if it did win, were too small compared to what it would

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we'll delay sale of the bonds,'" *id., at 322* (Merritt, C. J., dissenting) (emphasis omitted). In any event, the Sixth Circuit rule -- to the extent that it would apply in a case as simple as this one -- would result in the same conclusion we reach here.

[7] *Federal Prescription Service, Inc. v. American Pharmaceutical Assn., 214 U.S. App. D.C. 76, 663 F.2d 253 (1981)*, cert. denied, ***455 U.S. 928, 71 L. Ed. 2d 472, 102 S. Ct. 1293 (1982)***. In that case, the antitrust plaintiff alleged a 2-decade long conspiracy to lobby, boycott, and sue it (in state licensing boards, state legislatures, the marketplace, and both state and federal courts) out of existence. In spite of those allegations, the Court of Appeals found that the defendant's actions, which primarily consisted in lobbying for the abolition of plaintiff's mail-order prescription business, were immune under *Noerr-Pennington*.

[8] In *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (1982)* (Posner, J.), cert. denied, ***461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 (1983)***, the antitrust defendant's alleged violations of several provisions of the Sherman and Clayton Acts included much more than the filing of a single lawsuit; they encompassed a broad scheme of monopolizing the entire relevant market by: purchasing patents; threatening to file many other, patently groundless lawsuits; acquiring a competitor; dividing markets; and filing a fraudulent patent application. In *In re Burlington Northern, Inc., 822 F.2d 518 (CA5 1987)*, cert. denied, ***484 U.S. 1007 (1988)***, the plaintiffs alleged, and produced evidence to support their theory, that the defendant had filed suit solely to cause them a delay of crippling expense, and the defendants had either brought or unsuccessfully defended a succession of related lawsuits involving plaintiff's right to compete. In both of these cases the Courts of Appeals ably attempted to balance strict enforcement of the antitrust laws with possible abuses of the judicial process. That they permitted some reliance on subjective motivation -- as even we have done in cases alleging abuse of judicial process, see *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513-518, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)* -- is neither surprising nor relevant in a case involving no such allegations.

have to spend on the litigation -- except that it wanted to **[****51]** **[*74]** use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability **[1652]** in the suit and that this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms. In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome. See *City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1265-66 (S.D. Fla. 1980)*.

"Some students of ***antitrust law*** would regard all of our examples of anticompetitive litigation as fanciful, and in all the evidentiary problems of disentangling real from professed motives would be acute. Concern with the evidentiary problems may explain why **[***633]** some courts hold that a single lawsuit cannot provide a basis for an antitrust claim (see Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington* **[****52]** *Doctrine*, 45 U. Chi. L. Rev. 80, 109-10 (1977)) -- an issue we need not face here since three improper lawsuits are alleged, and it can make no difference that they were not all against Grip-Pak. Still, we think it is premature to hold that litigation, unless malicious in the tort sense, can never be actionable under the antitrust laws. The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, see, e.g., *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-64 (7th Cir. 1982)*, it becomes a matter of antitrust concern. This is **[*75]** not to say that litigation is actionable under the antitrust laws merely because **[**1936]** the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, **[****53]** and deter others, by the process itself -- regardless of outcome -- of litigating. The difficulty of determining the true purpose is great but no more so than in many other areas of ***antitrust law***." *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (1982)*.

It is important to remember that the distinction between "sham" litigation and genuine litigation is not always, or only, the difference between lawful and unlawful conduct; objectively reasonable lawsuits may still break the law. For example, a manufacturer's successful action enforcing resale price maintenance agreements, [9] restrictive provisions in a license to use a patent or a trademark, [10] or an equipment lease, [11] may evidence, or even constitute, violations of the antitrust laws. On the other hand, just because a sham lawsuit has grievously harmed a competitor does not necessarily mean that it has violated the Sherman Act. See *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455-459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. The rare plaintiff who successfully proves a sham must still satisfy the exacting elements of an antitrust demand. See *ante*, at 61. **[****54]**

In sum, in this case I agree with the Court's explanation of why respondents' copyright infringement action was not "objectively baseless," and why allegations of improper subjective **[*76]** motivation do not make such a lawsuit a "sham." I would not, however, use this easy case as a **[***634]** vehicle for **[****55]** announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process. Accordingly, I concur in the Court's judgment but not in its opinion.

References

[9] *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*; *Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745 (1951)*.

[10] *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)*; *Farbenfabriken Bayer A. G. v. Sterling Drug, Inc., 307 F.2d 207 (CA3 1962)*.

[11] *International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*; *United Shoe Machinery Corp. v. United States, 258 U.S. 451, 66 L. Ed. 708, 42 S. Ct. 363 (1922)*.

Noerr-Pennington doctrine, exempting from federal antitrust laws joint efforts to influence governmental action--Supreme Court cases

52 Am Jur 2d, Malicious Prosecution 50- 55; *54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 108*

9 Am Jur Trials 293, Copyright Infringement Litigation; 24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 1, *2*

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9.5

L Ed Index, Malicious Prosecution; Noerr-Pennington Doctrine; Probable Cause; Restraints of Trade, Monopolies, and Unfair Trade Practices; Sham

ALR Index, Farce, Mockery, and Sham; Malicious Prosecution; Noerr-Pennington Doctrine; Probable Cause; Restraints of Trade and Monopolies

Annotation References :

"Sham" exception to application of Noerr-Pennington doctrine, exempting from federal antitrust laws joint **[****56]** efforts to influence governmental action. 71 ALR Fed 723.

Application of doctrine exempting from federal antitrust laws joint efforts to influence legislative or executive action. 17 ALR Fed 645.

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Adams Insulation Co. v. Orange County Dist. Council of Carpenters

United States Court of Appeals for the Ninth Circuit

April 5, 1993, Argued, Submitted, Pasadena, California ; May 6, 1993, Filed

No. 91-56428

Reporter
1993 U.S. App. LEXIS 10522 *

ADAMS INSULATION COMPANY, INC., Plaintiff-Appellant, v. ORANGE COUNTY DISTRICT COUNCIL OF CARPENTERS; AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; CARPENTERS LOCAL UNION NO. 2361; CARPENTERS LOCAL UNION NO. 1506; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; VENTURA COUNTY DISTRICT COUNCIL OF CARPENTERS, et al., Defendants-Appellee.

Notice: **[*1]** THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

Subsequent History: Reported as Table Case at: *993 F.2d 881, 1993 U.S. App. LEXIS 18211*.

Prior History: Appeal from the United States District Court for the Central District of California. D.C. No. CV-79-2124-MRP. Mariana R. Pfaelzer, District Judge, Presiding

Disposition: APPEAL DISMISSED.

Core Terms

costs, district court, noticed

Judges: Before: WALLACE, Chief Judge; O'SCANNLAIN and FERNANDEZ, Circuit Judges.

Opinion

ORDER

The appellant, Adams Insulation, brought suit against a number of labor unions alleging a conspiracy in violation of federal ***Antitrust law***. After judgment was entered against Adams Insulation in the district court, the defendant unions filed a motion to bill costs. On October 30, 1991, the unions filed a notice indicating that their application for costs would be presented to the clerk of the court on November 13, 1991.

Under Local Rule 16.5 of the Central District of California, a party must file objections to items specified in a Bill of Costs no later than seven days before the date noticed for the application. Adams Insulation filed a memorandum in opposition to the unions' motion to bill costs on November 12, 1991, one day before the date noticed for the application. Thus, Adams **[*2]** Insulation's objection was untimely and the clerk was entitled to disregard it. *See Lee v. United States, 238 F.2d 341, 343-44 (9th Cir. 1956)*.

Both *Federal Rule of Civil Procedure 54(d)* and Local Rule 16.7 of the Central District of California provide a mechanism through which a party may seek district court review of the clerk's assessment of costs. Adams

Insulation, however, made no effort to request district court review of the clerk's award. We therefore have no power to review the finding of the clerk. *Jacobson v. Rose, 592 F.2d 515, 521 (9th Cir. 1978)* (quoting *Guffey v. Alaska & P.S.S. Co., 130 F. 271, 279 (9th Cir. 1904))*, *cert. denied, 442 U.S. 930 (1979)*.

APPEAL DISMISSED.

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Pennsylvania v. Russell Stover Candies, Inc.

United States District Court for the Eastern District of Pennsylvania

May 6, 1993, Decided ; May 6, 1993, Filed, Entered

CIVIL ACTION NO. 93-1972

Reporter

1993 U.S. Dist. LEXIS 6024 *; 1993-1 Trade Cas. (CCH) P70,224

COMMONWEALTH OF PENNSYLVANIA v. RUSSELL STOVER CANDIES, INC., et al.

Core Terms

chocolates, boxed, drugstores, chain, manufacturers, retail, merchandisers, products, Memorandum, gift, acquisition, preliminary injunction, parens patriae, confectionery, purposes, anti trust law, marketers, market share, competitor, antitrust, compete, sales, branded, prices, outlets, shelf, space, relevant market, regional, injunction

LexisNexis® Headnotes

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Grounds for Injunctions**

In order to determine whether a preliminary injunction should issue, the court must weigh the following factors: 1) whether the plaintiff has a reasonable probability of success on the merits; 2) whether the plaintiff will be irreparably harmed if the injunction does not issue; 3) whether other interested parties will be harmed by either a grant or denial of the injunction; and 4) whether issuance of the injunction is in the public interest. The plaintiff has the burden of showing that it will likely succeed on the merits and that it will be irreparably harmed if the preliminary injunction does not issue. If the plaintiff makes this prerequisite showing, then the court must determine the weight of the other two factors, namely, harm to other interested parties and the public interest, to determine if the preliminary injunction should issue.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

A preliminary injunction is ordinarily granted for the purpose of maintaining the status quo during the litigation.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN3[] **Remedies, Injunctions**

Divestiture is an appropriate remedy under the Clayton Act.

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Injunctions, Mandatory Injunctions**

Under appropriate circumstances a district court may direct mandatory preliminary injunctive relief.

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] **Injunctions, Mandatory Injunctions**

If a plaintiff seeks to alter the status quo by requesting mandatory preliminary relief, the plaintiff's burden of establishing entitlement to that preliminary relief is heightened.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Justiciability > Standing > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN6[] **Public Enforcement, State Civil Actions**

Parens patriae is a concept of standing utilized to allow states to protect quasi-sovereign interests such as the health, comfort, and welfare of the people of a state and the general economy of that state. A state can sue as parens patriae for the protection of its people or its general economy. This ability of a state to seek protection of its general economy in the federal as well as the state forum includes suits under federal ***antitrust law***.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Justiciability > Standing > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN7[] **Public Enforcement, State Civil Actions**

A state that sues as parens patriae must seek to redress an injury to an interest that is separate from the interests of particular individuals.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Justiciability > Standing > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN8[] **Public Enforcement, State Civil Actions**

A state may seek injunctive relief for harm to its general economy that is caused by a violation of federal ***antitrust law***.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN9[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN10[] **Clayton Act, Claims**

Ordinarily, the plaintiff bears the burden of proving the relevant geographic market as an essential element of its antitrust claim.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN11[] **Clayton Act, Claims**

In order to show the likely effect on an area of competition, the plaintiff must show what the line of commerce is that it contends may be substantially effected. This is determined with reference to the relevant product market.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN12[] **Clayton Act, Claims**

The boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists. In determining the relevant product market, well-defined submarkets may exist which constitute the relevant product market for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN13[] Clayton Act, Claims

Where the antitrust plaintiff articulates product differences along a spectrum of price and quality, the product market distinctions are economically meaningless and unrealistic. However, the price and quality distinctions are relevant in analyzing the effect conduct will likely have on competition.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN14[] Clayton Act, Claims

In order to utilize the Herfindahl-Hirschmann Index to support its case, a plaintiff must establish the relevant market and then must provide reliable data establishing the market share of the participants in that market.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

HN15[] Clayton Act, Defenses

Once the plaintiff makes out a prima facie showing that the acquisition may likely substantially lessen competition, the defendant can rebut the evidence by showing that the barriers to entry are not significant.

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For LOCAL 6, BAKERY, CONFECTIONERY & TOBACCO WORKERS UNION, AFL-CIO, MOVANT: MICHAEL KATZ, METANZE & KATZ, 15TH & LOCUST STREETS, 1200 LEWIS TOWER BLDG., 12TH FL., PHILA, PA 19102, USA. For PITTSBURGH FOOD & BEVERAGE COMPANY, INC., D. L. CLARK COMPANY, JAMES RAWLINGS, MOVANTS: DAVID J. HUMPHREYS, HUMPHREYS, NUBANI & BREAULT, P.C., 707 GRANT STREET, 3800 GULF TOWER, PITTSBURGH, PA 15219-1913, USA.

Judges: **[*1]** VanArtsdalen

Opinion by: BY THE COURT; DONALD W. VANARTSDALEN

Opinion

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, S.J.

May 6, 1993

On April 15, 1993, plaintiff, the Commonwealth of Pennsylvania, filed this action alleging that the acquisition of the Division of Pet, Inc. (Pet), known as Whitman's Chocolates (Whitman's), by Whitman's Candies, Inc. (WCI), violates federal ***antitrust law***, specifically section 7 of the Clayton Act, *15 U.S.C. § 18*. Pennsylvania seeks an injunction preventing Pet from transferring any remaining assets in its Whitman's Chocolate Division to WCI, and ordering that WCI divest itself of assets that have been previously transferred to it by Pet. Defendants Russell Stover, Inc. (Stover) and WCI have filed a motion to dismiss this action, joined in by Pet, contending that the Commonwealth of Pennsylvania lacks standing to seek the requested relief. (filed Doc. No. 12).

After holding a conference on plaintiff's application for a temporary restraining order filed with the complaint, I scheduled a hearing for April 26, 1993, on plaintiff's application for a temporary restraining order and/or preliminary injunction. (filed Doc. No. 5). Presently **[*2]** pending are plaintiff's motion for a preliminary injunction requesting essentially mandatory divestiture by WCI, and defendants' motion to dismiss for lack of standing. On April 26, 1993, and on April 27, 1993, a full evidentiary hearing and argument was held on these motions. Defendants' motion to dismiss will be denied as I find that plaintiff, the Commonwealth of Pennsylvania, has *parens patriae* standing to maintain this action. However, plaintiff has failed to show a likelihood of success on the merits. Therefore, plaintiff's motion for a preliminary injunction will be denied. In accordance with *Federal Rule of Civil Procedure 52*, I enter the following findings of fact and conclusions of law.

I. *Findings of Fact*

1. Plaintiff is the Commonwealth of Pennsylvania, suing in its *parens patriae* capacity.

2. Defendant, Pet, Inc., (Pet) is a publicly held corporation based in Missouri that operates a division known as the Whitman's Chocolates Division (Whitman's), producer of the "Whitman's Sampler," boxed chocolates, and other confectionery items.

3. Defendant, Whitman's Candies Inc. (WCI), is a Missouri Corporation owned by Scott Ward, Tom Ward, and Linda Ward. (P-unmarked, **[*3]** Merrifield Dep. at 45-46). [1]

4. Defendant, Russell Stover, Inc. (Stover), is a privately held company based in Missouri. It manufactures and sells boxed chocolates and other confectionery items.

5. Whitman's has experienced declining sales and profits in recent years.

6. Pet has no intent to continue manufacturing the Whitman's line of chocolates after the scheduled plant closing in May, 1993, regardless of the outcome of this proceeding.

7. In June of 1992, Pet announced its intention to sell Whitman's, either as an operating concern, if possible, otherwise to liquidate Whitman's by sale of its assets.

8. In its efforts to sell the assets of the Whitman's Division, Pet engaged the investment banking firm of Lazard Freres & Co. (Lazard).

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[1] Plaintiff's exhibits will be referred to as P-unmarked, P-1, etc., and defendants' as D-1, etc.

9. Lazard prepared a confidential memorandum, (P-8, Lazard Memorandum), to be given to parties seriously interested in purchasing Whitman's assets.

10. The Lazard Memorandum was given **[*4]** only to those apparently seriously interested parties who agreed to sign a confidentiality agreement.

11. Although several parties indicated interest in purchasing the assets of Whitman's, only approximately six or seven parties obtained a copy of the Lazard Memorandum.

12. On or about March 5, 1993, WCI purchased certain assets of Whitman's from Pet, including the Whitman's Trademark, recipes, trade secrets, and certain equipment.

13. Termination of production at Whitman's only plant, located in Philadelphia, Pennsylvania, is contemplated for early May, 1993, after exhaustion of Whitman's existing raw materials and packaging.

14. Under the agreement of sale, Pet may continue to use the Trademark, and various other Whitman's assets until final distribution and sale of Whitman's product inventory which is in existence at the time of the termination of production at Whitman's Plant.

15. It is unclear what the relevant product market is for antitrust purposes.

16. Gift boxed chocolates, brand name boxed chocolates, and boxed chocolates are similar products distributed through similar outlets and are substitutes.

17. Other boxed confectionery products, such as peanut brittle, fudge, **[*5]** and nut clusters, compete with boxed chocolate for sales, and are substitutes.

18. The boxed chocolate industry and the confectionery industry in general are highly competitive.

19. Distribution outlets that sell boxed chocolates to ultimate consumers include national and regional chain drugstores, national and regional mass merchandisers, manufacturer's retail stores, local drugstores, department stores, and specialty candy stores. Ultimate consumers also purchase boxed chocolates and other confectionery items through mail order catalogues published by various distributors, including manufacturers and wholesalers.

20. Chain drugstores and mass merchandisers, [2] as purchasers of boxed chocolates, have considerable if not complete control over what brand of boxed chocolates are sold and displayed in their stores and the retail pricing of those items. Some chain drugstores and some mass merchandisers frequently select Stover's and Whitman's boxed chocolates from a variety of manufacturers' boxed chocolates to sell nationally.

[*6] 21. Stover's boxed chocolates and Whitman's boxed chocolates directly compete for sales.

Testimony

Ms. Beatrice Cozzolino

22. Beatrice Cozzolino, a forklift operator at Whitman's, testified that at annual meetings Whitman's executives mentioned Stover as its competitor. Ms. Cozzolino also testified that the Whitman's employees received notice that the plant will close on or about May 8, 1993.

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[2] Chain drugstores include companies such as Rite-Aid, Thrift Drugs, Eckerd's, Pharmor, Revco and CVS, and mass merchandisers include companies such as K-Mart, Wal-Mart, and Target. The witnesses interchangeably referred to chains and chain drugstores, and also interchangeably referred to mass merchandisers, mass marketers, and mass marketeers.

Ms. Blanche Standback

23. Blanche Standback, an hourly supervisor in packaging who has worked for Whitman's for thirty-nine years, testified, based on discussions at annual employee meetings, that Whitman's considered Stover as its "chief competitor." *Mr. Jay Shoemaker*

24. Jay Shoemaker, former President and CEO of Whitman's from approximately August, 1990, until approximately June, 1991, was hired by Whitman's because of his experience with and knowledge of mass merchandisers and chain drugstores. Mr. Shoemaker described his hiring as a "turn around situation."

25. According to Mr. Shoemaker, previous to his employment at Whitman's, Pet had neglected Whitman's and advertising for Whitman's products had been eliminated. Also, he testified that Whitman's had suffered **[*7]** "customer deterioration." Part of Whitman's difficulties stemmed from Whitman's rapid price increases, which were not followed by competitors. Whitman's strategy at the time Mr. Shoemaker was President and CEO was to make Whitman's boxed chocolates more attractive for purchase as a gift.

26. The channels of distribution, according to Mr. Shoemaker, are relevant to defining the applicable market. He testified that with respect to particular channels of distribution the consumers within a particular channel are similar and purchase boxed chocolates for similar occasions.

27. Mr. Shoemaker placed Whitman's in the middle priced tier of the branded boxed chocolate market. He testified that the other competitors in the middle priced tier of the branded boxed chocolate market were Stover, See's, Fannie Mae, and Fannie Farmer. According to Mr. Shoemaker, only Stover competed on a national level with Whitman's, and See's, Fannie Mae, and Fannie Farmer were regional competitors. 28. Mr. Shoemaker testified that there is heavy competition for shelf space within mass merchandisers and chain drugstores.

29. Mr. Shoemaker stated that boxed fudge, nut clusters, and peanut brittle compete with boxed **[*8]** chocolate for sales.

30. According to Mr. Shoemaker, Asher's, a chocolatier located in Germantown, Pennsylvania, does not compete on a regional basis with Whitman's because Mr. Shoemaker considers Asher's inferior in quality and considers Asher's boxed chocolates to be located as a competitor in the lower price tier of the boxed chocolate market.

31. Mr. Shoemaker testified that mass merchandisers and chain drugstores often sold the Whitman's Sampler at $ 3.99, which was below the manufacturer's wholesale price.

Mr. Thomas McNulty

32. Thomas McNulty, who currently works as New Business Development Manager for New England Confectionery Co. of Cambridge, Massachusetts (NECCO), was a former Vice-President of Sales for Whitman's from 1986 until 1990. Mr. McNulty has nearly forty years of experience in the confectionery industry. NECCO produces Candy Cupboard boxed chocolates. Mr. McNulty testified that Candy Cupboard's Masterpieces, a line of boxed chocolates, is sold nationally through K-Mart. He further testified as to what he considers to be two separate product markets: gift boxed chocolates and promotional boxed chocolates. Attempting to distinguish between the two, Mr. McNulty **[*9]** described promotional boxed chocolates as typically being chocolates packaged in boxes containing larger quantities of chocolate pieces and purchased for office or family consumption.

33. Mr. McNulty testified that although he would consider Whitman's Sampler to be a gift boxed chocolate, in the opinion of some in the industry, Whitman's Sampler has become a promotional boxed chocolate. The perception of Whitman's Sampler as a promotional boxed chocolate is perhaps due to the fact that mass merchandisers and chain drugstores often sell the Whitman's Sampler at a retail price of $ 3.99, a price less than that at which Whitman's sells the product to the retail outlets.

34. Mr. McNulty testified that in general the boxed chocolate business is highly competitive, and has become even more competitive in the past year.

35. Mr. McNulty testified that the buyers for mass merchandisers and chain drugstores are constantly called upon by purveyors of confections, including boxed chocolates, who would like to sell their products to and obtain store shelf space from the mass merchandisers and chain drugstores for retail distribution.

36. Mr. McNulty testified that significant competition exists **[*10]** for shelf space in the chain drugstores and in mass merchandisers.

37. Mr. McNulty testified that promotional boxed chocolates were developed at the request of retailers.

38. Mr. McNulty testified that Hershey's, Mars, and Nestle's have considerable influence with mass merchandisers and chain drugstores, and admitted on cross-examination that all manufacture boxed chocolates.

39. Mr. McNulty testified that the ultimate consumer of boxed chocolates and confections in general has a wide array of outlets to choose from when purchasing boxed chocolates and confections, including department stores, manufacturers' retail stores, specialty candy stores, and through mail order catalogues, in addition to mass merchandisers and chain drugstores.

40. Based on his extensive experience in the confectionery business, and on available information in the confectionery industry, Mr. McNulty testified as to his estimates of Whitman's and Stover's current respective percentage of sales in a particular market segment. Mr. McNulty based this testimony on United States Commerce Department figures for confectionery products, National Confectioners Association data, sales information based on his experience **[*11]** with confections, and information in newspaper and magazine articles. The percentages estimated by Mr. McNulty were for branded gift boxed chocolates sold through mass merchandisers and chain drugstores. According to Mr. McNulty, Whitman's accounted for approximately 15-20% and Stover's accounted for 50%.

41. Mr. McNulty stated that Hershey's, Mars, and Nestle's have the resources (productive, financial, and strategic) to enter the national gift boxed chocolate market.

Mr. James L. Rawlings

42. After Pittsburgh Food & Beverage Company, Inc., obtained a copy of the Lazard Memorandum, James L. Rawlings, who serves as a consultant, representative, and agent for Pittsburgh Food & Beverage Company, Inc., discussed with Mr. Gold of Lazard the potential interest of Pittsburgh Food & Beverage in acquiring the assets of Whitman's that Pet intended to sell.

43. The sum of Mr. Rawlings' testimony is that Pittsburgh Food & Beverage Company, Inc., expressed interest in Whitman's assets to Mr. Gold of Lazard, and if Whitman's assets were again available for sale, Pittsburgh Food & Beverage Company, Inc., would still be interested in purchasing the assets. However, Mr. Rawlings never communicated **[*12]** to Mr. Gold a firm offer from Pittsburgh Food & Beverage for the purchase of Whitman's assets.

Mr. Eugene Smith

44. Eugene Smith, a consultant and private investor for Mr. Sagra, spoke with Mr. Gold on behalf of Mr. Sagra concerning Mr. Sagra's potential interest in Whitman's. Mr. Smith testified that neither he nor Mr. Sagra received a copy of the Lazard Memorandum, and Mr. Sagra was not allowed access to Whitman's plant. Apparently, Mr. Sagra refused to sign the confidentiality agreement Whitman's required before it would allow access to the plant or provide a copy of the Lazard Memorandum.

Dr. John L. Stanton

45. Dr. Stanton, professor and the C.J. McNutt Chair of Food Marketing Research in the Department of Food Marketing at St. Joseph's University, has a Ph.D. in marketing from Syracuse University and extensive experience in the field of marketing as a professor and consultant.

46. Dr. Stanton testified that significant competition exists for shelf space in chain drugstores and in mass merchandisers.

47. For a portion of his testimony, Dr. Stanton relied on certain documents prepared by Whitman's, such as the Lazard Memorandum (P-8) and Whitman's Marketing Plan **[*13]** for 1992-1993 (P-19). [3]

48. Based on his experience in marketing, Dr. Stanton testified as to the importance of marketing plans and the general reliability of information contained within those plans. Based on his review of P-19, Whitman's is a chief competitor of Stover. 49. Dr. Stanton testified that Whitman's and Stover have high brand name recognition with consumers, which is also referred to as brand equity.

50. Dr. Stanton described the substantial control that retailers have over their scarce shelf space and testified that retailers such as chain drugstores and mass marketers often charge slotting allowances, a rental fee for the shelf space, and "goodbye money," which is a fee retailers charge manufacturers for taking unsuccessful products off the shelves.

51. Dr. Stanton testified that Hershey's, Mars, and Nestle's have considerable influence **[*14]** with mass merchandisers and chain drugstores.

52. Dr. Stanton testified that the ultimate consumer of boxed chocolates and confections in general has a wide array of outlets to choose from when purchasing boxed chocolates and confections, including Department Stores, Manufacturer's Retail Stores, and Specialty Candy Stores.

Mr. Michael H. Siemer

53. Mr. Michael H. Siemer, C.P.A., is Vice-President of Operations Control and Analysis at Pet.

54. In 1989, Mr. Siemer recommended to Pet that it sell Whitman's assets.

55. Since 1985, Whitman's sales volume have declined and the costs for the manufacture of its products have increased due to the age of its factory, an increase in competition, and the inefficient methods of distribution utilized by Whitman's.

56. Mr. Siemer testified that Whitman's had suffered losses in recent years.

57. Pet decided to sell Whitman's assets because the Division required substantial capital investment if it was to continue operations due to the seasonal nature of its sales, it was suffering declining sales, and it did not fit into Pet's overall corporate plans.

58. Mr. Siemer was involved in the preparation of the Lazard Memorandum. He testified **[*15]** that reliable industry data for market share purposes is unavailable, and that certain numbers provided in the Lazard Memorandum are based solely on estimates of Whitman's management, as clearly noted in the Lazard Memorandum itself. Although he described the numbers as management's best estimates, he also characterized them as unreliable for market share purposes due to lack of accurate industry data and the purpose for which the estimates were prepared.

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[3] Although admissible as against Pet, both documents, as well as testimony based on those documents, on objection was ruled inadmissible as against WCI and Stover.

59. According to Mr. Siemer's testimony, Pet does not intend to continue to operate Whitman's after the plant closing, even if WCI is ordered to divest of Whitman's assets.

Other Evidence

Mr. Thomas Merrifield [4]

60. Mr. Merrifield was not sure if the Whitman's Sampler should be categorized as a gift boxed chocolate or promotional boxed chocolate. (Merrifield Dep. at 35).

61. Whatever market category the Whitman's Sampler **[*16]** currently falls into, WCI intends to manufacture and market the Whitman's Sampler as a gift boxed chocolate. (Merrifield Dep. at 36).

62. According to Mr. Merrifield, the retailer determines whether a boxed chocolate is a promotional boxed chocolate or a gift boxed chocolate. (Merrifield Dep. at 32).

63. Mr. Merrifield also stated that as to sales of boxed chocolates to national chain drugstores and mass merchandisers, Whitman's was Stover's number one competitor, (Merrifield Dep. at 19), and that boxed chocolates are Stover's best selling product, accounting for 50% of Stover's total sales. (Merrifield Dep. at 11).

Stipulation as to Purchase of Certain Confectionery Items

64. Defendants introduced into evidence a stipulation between plaintiff and defendants, for purposes of the preliminary injunction hearing, providing a list of described items that were purchased since the filing of the complaint at the indicated locations and prices. (Defs. Ex. Nos. 100-169, filed Doc. No. 24). The list includes confectionery products ranging in price, description, and outlet where purchased.

65. This evidence shows, as does the testimony of plaintiff's witnesses, that there is an abundance **[*17]** of competition in the market for chocolates in general, including boxed chocolate products purchased for gift-giving, and there is a variety of outlets from which ultimate consumers can purchase those products. *Lazard Memorandum*

66. The Lazard Memorandum, principally relied on by plaintiff, provides a general description of the United States confectionery market, and the United States chocolate confectionery market, and describes boxed chocolates as a segment of this market.

II. *Discussion*

Standard for Preliminary Injunction

HN1[] In order to determine whether a preliminary injunction should issue, the court must weigh the following factors: 1) whether the plaintiff has a reasonable probability of success on the merits; 2) whether the plaintiff will be irreparably harmed if the injunction does not issue; 3) whether other interested parties will be harmed by either a grant or denial of the injunction; and 4) whether issuance of the injunction is in the public interest. Plaintiff has the burden of showing that it will likely succeed on the merits and that it will be irreparably harmed if the preliminary injunction does not issue. If plaintiff makes this prerequisite showing, **[*18]** then I must determine the weight of the other two factors, namely, harm to other interested parties and the public interest, to determine if the preliminary injunction should issue. *See Eli Lilly and Co. v. Premo Pharmaceutical Labs., 630 F.2d 120, 136* (3d Cir.), *cert. denied*, *449 U.S. 1014 (1980)*.

[4] Plaintiff introduced into evidence the deposition of Mr. Thomas Merrifield, the vice-president of WCI. (P-Unmarked, Merrifield Dep.).

HN2[] A preliminary injunction is ordinarily granted for the purpose of maintaining the status quo during the litigation. *HN3*[] Divestiture is an appropriate remedy under the Clayton Act, *California v. American Stores, Co., 495 U.S. 271 (1990)*; however, plaintiff's request for a preliminary injunction ordering that WCI mandatorily divest of Whitman's assets seeks not to maintain but rather to alter the status quo. *United States v. Price, 688 F.2d 204 (3d Cir. 1982)*, provides that *HN4*[] under appropriate circumstances a district court may direct mandatory preliminary injunctive relief. *688 F.2d at 210-212*. *HN5*[] Because plaintiff seeks to alter the status quo by requesting mandatory preliminary relief, plaintiff's burden of establishing entitlement to that preliminary **[*19]** relief is heightened. *Punnett v. Carter, 621 F.2d 578, 582 (3d. Cir. 1980)*. Applying either the traditional or heightened standard, plaintiff has failed to meet its burden.

Antitrust Standing

Defendants raise the issue of plaintiff's standing in their motions in opposition to issuance of a preliminary injunction and in their motions to dismiss the complaint. Defendants assert that *parens patriae* standing is lacking in this case, and therefore, the preliminary injunction should be denied for failure to show that Pennsylvania, lacking standing, will likely succeed on the merits. They further assert that the case should be dismissed based on the same reason.

HN6[] *Parens patriae* is a concept of standing utilized to allow states to protect quasi-sovereign interests [5] such as the health, comfort, and welfare of the people of a state and the general economy of that state. *Gibbs v. Titelman, 369 F. Supp. 38, 54 (E.D. Pa. 1973)*, *rev'd on other grounds*, *502 F.2d 1107* (3d Cir.), *cert. denied*, *419 U.S. 1039 (1974)*. A state can sue as *parens patriae* for the **[*20]** protection of its people or its general economy. *See* *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982)*, *Georgia v. Pennsylvania R.R., 324 U.S. 439, 446-448 (1945)*. This ability of a state to seek protection of its general economy in the federal as well as the state forum has been well recognized and includes suits under federal ***antitrust law***. As Justice Douglas stated in *Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945)*, "suits by a State, *parens patriae*, have long been recognized. There is no reason why those suits should be excluded from the purview of the anti-trust acts." *324 U.S. at 447*. *Georgia v. Pennsylvania R.R.* involved a suit brought by the State of Georgia, *parens patriae*, seeking an injunction under federal ***antitrust law***. The Supreme Court held that Georgia could maintain the suit.

[*21] Defendants principally rely on *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)*, in asserting that Pennsylvania does not have *parens patriae* standing to pursue this action to prevent harm to its general economy. Defendants read *Cargill* as effectively overruling *Georgia v. Pennsylvania R.R.*, as it applies to *parens patriae* actions seeking an injunction under federal ***antitrust law***. Particular importance is attached by defendants to the statement in *Cargill* that it would be anomalous to allow a party to seek an injunction to prevent harm when the party would not have standing to seek damages if the harm were to occur. *Cargill, 479 U.S. at 112*. [6] The Supreme Court in *Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)*, held that states cannot seek damages for injury to a state's general economy caused by a violation of federal ***antitrust law***. Thus, defendants argue, a state cannot seek injunctive relief for harm to its general economy.

[*22] A close look at both *Standard Oil Co.* and *Cargill* suggests to me that, under *Georgia v. Pennsylvania R.R.*, *HN8*[] a state may still seek injunctive relief for harm to its general economy that is caused by a violation of federal ***antitrust law***. The Supreme Court in *Standard Oil Co.* recognized the difficulty in allowing damage awards for harm to a state's general economy. While theoretically cognizable as a direct injury, the practicalities of attempting to measure damages and the likelihood of duplicative recovery counselled against permitting state suits

[5] *HN7*[] "A state that sues as *parens patriae* must seek to redress an injury to an interest that is separate from the interests of particular individuals." *People of State of New York by Abrams v. Seneci, 817 F.2d 1015, 1017 (2d Cir. 1987)*.

[6] The Court stated that "it would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred." *Cargill, Inc. v. Monfort of Colorado, 479 U.S. at 112*.

for damages to that state's general economy. However, the parties in *Standard Oil Co.* did not suggest that lack of availability of damages affected the availability of injunctive relief. *405 U.S. at 256 n.7*. [7]

[*23] In fact, Justice Marshall, delivering the opinion of the Court in *Standard Oil Co.* reiterated the holding of *Georgia v. Pennsylvania R.R.* and stated that

> the Court upheld Georgia's claim as *parens patriae* with respect to injunctive relief, but had no occasion to consider whether the antitrust laws also authorized damages for an injury to the State's economy . . . . Nowhere in *Georgia* did the court address itself to the question whether § 4 of the Clayton Act authorizes damages for an injury to the general economy of a State. Thus, the question presented here is open.

405 U.S. at 260. Justice Marshall's opinion indicates that a state's *parens patriae* standing to seek an injunction to prevent harm to the state's general economy caused by a violation of federal ***antitrust law*** remains a closed question until the Court expressly decides to revisit that issue.

In *Cargill* the issue of a state's *parens patriae* standing to seek an injunction under federal ***antitrust law*** to prevent harm to the state's general economy was not before the Supreme Court and the Court did not suggest any intention to eradicate the traditional precepts **[*24]** of *parens patriae* standing for purposes of injunctive relief. Although the Court in *Cargill* did state that it would be anomalous to allow a private party to sue for an injunction when that party could not sue for damages, and the state is considered a private party under the antitrust laws, the Supreme Court did not discuss *Georgia v. Pennsylvania R.R. Georgia v. Pennsylvania R.R.* involved precisely the anomaly intimated in *Cargill* and the Court in *Georgia v. Pennsylvania R.R.* found that although Georgia had standing to seek an injunction preventing the antitrust behavior, it would not have standing to seek damages. *Georgia v. Pennsylvania R.R., 324 U.S. at 453*. It would be imprudent to infer that *Cargill* intended to overrule *Georgia v. Pennsylvania R.R.*, when the issue of *parens patriae* standing was not before the court.

The contours of antitrust standing as it relates to a state in its *parens patriae* capacity are perhaps different from antitrust standing as it applies to other private parties. Precedent involving standing of individual private parties may not control the issue of *parens patriae* standing as those **[*25]** cases do not implicate quasi-sovereign interests. Although the state is considered a private party, to some extent, when it brings an action *parens patriae*, defendants fail to realize possible nuances between an individual and a state which are relevant to the issue of antitrust standing.

The Commonwealth asserts that it seeks through this action to prevent the harm that WCI's acquisition of Whitman's would cause to the general economy of Pennsylvania due to a substantial decrease in competition. At least for purposes of deciding the pending motion for a preliminary injunction, I conclude that Pennsylvania has standing to proceed under the doctrine of *parens patriae*. Therefore, defendants' motion to dismiss will be denied. However, before any relief may be granted on Pennsylvania's claim as *parens patriae*, plaintiff will have to prove an antitrust injury to the general economy of Pennsylvania.

Antitrust Law

Plaintiff is bringing this suit under *15 U.S.C. § 18*. *Section 18* provides:

> ***HN9***[] No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or **[*26]** other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, **where in any line of commerce or**

[7] The Court stated that "although the Court of Appeals directed that the count be dismissed in its entirety, the parties have not suggested that its decision foreclosed any relief the State might obtain by way of injunction." *Standard Oil Co., 405 U.S. at 256 n.7*.

> **in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly**.

15 U.S.C. § 18 (emphasis added).

Plaintiff asserted on the second day of the hearing that it does not contend that WCI's purchase of the Whitman assets from Pet will tend to create a monopoly. Therefore, the issue is whether Pennsylvania is likely to succeed in proving at trial that the effect of WCI's acquisition of Whitman's assets may be substantially to lessen competition in a line of commerce. Pennsylvania bears the burden of proving that the acquisition of Whitman's assets by WCI may substantially lessen competition in a line of commerce. Plaintiff argues that WCI is in effect controlled by Stover, so that WCI's acquisition of Whitman's should be viewed as if Stover had actually acquired the assets. The majority **[*27]** of the evidence dealt with comparison of Stover and Whitman's, apparently equating WCI, the actual purchaser of Whitman's assets, with Stover for purposes of this antitrust action. Although Stover is not directly acquiring the assets of Whitman's, apparently plaintiff intends to show that Stover will control WCI, and therefore, acquisition of Whitman's by WCI may substantially lessen competition by virtue of Stover's influence on WCI decisionmaking.

Stover's Potential Control of WCI

The deposition of Mr. Merrifield, the Vice President of WCI, (P-unmarked, Merrifield Dep. at 3), provides some evidence of the connection. Mr. Merrifield served as Vice President of Eastern Sales for Russell Stover prior to his current position as Vice President of WCI, and had been employed by Stover since he graduated from college. (Merrifield Dep. at 4-5).

A few responses by Mr. Merrifield in his deposition relate to commonality of ownership. Mr. Merrifield engaged in the following colloquy with plaintiff's counsel:

> Q. Are you still presently employed at Russell Stover?
> A. I'm employed by Whitman's Candies, Inc. [WCI].
> Q. You resigned from Russell Stover?
>
> A. No, I was **[*28]** appointed to vice-president of Whitman's Candies, Inc., when we bought the company. . . .
> Q. When you say "we," do you mean Russell Stover?
> A. Yes.

(Merrifield Dep. at 13).

Mr. Merrifield stated that: Tom Ward, Scott Ward, and Jack Carr will have input into pricing decisions at WCI, (Merrifield Dep. at 20); Jack Carr is employed by Stover and not by WCI, but will have pricing input at WCI, (Merrifield Dep. at 20-21); and Tom Ward, Vice-President of Stover, and Scott Ward, President of WCI, each own one-third of WCI, (Merrifield Dep. at 20). WCI will use Stover's distribution centers. (Merrifield Dep. at 25). However, Mr. Merrifield testified that WCI is an entirely separate entity from Stover. (Merrifield Dep. at 46). Although, plaintiff's evidence to establish the essential link between WCI and Stover is extremely weak, the evidence produced for purposes of deciding the preliminary injunction motion will suffice. For present purposes only, I will accept plaintiff's contention that the purchase by WCI is functionally the same as a purchase by Stover, and I will view the effect of WCI's acquisition as if Stover had directly acquired the assets of Whitman's.

Geographic **[*29]** Market

HN10[] Ordinarily, plaintiff bears the burden of proving the relevant geographic market as an essential element of its antitrust claim. *See* *United States v. Marine Bancorporation, 418 U.S. 602, 618 (1974)*. Plaintiff asserts that the United States is the relevant geographic market. Defendants do not contest plaintiff's allegation that the United States constitutes the relevant geographic market for purposes of the preliminary injunction. Utilizing the entire United States as the relevant geographic market, I must determine whether plaintiff has shown that it will likely succeed in proving that WCI's purchase of Whitman's assets may substantially lessen competition on a nationwide basis within the relevant product market.

Relevant Product Market

HN11[] In order to show the likely effect on an area of competition of WCI's acquisition of Whitman's, plaintiff's must show what the line of commerce is that it contends may be substantially effected. *See* *Marine Bancorporation, 418 U.S. at 618 (1974)*. This is determined with reference to the relevant product market. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962)*. **[*30]** Plaintiff suggests alternative choices for what the relevant market is, asserting that it is either branded gift boxed chocolates sold nationally through chain drugstores and mass marketers, or it is the slightly broader market of boxed chocolates sold through those same channels of distribution.

HN12[] "The boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Brown Shoe Co., 370 U.S. at 326*. In determining the relevant product market, well-defined submarkets may exist which constitute the relevant product market for antitrust purposes. *Id. at 325*. "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

Mr. Shoemaker and Mr. McNulty differentiated gift boxed chocolates from other confectionery **[*31]** products. Their attempt to distinguish between the products does not establish that gift boxed chocolates or boxed chocolates constitutes a submarket within the general confectionery market. Mr. McNulty testified that promotional boxed chocolates were largely created at the behest of retailers. Whitman's Sampler, Whitman's top volume seller, often sold at retail for $ 3.99, indicating that it was used as a promotional boxed chocolate, selling to the consumer at a loss to the retailer (referred to in the testimony as a "loss leader"). The evidence indicates that gift boxed chocolates and promotional boxed chocolates, although potentially distinct products, compete in the same product market due to the fluidity between the two. This fluidity is evidenced by Mr. McNulty's testimony that the Whitman's Sampler is viewed by some as a promotional boxed chocolate and by testimony that the retailer determines whether a boxed chocolate is a gift boxed chocolate or a promotional boxed chocolate.

The relevant product market, however, is not limited to the combination of the gift boxed chocolates and promotional boxed chocolates markets. A large variety of products compete with boxed chocolates. **[*32]** In fact, Mr. Shoemaker admitted on cross-examination that other items, including such items as boxed fudge, peanut brittle, and nutclusters, compete with boxed chocolates for sales. Plaintiff's difficulty in delineating the relevant product market is understandable in light of the wide variety of product substitutes and consumer outlets for the purchase of those products. Plaintiff has failed to show that it will likely prove at trial that the relevant product market is limited to gift boxed chocolates or even boxed chocolates. Without a clear showing of the relevant market, plaintiff is not entitled to the requested preliminary relief.

Likely Effect On Market Competition

Plaintiff must show that it will likely succeed in proving that the acquisition of Whitman's assets by WCI may substantially lessen competition in the relevant market. Although plaintiff has failed to show that gift boxed chocolates or boxed chocolates is the relevant market, I will assume for purposes of discussing the likely effect on competition that the relevant product market is the broader boxed chocolate market.

It is unclear from plaintiff's evidence just what effect WCI's purchase of Whitman's may **[*33]** have on competition in the relevant market. Whitman's and Stover compete most heavily against each other in selling to mass merchandisers and chain drugstores. Plaintiff urges the court to consider the potential effect of the acquisition on the competition in those two channels of distribution only, virtually eliminating all other significant competition in the boxed chocolates market, including Godiva, See's, Fannie Mae, Fannie Farmer, Hallmark, and many other manufacturers who distribute boxed chocolates through department stores, manufacturer's retail stores, specialty candy stores, local drugstores, and other outlets.

At the hearing, some of plaintiff's witnesses considered the relevant product market to exclude boxed chocolates, gift or otherwise, that are high-priced or low-priced, leaving only middle-priced boxed chocolates as competition. Arguments factoring quality and price as determining the relevant product market often fail. See, *e.g.*, *Murrow Furniture v. Thomasville Furniture, 889 F.2d 524 (4th Cir. 1989)*. This is so because the definition of the relevant product market as articulated by *Brown Shoe Co.* "presumes that consumers are **[*34]** willing to make tradeoffs on some of the very factors the [plaintiff] attempts to use to define [the] market." *Murrow Furniture, 889 F.2d at 528*. ***HN13***[] Where the antitrust plaintiff articulates product differences along a spectrum of price and quality, the product market distinctions are economically meaningless, *see Murrow Furniture, 889 F.2d at 528*, and unrealistic. *See Brown Shoe Co., 370 U.S. at 326*. However, the price and quality distinctions are relevant in analyzing the effect WCI's acquisition of Whitman's will likely have on competition. *See Brown Shoe Co., 370 U.S. at 326* (taking the distinctions into account for purposes of discerning the likely effect of a merger).

Dr. Stanton testified as to Stover's potential marketing strategy involving differing price-points. Relating this case to his own experience, Dr. Stanton stated that Stover could block out a price range for its products by utilizing Whitman's to block competitors at the lower price and quality range from entering the middle price range. Stover could keep its boxed chocolate products at the upper **[*35]** end of the middle price range and could, through WCI, price Whitman's boxed chocolate products in the lower price range. Products competing with Whitman's boxed chocolate products would be unable to raise their prices to the middle range above Whitman's prices, thus, effectively blocking out several "price-points" from the competition.

This two-tiered pricing scenario aimed at keeping new entrants out of the middle-tier is purely speculative and does not make sound economic sense. The technique seems slightly unrealistic at best, and at worst could prove disastrous for Stover. Assuming Whitman's and Stover's products compete, Stover would stand to lose substantial sales in implementing this technique. If Whitman's and Stover do not compete, WCI's purchase of Whitman's assets will not greatly impact Stover's market power; Whitman's Sampler, the highest volume seller of Whitman's, currently sells quite often below the manufacturer's price to the retailer; Stover, which manufactures more than one type of boxed chocolate, could implement the scheme without WCI's acquisition of Whitman's; and the evidence indicates that WCI intends to revitalize Whitman's products, such as the famous Whitman's **[*36]** Sampler. If this marketing technique was successfully implemented in a different product market as illustrated by Dr. Stanton, it may have been because the product utilized to block entrants from the middle-price tier was not in competition with the higher priced product. Dr. Stanton testified that the higher-priced product was developed to replace the lower-priced one, indicating that the lower-priced product may not have been a substitute for the newer product.

Even if I were to narrow the market so drastically, as plaintiff urges me to do, it remains unclear just what effect this would have on competition within mass merchandisers and chain drugstores channels of distribution. Plaintiff's witnesses portrayed the mass merchandisers and chain drugstores as having considerable control over manufacturers of boxed chocolates and other confectionery products. Dr. Stanton's testimony concerning slotting allowances and goodbye money, and his description of retailers as being shelf space realtors, would seem to characterize manufacturers as the customers who purchase and consume retail shelf space, rather than characterizing retailers as the direct customers of manufacturers such as Whitman's **[*37]** and Stover. Dr. Stanton's description of retailers' substantial control of shelf space and testimony as to the great demand of potential competitors in these channels of distribution for such shelf space, if accurate, would seem to obviate the effects of any attempted anticompetitive behavior on the part of Stover.

Existing Competition In The Market

The evidence established that in the confectionery industry competition is heavy. In the middle tier pricing level Stover and Whitman's are the major players on a national level selling to mass marketers and chain drugstores. However, there are strong regional players. For example, plaintiff's evidence showed that, on the West Coast, See's is a tough competitor in the boxed chocolate market, [8] although they do not compete in the mass marketers and chain drugstores because See's primary chain of distribution is its own retail outlet stores. Plaintiff's witness, Thomas McNulty, a former Vice President of Sales for Whitman's, considered the Candy Cupboard brand of boxed chocolates by NECCO as a regional competitor of Whitman's but, citing confidentiality concerns, he did not provide any statistics as to the strength of its competition. **[*38]** Further, testimony of plaintiff's witnesses portrayed the retail drugstore chains and mass marketers as having significant power in determining which manufacturers will be allowed to stock the retailer's shelves. Chain drugstore buyers and buyers for the mass marketers are bombarded with calls from candy manufacturers of all kinds who would like to have their products sold on and who compete for those retailer's shelf slots or spaces. In effect, Mr. McNulty testified that if a chain drugstore or mass merchandiser approached NECCO for national distribution of Candy Cupboard, that company would jump at the opportunity to supply boxed chocolates to it. The evidence is quite clear that other large regional confectionery manufacturers are seeking opportunities to place their products in chain drugstore and mass merchandiser outlets.

Market Share Information

Accurate information on the respective **[*39]** market share of boxed chocolate manufacturers is scarce. Jay Shoemaker, Thomas McNulty, and Dr. Stanton all testified that the tracking data in the industry is very poor and difficult, if not impossible, to obtain. At argument, defendants asserted that in order to succeed on a claim alleging that the WCI acquisition of Whitman's may substantially lessen competition, plaintiff must produce hard evidence of market share. Although hard evidence of market share certainly would aid the finder of fact, accepting defendants' argument would permit an industry to shield itself from liability under section 7 of the Clayton Act by poorly tracking, collecting, or assessing data as to market share among competitors. The availability of hard data must be taken into consideration before holding plaintiff responsible for failure to present that data. Proof of market share may be made by introducing evidence of the best available data. At least for present purposes, the evidence of market share need not be perfectly precise, provided it is sufficient for drawing reasonable conclusions.

In order to grant plaintiff effective relief, I would have to mandatorily enjoin WCI to divest itself of Whitman's **[*40]** assets. At a minimum, plaintiff must introduce market share data for the relevant product market that is admissible against WCI in order to be entitled to the requested relief. Unfortunately, because the market share evidence introduced at the hearing was inconclusive and largely unreliable, and as noted, the majority of that evidence is inadmissible against WCI and Stover, plaintiff has failed to show a likelihood of success on the merits.

Plaintiff relies in part on Whitman's estimates of its share of the boxed chocolate market sold through certain channels of distribution as provided in the Lazard Memorandum. (P-8). Counsel for defendants Stover and WCI appropriately objected to admission of the Lazard Memorandum and Whitman's Marketing Report for 1992-1993 (P-19) as evidence against Stover and WCI because the purported estimates were solely that of Whitman's. The objection was sustained. The information in that memorandum, testimony based on that information, and testimony as to other statements made on behalf of Whitman's, is not admissible against Stover and WCI. Dr. Stanton's testimony as to the relative strengths of Stover and Whitman's was based on information inadmissible **[*41]** against WCI and Stover. Mr. McNulty's testimony as to the relative market strengths of Stover and Whitman's, although based on independent data, limited the market to branded gift boxed chocolates sold nationally through mass merchandisers and chain drugstores. [9] The extremely narrow market for which Mr. McNulty provided figures does not substantially aid in determining the post acquisition market power Stover, through WCI, will possess even as to boxed chocolates in general. [10]

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[8] There is evidence that See's total annual sales volume is approximately 150 million, which if true, exceeds Whitman's.

[9] Such narrowing of the relevant product market has been referred to as describing the proverbial "strange red-haired, bearded, one-eyed man-with-a-limp." *City of Detroit v. Grinnell Corp., 495 F.2d 448, 457 n.4 (2d Cir. 1974)* (quoting *United States v. Grinnell, 384 U.S. 563, at 591 (1966)* (Fortas, J., dissenting)).

[10] Mr. McNulty estimated that for sales of branded gift boxed chocolates sold through mass merchandisers and chain drugstores Whitman's accounted for approximately 15-20% and Stover's accounted for 50%.

[*42] For antitrust purposes, Pennsylvania imports too much weight to the product differentiation indicated in the Lazard Memorandum. "Market share" information provided in the Lazard Memorandum, when taken in the context of the entire memorandum is inconclusive and not wholly reliable for the purposes for which Pennsylvania seeks to utilize it. Further, the information is inadmissible against Stover and WCI. It is admissible against Pet because it is a document prepared by Pet's agent, Lazard, with the assistance of Pet. Stover and WCI have never adopted nor acknowledged the Lazard Memorandum as accurate and the document was not otherwise authenticated. According to the Lazard Memorandum, as to boxed chocolates, Whitman's competes with Stover nationally, and in various regional areas throughout the United States with regional manufacturers in distribution to chain drugstores and mass merchandisers, and also competes with boxed chocolates sold through other outlets and for other end-markets. To exclude the effect of this competition, Pennsylvania attempted to severely restrict the definition of the relevant product market.

Little market share information was submitted that was admissible **[*43]** against WCI and Stover. No market share information was submitted which would include the substitutes mentioned by Mr. Shoemaker as competing with boxed chocolates. Without this information it is impossible to determine exactly how WCI's acquisition of Whitman's may affect the relevant market. Thus, plaintiff's assertion of the concentration in the market has not been established by the admissible and relevant evidence. Plaintiff asserts that market concentration should be calculated with reference to the Herfindahl-Hirschmann Index (HHI). Plaintiff did not introduce into evidence the application of the HHI. Moreover, ***HN14***[↑] in order to utilize the HHI to support its case, plaintiff must establish the relevant market and then must provide reliable data establishing the market share of the participants in that market. [11]

[*44] Barriers to Entry

HN15[↑] Once plaintiff makes out a prima facie showing that the acquisition may likely substantially lessen competition, defendant can rebut the evidence by showing that the barriers to entry are not significant. *See United States v. Baker Hughes, Inc., 285 U.S. App. D.C. 222, 908 F.2d 981, 984 (D.C. Cir. 1990)*. If I were to determine that plaintiff's would likely prove that branded gift boxed chocolates sold through mass merchandisers and chain drugstores is the relevant market, then, accepting Mr. McNulty's figures, acquisition by WCI, presumably controlled by Stover, of Whitman's could presumptively violate ***antitrust law***. *See United States v. Philadelphia National Bank, 374 U.S. 321 (1963)*. However, the barriers to entry in even that market are not significant.

Plaintiff's witness, David Ganong, President of Ganong Bros. Limited, a Canadian manufacturer of packaged chocolates, provided in his sworn statement that his company has "found it difficult to penetrate the market positioning held by Russell Stover and Whitman, due to very strong market power, the strength of the two brands and strong trade contacts and historic sales **[*45]** relationships by both companies." (P-unmarked, Ganong Aff.). Mr. Shoemaker, Mr. McNulty, and Dr. Stanton testified that significant barriers exist to entry into the market on a national level. Those barriers, according to the testimony, were essentially brand equity, name recognition, and the substantial monetary investment required.

Although plaintiff's witnesses made blanket statements as to significant barriers to entry, other statements made by those same witnesses tended to show that as to certain manufacturers those barriers are not significant. Mr. Shoemaker, Mr. McNulty and Dr. Stanton admitted that Hershey's, Mar's and Nestle's, referred to as the "big three," had the power and manufacturing resources to enter even the assertedly narrow market of gift boxed chocolates sold nationally through chain drugstores and mass marketers. Mr. McNulty testified that his company, NECCO, as a regional competitor, would be ready, willing and able to supply boxed chocolates for chain drugstores and mass marketers nationally. [12] If the company Mr. McNulty works for is representative, other similarly situated regional

[11] The relevant market must be correctly defined, "if not, the HHI's computed are meaningless and do not reflect market reality." *F.T.C. v. PPG Industries, Inc., 255 U.S. App. D.C. 69, 798 F.2d 1500, 1503 (D.C. Cir. 1986)*.

[12] Candy Cupboard Masterpieces, a boxed chocolate manufactured by NECCO, is already distributed nationally through K-Mart.

competitors (and there are many) are ready, willing, and able to enter **[*46]** the market. Contrary to plaintiff's assertions, the sum of the testimony supports a finding that the barriers to entry in the boxed chocolate market are not significant.

Harm to the General Economy of Pennsylvania

Even if plaintiff had met its burden of showing a likelihood of success on the merits, it has failed to show irreparable harm that will occur if the preliminary injunction is not granted. The sale of Whitman's assets to WCI has taken place, and Pennsylvania seeks to change the status quo in seeking mandatory divestiture by WCI. [13] The imminent closing of the Whitman's plant in Philadelphia, Pennsylvania, will certainly affect the surrounding community. I am aware and concerned about the impact the closing will have on the employees of Whitman's and their families. Although I recognize the likely detrimental effect of the plant closing, it is clear that any potential "anticompetitive **[*47]** effect" of WCI's acquisition cannot be causally linked to the plant closing. Unfortunately, the antitrust laws are not designed to prevent the effects likely to occur after Whitman's ceases operations in Philadelphia. The evidence does not establish that the plant closing by Pet will have any anticompetitive effect on the sale of boxed chocolates or that Pet's sale of Whitman's assets to WCI as opposed to some other hypothetically interested entity can be considered the cause of the plant closing. Nothing in the Clayton Act or other federal antitrust laws addresses Pennsylvania's concern about the plant closing.

Plaintiff brought this *parens patriae* action to protect its quasi-sovereign interest in the general economy of the Commonwealth of Pennsylvania from harm caused by a violation of federal **[*48]** ***antitrust law***. Other than stating that WCI's acquisition will harm Pennsylvania's general economy, plaintiff has not articulated how the alleged antitrust violation will harm its quasi-sovereign interest in Pennsylvania's general economy. At this stage of the litigation, it is difficult to discern from plaintiff's evidence how Pennsylvania's general economy will suffer from the violation alleged by plaintiff. The evidence produced at the preliminary injunction hearing does not establish that Pennsylvania consumers will pay more for gift or promotional boxed chocolates or that as a result of the acquisition, Stover, in exerting increased power, will drive local chocolatiers out of business. The evidence does not show that Pennsylvania retailers will suffer from anticompetitive behavior on the part of Stover. Plaintiff's witnesses readily admitted the variety of outlets for purchasing boxed chocolates and a substantial variety of manufacturers of boxed chocolates. The retailers have scare shelf space and a variety of manufacturers willing to stock their shelves with boxed chocolates. In fact, certain Pennsylvania confectionery manufacturers such as Asher's may benefit if Stover attempts **[*49]** to raise prices for boxed chocolates it sells to chain drugstores and mass merchandisers. If Stover attempts to raise prices it will invite retailers to take advantage of their control over scarce shelf space and provide access for local and regional candy manufacturers to the retailers' channels of distribution.

Because of my conclusion that plaintiff failed to show a likelihood of success on the merits, I need not consider a balancing of the equities as to the harm that a grant or denial of the preliminary injunction will cause to the parties or the public. Due to the imminent plant closing, which is of major concern to the public and all parties, this memorandum opinion was prepared without transcription of notes of testimony and is not as detailed in findings of fact and conclusions of law as would ordinarily be provided absent extreme time constraints. To the extent the foregoing "Discussion" contains findings of fact or conclusions of law not specifically set forth under the sections entitled "Findings of Fact" and/or "Conclusions of Law," the same shall be deemed as additional findings of fact and/or conclusions of law.

III. *Conclusions of Law*

1. Civil Action 93-1972 **[*50]** is an action brought by the Commonwealth of Pennsylvania, *parens patriae*, seeking injunctive relief under federal ***antitrust law***.

2. The court has jurisdiction over the subject-matter and the parties.

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[13] Although originally requested in the complaint's prayer for relief, (Complaint, at 10, P 28(e)), plaintiff concedes that this court could not order Pet to continue manufacturing Whitman's at the Philadelphia plant.

3. Pennsylvania has standing to bring this action.

4. Pennsylvania failed to prove that it will likely succeed on the merits.

5.. Pennsylvania failed to show that it will likely establish that the relevant market for antitrust purposes is branded gift boxed chocolates sold nationally at chain drugstores and mass merchandisers. Plaintiff further failed to show that boxed chocolates is the relevant market.

6. Pennsylvania failed to show that it will prove WCI's acquisition of Whitman's may substantially lessen competition in a relevant market.

7. Pennsylvania failed to prove it will suffer irreparable harm to its general economy if the preliminary injunction is not granted.

8. Pennsylvania is not entitled to a preliminary injunction ordering WCI and Stover to divest Whitman's assets purchased from Pet, and ordering further that Pet not transfer any remaining assets of Whitman's to WCI or Stover, or any other preliminary relief.

An appropriate order follows.

ORDER

For the reasons **[*51]** set forth in the accompanying memorandum opinion, containing findings of fact, conclusions of law, and a discussion of the issues relating to plaintiff's motion for a preliminary injunction, plaintiff's motion is DENIED. Defendants' motion to dismiss for lack of standing, (filed Doc. No. 12), is likewise DENIED.

BY THE COURT:

Donald W. VanArtsdalen, S.J.

May 6, 1993

Caribe BMW v. Bayerische Motoren Werke Aktiengesellschaft

United States District Court for the District of Puerto Rico

May 13, 1993, Decided

CIVIL NO. 91-1156 (RLA)

Reporter

821 F. Supp. 802 *; 1993 U.S. Dist. LEXIS 6905 **; 1993-1 Trade Cas. (CCH) P70,257

CARIBE BMW, INC., Plaintiff, v. BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT AND BMW OF NORTH AMERICA, INC., Defendants.

Subsequent History: COUNSEL Segment Amended August 12, 1993.

Core Terms

forum-selection, clauses, motion to dismiss, Importer, parties, Robinson-Patman Act, prices, amended complaint, antitrust claim, contract claim, allegations, negotiated, discovery, dealers, termination, disputes, courts, continental united states, antitrust, retailers, seller, inconvenience, contractual, forum non conveniens, summary judgment, anti trust law, public policy, sells, cause of action, convenient

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

Consistent with *Fed. R. Civ. P. 12(b)(6)*, the court views the pleadings, affidavits, and other competent submissions in a favorable light to plaintiff. Thus, the court exempts those facts which have since been conclusively contradicted by plaintiffs' concessions or otherwise, and likewise eschew any reliance on bald assertions, unsupportable conclusions, and opprobrious epithets. To withstand a motion to dismiss, a complaint must contain specific factual allegations respecting all material elements necessary to sustain relief under an actionable theory.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN2[] **Summary Judgment, Opposing Materials**

U.S. Dist. Ct., D. Puerto Rico, R. 311.23 provides that the failure to submit statement of contested facts in opposition to a motion for summary judgment results in movants' statement of uncontroverted facts being deemed admitted.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN3[] **In Rem & Personal Jurisdiction, In Personam Actions**

Where merits can be easily resolved in favor of party challenging jurisdiction, resolution of complex jurisdictional inquiry may be avoided.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN4[] **Robinson-Patman Act, Claims**

To assert a prima facie claim under any of the provisions of the Robinson-Patman Act, a plaintiff must allege that the asserted discriminations involved a single seller.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN5[] **Robinson-Patman Act, Claims**

Although sales by two affiliated companies can, under certain circumstances, be treated as having been made by a single seller for Robinson-Patman Act purposes, such linkage cannot be presumed even if one seller is wholly owned by the other.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN6[] **Robinson-Patman Act, Claims**

The same seller doctrine is not to be invoked merely upon a showing that one seller is wholly owned by another. Rather, a Robinson-Patman Act plaintiff must make an "affirmative showing" that the parent actually controls the subsidiary's selling activities. Specifically, a parent will not be considered to be the same seller as its wholly-owned subsidiary for purposes of the Robinson-Patman Act unless the plaintiff affirmatively pleads and shows that the parent actively controls the subsidiary by dictating the customers to whom it sells merchandise, as well as the prices, terms, and conditions of the sales made by the subsidiary.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN7[] **Robinson-Patman Act, Claims**

A Robinson-Patman Act claim will not lie if the buyer fails to take advantage of favorable prices or arrangements that were in fact made available to it.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN8[] **Pleadings, Rule Application & Interpretation**

The mere incantation of antitrust "buzzwords" cannot substitute for necessary factual allegations establishing a valid claim for recovery.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN9[] **Robinson-Patman Act, Claims**

A customer cannot claim injury under the Robinson-Patman Act for preferences allegedly given to another customer with whom it does not compete.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN10[] **Remedies, Damages**

Section 4 of the Clayton Act limits standing to bring an action for treble damages under the Sherman Act only to persons who shall be injured in their business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15*. Thus, to have standing under § 4, a plaintiff must suffer injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Compliance > ... > Types of Damages > Consequential Damages > Actions for Price

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

HN11[] **Private Actions, Standing**

Dealer standing for maximum resale price maintenance claims is limited to three kinds of injury: (i) injury caused when prices are fixed too low for the dealer to furnish services essential to the value which goods have for the consumer, or to furnish services and conveniences which consumers desire; (ii) injury caused to smaller dealers when the fixed prices channel distribution through a few large or specifically advantaged dealers; and (iii) injury that results when the maximum price approaches the actual cost to the dealer and acquires the attributes of an arrangement fixing minimum prices.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN12[] **Private Actions, Remedies**

Lost profits, without more, is not antitrust injury.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN13[] **Contract Conditions & Provisions, Forum Selection Clauses**

Forum-selection clauses are prima facie valid if reasonable, absent any fraud or overreaching.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN14[] **Contract Conditions & Provisions, Forum Selection Clauses**

There is a "strong presumption" in favor of the validity of forum selection clauses, and their application extends to all types of cases.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN15[] **Contract Conditions & Provisions, Forum Selection Clauses**

The party resisting enforcement of the forum selection clause bears a heavy burden of proof to show unreasonableness.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN16[] **Contract Conditions & Provisions, Forum Selection Clauses**

A forum selection clause is unreasonable only if it is invalid, or fundamental fairness compels that it not be enforced. The clause is invalid only if it is shown to have been the product of fraud, undue influence, or overweening bargaining power. It should be held unenforceable if the chosen forum is seriously inconvenient for the trial of the action.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN17[] **Contract Conditions & Provisions, Forum Selection Clauses**

To establish that a particular choice of forum clause is unreasonable, a resisting party must present evidence of fraud, undue influence, overweening bargaining power or serious inconvenience in litigating.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN18[] **Contract Conditions & Provisions, Forum Selection Clauses**

The prevailing rule is clear that where venue is specified with mandatory language, the clause will be enforced.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN19[] **Contract Conditions & Provisions, Forum Selection Clauses**

Contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN20[] **Contract Conditions & Provisions, Forum Selection Clauses**

The party avoiding a choice-of-forum clause must show it would to so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to its bargain.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN21[] **Venue, Forum Non Conveniens**

The forum non conveniens doctrine permits discretionary dismissals on a "case-by-case" basis where an alternative forum is available in another nation which is fair to the parties and substantially more convenient for them and the courts. The court's task is to determine whether the availability of an adequate alternative forum would in fairness be sufficient to overcome a presumption in favor of plaintiff's choice of forum. To perform this task, the court must consider the private and public interests at stake.

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

International Law > Dispute Resolution > General Overview

HN22[] **Conflict of Law, Forum Selection**

While there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, the presumption is simply inapplicable where plaintiff brings its lawsuit in a forum different from that chosen in its international contract and where the dispute essentially is not a local one involving local interests.

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For Defendants: Manuel A. Guzman, Esq., McCONNELL VALDES, P.O.Box 364225, San Juan, P.R. 00936-4225, Tel. (809) 250-564.

Judges: ACOSTA

Opinion by: RAYMOND L. ACOSTA

Opinion

[*805] ***OPINION AND ORDER***

For a period of nine years, plaintiff, Caribe BMW, Inc. ("Caribe") was the sole importer-retailer in Puerto Rico of certain BMW automobiles **[*806]** and parts. Caribe worked under an "Importer Contract" it negotiated in Germany with codefendant Bayerische Motoren Werke Aktiengesellschaft ("BMW AG"), the German manufacturer of BMW cars and parts and Caribe's only supplier of BMW products. Caribe would buy BMW products directly from BMW AG in Germany, import them into Puerto Rico, and sell them to consumers in Puerto Rico. In December 1990, BMW AG terminated its contract with Caribe.

Thereafter, Caribe filed the present action against BMW AG for breach of contract, **[**2]** violation of the Puerto Rico Dealers' Contracts Act ("Act 75"), and violation of Federal and Puerto Rico antitrust laws. Under the same antitrust laws and allegations it raised against BMW AG, Caribe also sued BMW of North America ("BMW NA"), a wholly-owned subsidiary of BMW AG that imports BMW automobiles and parts into the continental United States where it sells them to various retailers. These retailers, in turn, sell the BMW products to consumers. There has never been a contractual relation between Caribe and BMW NA.

Plaintiff has amended its Complaint three times, twice in an attempt to cure various deficiencies raised by the defendants in a succession of dispositive motions. Before the Court are a combination of motions to dismiss the entire Second Amended Complaint (the "Complaint") and their respective oppositions. BMW NA and BMW AG have moved to dismiss the antitrust claims in Caribe's Complaint for failure to state a cause of action. BMW AG also avers that the court lacks *in personam* jurisdiction and that plaintiff's contract-based allegations should be dismissed because of a mandatory forum-selection clause in the Importer Contract making Germany the exclusive **[**3]** jurisdiction for all disputes.

I. ***BACKGROUND***

A. THE COMPLAINT

There are four "counts" or causes of action alleged in Caribe's Complaint. Count one (Robinson-Patman Act and Puerto Rico's Antimonopolistic law) states that: (1) BMW AG charged Caribe higher prices than BMW NA contemporaneously charged retail outlets in the United States that were competing with Caribe in the resale of BMW automobiles of like grade and quality, in violation of Section 2(a) of the Robinson-Patman Act, *15 U.S.C. § 13(a)*, and the analogous Puerto Rico antitrust statute, *P.R. Laws Ann. tit. 10 § 265*; (2) BMW AG and BMW NA paid unidentified brokerage commissions or discounts in lieu thereof to its dealers, where no services were provided in return, in violation of Section 2(c) of the Robinson-Patman Act, *15 U.S.C. § 13(c)*; (3) BMW NA offered retail outlets in the continental United States competing with Caribe unspecified economic advantages unavailable to Caribe on proportionally equal terms, in violation of Sections 2(d) and 2(d) of the Robinson-Patman Act, *15 U.S.C. §§ 13(d)* and *(e)*, **[**4]** and *P.R. Laws Ann. tit. 10 §§ 263(b)* and *(c)*; and (4) if BMW NA is deemed separate from BMW AG for Robinson-Patman Act purposes, then BMW NA knowingly induced and received a price discrimination in violation of Section 2(f) of the Robinson-Patman Act, *15 U.S.C. § 13(f)*, and *P.R. Laws Ann. tit. 10, § 263(d)*.

Count two (Sherman Act and Puerto Rico law) states that: Caribe, under threat that it would be terminated as a BMW importer/retailer, agreed to a "secret condition" in the Importer's Contract prohibiting it from raising its retail prices above levels set by BMW AG and BMW NA, in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, and the analogous Puerto Rico antitrust statute, *P.R. Laws Ann. tit. 10 § 258*.

Count three (Breach of Contract) alleges that BMW AG breached the Importer Contract by: (a) incorrectly representing that these contracts were "standard;" (b) charging Caribe prices that were not those that were "valid on the dates of the invoices;" (c) failing to sell Caribe the 318i model or its substantial equivalent; (d) failing to offer "factory support;" (e) directly or indirectly selling and **[**5]** delivering "cars destined to be sold in Puerto Rico;" and (f) unjustifiably terminating the contract.

Count four (Act 75) states that BMW AG violated the Puerto Rico Dealers' Contracts Act, *P.R. Laws Ann. tit. 10, § 278, et seq.* **[*807]** (1964), by terminating the Importer Contract without just cause.

B. PROCEDURAL BACKGROUND

Plaintiff's original complaint was filed on February 1, 1991 (Docket No. 1). It was quickly followed by a "First Amended Complaint" on March 18, 1991 (Docket No. 3).

On May 14, 1991, BMW NA filed a Motion to Dismiss and/or for Summary Judgment regarding the two antitrust claims in the First Amended Complaint, which were, and still are, the only claims asserted against BMW NA (Docket No. 9). Attached to BMW NA's motion was a three-paragraph affidavit by James Ryan, a BMW NA executive, as well as copies of blank "dealer agreements" BMW NA used in the mainland United States. BMW NA's motion also included a separate statement of material facts as to which BMW NA alleged there was no genuine issue to be tried. In essence, BMW NA argued that the amended complaint failed to state critical factual elements to properly assert antitrust claims.

During the early **[**6]** summer of 1991, plaintiff notified BMW NA with various wide-ranging discovery requests and deposition notices. BMW NA responded with an extensive "Motion for Protective Order," pursuant to *Fed. R. Civ. P. 26(c)* (Docket No. 13), enclosing copies of all the disputed discovery requests. In its *Rule 26(c)* motion, BMW NA argued that plaintiff's "broad-based merits discovery" should not be allowed or, in the alternative, that discovery should be limited to the antitrust issues raised in the pending motion to dismiss and/or for summary judgment, as allowed by *Fed. R. Civ. P. 56(f)*.

On June 17, 1991, plaintiff responded by filing motions requesting discovery be compelled, opposing defendants' motion to dismiss, and tendering an amended complaint. [1]

[7]** The sum effect of plaintiff's multiple filings was that it refused BMW NA's alternative suggestion that discovery be limited to the antitrust issues in BMW NA's motion to dismiss. Indeed, through its *Rule 56(f)* motion and its motion to compel, Caribe insisted on obtaining all the extensive discovery it originally sought. In addition, Caribe submitted a complete -- despite its "preliminary" title -- opposition to BMW NA's motion to dismiss and for summary judgment. And, finally, Caribe tendered a Second Amended Complaint expressly directed towards defeating BMW NA's motion to dismiss.

On July 10, 1991, the Court (Fuste, J.) granted BMW NA's motion for protective order, denied Caribe's *Rule 56(f)* motion and its motion to compel discovery, and stayed all discovery pending resolution of BMW NA's motion to dismiss the antitrust claims. The Court also allowed the Second Amended Complaint. (Docket No. 25) (the "Complaint").

Apparently unaware of the Second Amended Complaint, BMW AG's first pleading in the case, a motion to dismiss and/or for summary judgment, was directed towards the, by then moot, First Amended Complaint. (Docket No. 27, July 15, 1991). BMW AG's motion sought **[**8]** dismissal of the Complaint for lack of *in personam* jurisdiction and failure to state a cause of action as to the antitrust claims. Regarding the Act 75 and breach of contract claims (the "contract claims"), BMW AG requested summary judgment in its favor on the basis of a choice-of-forum clause in its contract with Caribe that designated Germany, and not Puerto Rico, as the only forum to **[*808]** resolve their disputes. It supported its motion with a separate statement of uncontroverted material facts which was founded on two affidavits by BMW AG executives, to wit, Mr. Horst Dihlmann and Dr. Jost J. Schmitt. [2]

[9]** Meanwhile, BMW NA filed yet another motion to dismiss addressed to the antitrust claims in the Second Amended Complaint. (Docket No. 36). This time, however, BMW NA changed procedural tack: it withdrew its original request for summary judgment and framed its motion as strictly one to dismiss the Complaint. Arguing, correctly we believe, [3] that the Second Amended Complaint had wiped the procedural slate clean, BMW NA asked the court to ignore the Ryan affidavit and other exhibits it attached to its original motion, and to focus solely on the latest version of the Complaint. BMW NA argued that the Complaint by itself failed to state a cause of action. BMW

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[1] The motions were: (a) a "Cross Motion to Compel Answers to Caribe's Discovery Requests" and Opposition to BMW NA's ***Rule 26(c)*** motion (Docket No. 14); (b) a motion for leave to file a "Second Amended Complaint" (in direct response to BMW NA's Motion to Dismiss and/or for Summary Judgment) (Docket No. 15); (c) a tendered "Second Amended Complaint" (Docket No. 15); (d) a *Fed. R. Civ. P. 56(f)* motion to deny BMW NA's dispositive motion or to "continue a hearing on the motion until discovery has been conducted" (Docket No. 18) with an affidavit from William R. Pakalka, one of Caribe's attorneys; and (e) a motion obliquely entitled "Caribe BMW, Inc.'s Memorandum of Law in Preliminary Opposition to Motion by Defendant BMW of North America, Inc. to Dismiss and for Summary Judgment" (Docket No. 17). Though the title of this last motion is confusing, the motion was clearly an opposition to BMW NA's motion for summary judgment since it included a separate "Statement of Material Facts as to Which There Exists a Genuine Issue to be Tried," as well as an affidavits from Juan Antonio Quintano Heilpern, President and principal stockholder of Caribe.

[2] BMW AG's mistiming of its Motion for Summary Judgment, as opposed to its Motion to Dismiss included in the same document, has little practical effect regarding plaintiff's contract claims, since the only allegations that plaintiff had amended dealt exclusively with ***antitrust law***. Regardless, BMW AG later slightly revised its original Motion to Dismiss and Motion for Summary Judgment and refiled it to correspond to the Second Amended Complaint (Docket No. 37, August 1, 1991).

[3] Our impression is apparently shared by Caribe who in its most recent motion conceded that "BMW NA thus currently has pending before this Court only a motion to dismiss." Docket No. 50, at 2. We will proceed to consider only the allegations of the complaint for purposes of the requested dismissal of the antitrust claims.

NA also asserted that the requested dismissal should be with prejudice given that plaintiff has had no less than three opportunities to sufficiently plead its antitrust allegations, and had failed.

[10]** Plaintiff, for its part, filed a supplement to its opposition to BMW NA's Motion to Dismiss (Docket No. 39) (to which BMW NA responded, Docket No. 41). Then, on September 27, 1991, it simultaneously filed the following motions: (a) a renewal *Fed. R. Civ. P. 56(f)* motion, specifically requesting discovery only as to BMW NA and BMW AG's motions to dismiss the antitrust claims and as to BMW AG's Motion to Dismiss for lack of *in personam* jurisdiction (Docket No. 50); [4] (b) an opposition to BMW AG's Motion to Dismiss and Motion for Summary Judgment (Docket No. 51); and (c) an Opposition to BMW NA and BMW AG's Motion to Dismiss the antitrust claims (Docket No. 52). BMW NA and BMW AG filed their respective replies and opposition to the *Rule 56(f)* request (Docket Nos. 56 and 57). We again find plaintiff's *Rule 56(f)* request unavailing as an unfocused and unsubstantiated "fishing expedition" and hereby DENY it.

[11]** On December 19, 1991, the case was reassigned to the undersigned judge (Docket No. 58).

The following motions are currently before the Court for resolution:

(a) BMW NA's motion to dismiss the Second Amended Complaint (Docket No. 36);

(b) BMW AG's Motion to Dismiss and/or for Summary Judgment (Docket No. 37);

(c) plaintiff's "Memorandum of Law in Preliminary Opposition to Motion by Defendant [BMW AG] to Dismiss and/or for Summary Judgment (Docket No. 51);

(d) Plaintiff's "Memorandum of Law in Preliminary Opposition to Defendants' BMW NA and BMW AG's Motion to Dismiss" (Docket No. 52); and

(e) BMW NA and BMW AG's "Reply" to plaintiff's three motions (Docket Nos. 56 and 57).

II. *ISSUES*

The following issues raised by the outstanding motions will be addressed by the Court seriatim.

1. Should this Court exercise *in personam* jurisdiction over BMW AG?

2. Does the Complaint fail to state an antitrust cause of action against BMW NA and BMW AG?

3. Assuming the Court has personal jurisdiction over BMW AG, should it specifically enforce the forum-selection clause which designates **[*809]** Germany as the exclusive jurisdiction for this dispute?

III. *DISCUSSION*

HN1[] Consistent **[**12]** with *Fed. R. Civ. P. 12(b)(6)*, [5] we view the pleadings, affidavits and other competent submissions in a favorable light to plaintiff. *See Milton v. Van Dorn Co., 961 F.2d 965, 969 (1st Cir. 1992)*. Our

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[4] Plaintiff's *Rule 56(f)* motion was completely silent as to BMW AG's motion to dismiss the *contract claims.*

[5] Although, as stated above, the Court will limit its review of the defendants' motions to dismiss the *antitrust claims* strictly to the well-pleaded facts in the Complaint, no such limitation applies to our review of BMW AG's motion to dismiss the *contract claims.* Regarding these claims, we have reviewed the affidavits of Mr. Dilhmann and Dr. Schmitt, as well as a statement of uncontroverted facts submitted by BMW AG which, on the specific issue of the effect of the forum-selection clause, was *not* controverted by plaintiff. In fact, plaintiff focused its evidence and discovery requests on the antitrust and personal jurisdiction issues and never attempted to show that the clause was unreasonable or that Germany was a fundamentally unfair forum. Since plaintiff has the burden of proof on this issue, and given that BMW AG's motion was presented as one to dismiss the complaint and/or for summary judgment, then BMW AG's statement of facts and affidavits must be taken as true. *See Alvarado Morales v. Digital Equip. Corp., 843 F.2d 613, 615 (1st Cir. 1988)* and ***HN2***[] Local Rule 311.12, United States District Court for the

following summary of the facts reflects this favorable reading, but specifically omits "conclusory allegations, improbable inferences, and unsupported speculation." *Conley v. Gibson, 355 U.S. 41, 45-48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990)*; *Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989)*. Thus, we exempt "those 'facts' which have since been conclusively contradicted by plaintiffs' concessions or otherwise, and likewise eschew any reliance on bald assertions, unsupportable conclusions, and opprobrious epithets." *Chongris v. Board of Appeals, 811 F.2d 36, 37* (1st Cir.), *cert. denied, 483 U.S. 1021, 97 L. Ed. 2d 765, 107 S. Ct. 3266 (1987)*. *See also* *Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988)* (to withstand a motion to **[**13]** dismiss, a complaint must contain specific factual allegations respecting all material elements necessary to sustain relief under an actionable theory).

[14]** BMW AG, a German corporation, manufactures automobiles and parts in Germany, which it sells throughout the world. BMW AG does not have offices, employees, manufacturing operations, real property or a license to do business in Puerto Rico.

Caribe is a Puerto Rico corporation. Caribe's major stockholders during 1981 through 1990 were Mr. Juan Quintano Heilpern and Mr. Pablo Benoit Hamel. Neither are American citizens nor residents of Puerto Rico: Mr. Quintano Heilpern is a citizen of Spain and Mr. Benoit Hamel is a citizen of either France, Spain or Chile.

BMW NA is a Delaware corporation with its principal place of business in New Jersey. BMW NA, not BMW AG, sells BMW automobiles and parts to retail outlets in the continental United States. Caribe competed with these retail outlets insofar as some consumers in Puerto Rico bought BMW automobiles and parts from continental retail outlets and shipped them privately into Puerto Rico.

In June 1981, BMW AG and Caribe negotiated a contract, titled the "Importer Contract," whereby Caribe agreed to purchase BMW cars and parts in Germany and import them into Puerto Rico for resale to the "motoring public." Title to the vehicles BMW AG **[**15]** sold to Caribe was transferred in Germany. The vehicles were paid for in German marks, and payment was made in Germany.

The negotiations that led to the Importer Contract in 1981 were conducted primarily in Munich, Germany between BMW AG and Mr. Quintano and/or Mr. Benoit, with some correspondence and telephone calls to and from Germany and Spain between these parties. These negotiations, and the transactions that sustained the contractual relationship between the parties over the years, were conducted by Messrs. Quintano or Benoit on behalf of Caribe and by various officers of BMW AG located in Germany. (No negotiations with Messrs. Quintano or Benoit took place in Puerto Rico.) The Importer Contract was renewed every year from 1982 until 1987.

[*810] At some point in 1988, the parties conducted additional contractual negotiations in Munich, Germany. As a result, by letter dated July 8, 1988, BMW AG offered Caribe to enter into a three-year Importer Contract, effective until 1991. The offer was in German. Mr. Quintano accepted the offer on behalf of Caribe, although he objected to the automatic expiration clause. His objection was made in writing in German.

The following forum-selection **[**16]** clause appeared in the German language Importer Contract:

> Place of performance and fulfillment of this agreement, as well as the exclusive jurisdiction for disputes concerning the beginning and termination of this agreement, as well as all and any rights and duties arising out of this agreement, is Munich, Federal Republic of Germany.

This forum-selection clause was a part of all the renewals executed by the parties between 1981-1988. The Importer Contract also has a choice-of-law clause that states as follows:

> All disputes concerning the beginning and termination of this agreement, as well as all and any rights and duties arising out of this agreement, will be subject to the laws of the Federal Republic of Germany as applied between the German merchants.

BMW AG has similar Importer Contracts in approximately one hundred countries.

District of Puerto Rico (failure to submit statement of *contested* facts in opposition to a motion for summary judgment results in movants' statement of uncontroverted facts being deemed admitted).

Sometime in 1987, BMW AG and BMW NA offered Caribe the opportunity to switch from being a direct purchaser of BMW AG to a direct purchaser of BMW NA. Caribe did not accept this offer. Thereafter, BMW AG extended Caribe's contract through June 1991, and Caribe continued to purchase from BMW AG.

During 1987, BMW NA gave its retail **[**17]** dealers in the continental United States payments of value and other considerations as compensation for services and facilities furnished by or through such retailers in connection with processing, handling, sale and offering for sale of BMW automobiles offered for sale by such retailers, none of which BMW AG made available on proportionally equal terms to Caribe. Also, Caribe's prices were higher than its competitors, *i.e.,* BMW retail outlets in the continental United States. Caribe was not specifically told that the payments, rebates, allowances and other considerations that were extended by BMW NA to its retail dealers in the continental United States would be made available to Caribe on proportionally equal terms should it accept the offer to become a BMW NA retailer.

If Caribe had accepted the 1987 offer to buy directly from BMW NA, it would have been required to give up unspecified benefits resulting from its Importer Contract with BMW AG while remaining responsible for shipping BMW automobiles from the continental United States into Puerto Rico.

Caribe was unable to sell BMW vehicles at a price low enough to compete for consumer business with BMW dealers in the continental **[**18]** United States.

Consumers in Puerto Rico were charged higher prices by Caribe than they would have paid BMW retailers in the continental United States.

In 1990, BMW AG terminated its contract with Caribe.

A. PERSONAL JURISDICTION

BMW AG asserts that it does not meet the minimum contacts test [6] to satisfy due process requirements because it does not own property, run business operations or conduct purposeful activities in Puerto Rico. Consequently, BMW AG argues that this Court cannot exercise jurisdiction over it and that the claims against it should be dismissed as a matter of law.

Plaintiff rejects BMW AG's contention and essentially argues that BMW AG's long term contractual relationship with Caribe and its predecessors--to sell cars in Puerto Rico and thus obtain benefits **[**19]** from Puerto Rico's economy and laws--sufficiently meets the minimum contacts test. Caribe also suggests that the Court cannot properly make this **[*811]** determination until it has allowed certain requested discovery on this issue. *See* Procedural Background *ante.*

Normally, contentions of this nature, given the circumstances alleged, would require greater scrutiny and the submission of additional evidence. However, we need not resolve this difficult jurisdictional issue, however, since we are dismissing the antitrust claims on the merits and the contract claims for improper venue.

This dismissal of the Complaint in favor of the party challenging our jurisdiction forecloses any need to consider the jurisdictional challenge since, for all practical purposes, it has become academic. *See* *Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522, 1528, 113 L. Ed. 2d 622, 629 (1991)* ("Because we find the forum-selection clause to be dispositive of [the question whether the District Court had personal jurisdiction over the defendant cruise line], we need not consider petitioner's constitutional argument as to personal **[**20]** jurisdiction"); *Norton v. Mathews, 427 U.S. 524, 528-33, 49 L. Ed. 2d 672, 96 S. Ct. 2771 (1976)* (***HN3***[] where merits can be easily resolved in favor of party challenging jurisdiction, resolution of complex jurisdictional inquiry may be avoided); *Secretary of the Navy v. Avrech, 418 U.S. 676, 677-78, 41 L. Ed. 2d 1033, 94 S. Ct. 3039 (1974)* (no need to argue the jurisdictional issue

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[6] *See generally* *International Shoe Co. v. State of Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945)* and ***Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980)***.

where the decision on the merits is foreordained); *Lambert v. Kysar, 983 F.2d 1110, 1118, n.11 (1st Cir. 1993)* ("we have repeatedly held that complex jurisdictional issues may be bypassed in circumstances when it is clear that the party challenging jurisdiction will prevail on substantive grounds in any event . . . [also] the rule that determination of jurisdictional issues should 'usually precede' determination of substantive law apply only weakly, if at all, in forum-selection cases . . . ."); *Feinstein v. Resolution Trust Corp., 942 F.2d 34, 40 (1st Cir. 1991)* (same); *Kaiser v. Armstrong World Industries, Inc., 872 F.2d 512 (1st Cir. 1989)* (same).

Accordingly, we will assume, for purposes of argument, but without deciding, **[**21]** that we have personal jurisdiction over BMW AG and subject matter jurisdiction as well. *Norton, 427 U.S. at 530-32*.

B. ANTITRUST CLAIMS

1. ***Robinson-Patman Act***

(a) "Single Seller" Requirement

HN4[] To assert a *prima facie* claim under any of the provisions of the Robinson-Patman Act, a plaintiff must allege that the asserted discriminations involved a *single* seller. *See, e.g., Walpa Constr. Corp. v. Mobile Paint Mfg. Co., 701 F. Supp. 23, 27 (D.P.R. 1988)*. [7] **[**22]** In its Complaint, Caribe in the first instance bases its Robinson-Patman claims on sales by BMW AG to Caribe *and* sales by BMW AG's wholly-owned subsidiary BMW NA to BMW retail dealers in the continental United States. Caribe recognizes that the two defendants are located in two different countries and that they are separately incorporated. Nevertheless, plaintiff attempts to satisfy the "single seller" requirement of the Robinson-Patman Act by lumping BMW AG and BMW NA together as "collectively BMW." [8] This is clearly insufficient.

HN5[] Although sales by two affiliated companies can, under certain circumstances, be treated as having been made by a single seller for Robinson-Patman Act purposes, such linkage cannot be presumed even if one **[*812]** seller is wholly owned by the other. *Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp., 785 F.2d 1240, 1243* (5th Cir.) ("***HN6***[] the same seller doctrine, however, is not to be invoked merely upon a showing that one seller is wholly owned by another"), *cert. denied, 479 U.S. 848, 93 L. Ed. 2d 108, 107 S. Ct. 171 (1986)*. Rather, a Robinson-Patman Act plaintiff must make an "affirmative showing" that the parent actually controls **[**23]** the subsidiary's selling activities. *Id.* (citing III E. Kintner & J. Bauer, *Federal* ***Antitrust Law*** § 21.16 at 212 (1983); 4 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 24.04[2][a] (1985)). Specifically, a parent will not be considered to be the same seller as its wholly-owned subsidiary for purposes of the Robinson-Patman Act unless the plaintiff *affirmatively pleads* and shows that the parent actively controls the subsidiary by dictating the customers to whom it sells merchandise, as well as the prices, terms, and conditions of the sales made by the subsidiary. *See, e.g., Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp., 785 F.2d 1240, 1243* (5th Cir.), *cert. denied, 479 U.S. 848, 93 L. Ed. 2d 108, 107 S. Ct. 171 (1986)*, *Island Tobacco Co. v. R.J. Reynolds Indus., 513 F. Supp. 726, 734 (D. Hawaii 1981)*; *Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541, 544 (E.D.N.Y. 1957)*. *See also Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962, 966 (5th Cir. 1979)*, *cert. denied, 444 U.S. 942, 62 L. Ed. 2d 309, 100 S. Ct. 298 (1980)*. **[**24]**

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[7] *See also Pierce v. Commercial Warehouse, 876 F.2d 86, 87 (11th Cir. 1989)*, *cert. denied,* ***493 U.S. 1045, 110 S. Ct. 841, 107 L. Ed. 2d 836 (1990)***; *Barnosky Oils, Inc. v. Union Oil Co., 665 F.2d 74, 83 (6th Cir. 1981)*; *FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1024 (2d Cir. 1976)*; *Hiram Walker, Inc. v. A&S Tropical, Inc., 407 F.2d 4, 7 (5th Cir. 1969)*; *Metro Video Dist., Inc. v. Vestron Video, Inc.,* 1990-1 Trade Cas. P 68,986 at 63,348 (D.P.R. 1990); *Carlock v. Pillsbury Co., 719 F. Supp. 791, 845 (D. Minn. 1989)*.

[8] This lumping together of the defendants is so indiscriminate and confusing as to constitute an attempt to make BMW AG and BMW NA look like a single entity by the simple fiat of referring to them collectively or separately to suit plaintiff's purposes. For example, in paragraph 11 of the Complaint, plaintiff refers to "BMW" as the manufacturer of BMW products, where clearly BMW NA, as opposed to BMW AG, is not a manufacturer of anything.

Under this clear precedent, Caribe's unsupported conclusion that BMW AG and BMW NA are a single entity, and thus a single seller for Robinson-Patman purposes, cannot survive the defendants' well-founded challenge, particularly considering that plaintiff has had ample warning and opportunities to meet its burden. In short, Caribe has not alleged the essential facts necessary to support an assertion that BMW AG and BMW NA are a single seller for purposes of the statute.

Because Caribe has failed to allege sufficiently that the alleged discriminatory sales were made by the same seller, a crucial jurisdictional element of its Robinson-Patman claims has not been satisfied, thus requiring dismissal of each such claim.

Plaintiff's counsel has argued that BMW AG impermissibly discriminated against Caribe by selling on more favorable terms to Caribe's alleged "competitor" BMW NA. However, there is no such claim in Caribe's pleadings. Its Second Amended Complaint, as did its prior complaints, alleges only that Caribe is an "importer-retailer purchasing directly from the factory" and that Caribe resells those automobiles solely "to the motoring public." (Complaint, PP 15 and 14). Also, **[**25]** Caribe has contended throughout that it competes with the BMW *retailers* that buy from BMW NA, not with BMW NA itself. Nowhere is it alleged that Caribe is an "importer-distributor" competing with BMW NA for sales of BMW automobiles to retail dealers. Caribe's counsel cannot substitute with argument what is Caribe's affirmative duty to plead with specificity. *See* *Daury v. Smith, 842 F.2d 9, 15 (1st Cir. 1988)* ("we do not think our duty to liberally construe the pleadings gives a plaintiff the license to amend the complaint by memorandum . . . ."); *Glaros v. Perse, 628 F.2d 679, 681 (1st Cir. 1980)* (same). The cases cited by Caribe apply only to the situation in which the same supplier sells goods to its subsidiary at more favorable prices than it sells to a purchaser competing with the subsidiary in the resale of the goods. Because Caribe does not contend in the Complaint that it resells to dealers in competition with BMW NA or has ever sought to compete with BMW NA, Caribe's argument is misplaced. *Acme Refrigeration, 785 F.2d at 1242-1244*.

In sum, Caribe's repeated failure to allege **[**26]** in any of its complaints that it competes with BMW NA in sales to retail dealers in the mainland United States, or that it has sought to do so, compels dismissal of the Robinson-Patman claims.

(b) Availability

Plaintiff's Robinson-Patman claims are subject to dismissal for yet another reason. Caribe's basic Robinson-Patman claims rest upon the conclusory allegation that prices, allowances and services given by BMW NA to the retail dealers in the continental **[*813]** United States which competed with Caribe allegedly were more favorable than the prices, allowances, and services provided by BMW AG to Caribe. Caribe also asserts, however, that it was offered the opportunity to become a BMW NA retailer--an offer it rejected. However, Caribe argues that it was not told at that time about these favorable terms. But, importantly, Caribe fails to claim that if it had known, it would have switched suppliers from BMW AG to BMW NA. Instead, Caribe alleges that it had no duty to make such a switch and did not want to lose unspecified benefits as BMW AG's importer-retailer. Thus, regardless of how the opportunity to become a BMW NA retailer were presented to Caribe, it would have rejected it.

[27]** ***HN7***[] A Robinson-Patman Act claim will not lie if the buyer fails to take advantage of favorable prices or arrangements that were in fact made available to it. *See, e.g.,* *Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1326 (6th Cir. 1983)*; *Shreve Equip., Inc. v. Clay Equip. Corp., 650 F.2d 101, 105* (6th Cir.), *cert. denied, 454 U.S. 897, 70 L. Ed. 2d 213, 102 S. Ct. 397 (1981)*; *Rod Baxter Imports, Inc. v. Saab-Scania of America, Inc., 489 F. Supp. 245, 249 (D. Minn. 1980)*. Thus, Caribe's factual averments indicate that its alleged injury was self-inflicted and beyond Robinson-Patman protection.

Caribe attempts to salvage its Robinson-Patman Act claims by asserting that the favorable prices and concessions it sought were not made "practically available" to it because to have taken advantage of the offers would have required Caribe to alter its purchasing status. This argument cannot withstand close scrutiny.

All that Caribe had to do to obtain the prices and concessions allegedly offered to BMW NA's retail dealers was to become one--and purchase BMW automobiles from BMW NA rather than from **[**28]** BMW AG. We find no judicial authority for the point of view that a favorable treatment is 'practically' unavailable to a buyer if the buyer has to change suppliers to obtain such treatment. In fact, the case law is to the contrary. *See, e.g.,* Hanson v. Pittsburgh Plate Glass Indus., Inc., 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied, 414 U.S. 1136, 38 L. Ed. 2d 761, 94 S. Ct. 880 (1974)*; Tri-Valley Packing Ass'n v. F.T.C., 329 F.2d 694, 703-04 (9th Cir. 1964).

Caribe also states in the Complaint that it was never told it would not be discriminated against if it had agreed to become a BMW NA dealer. Caribe seems to be saying that when the defendants offered it the opportunity to purchase from BMW NA, they had a legal duty to inform Caribe that it would not be discriminated against.

However, absent factual allegations to the contrary--allegations that Caribe has not made--the law presumes that BMW NA would have behaved properly, not unlawfully. *See* P.R.R. Evidence, T. 32 Ap. IV R. 16, presumption 32; 29 Am. Jur. 2d Evidence §§ 168-169 at 209-10 (1967) (1993 Supplement). As our Court of Appeals has cautioned, **[**29]** the liberal pleading rules do not "entitle a plaintiff to rest on 'subjective characterizations' or conclusory descriptions of a general scenario which could be dominated by unpleaded facts." Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52-53 (1st Cir. 1990) (citing Dewey v. Univ. of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982)), *cert. denied, 461 U.S. 944, 77 L. Ed. 2d 1301, 103 S. Ct. 2121 (1983)*. Rather, "it is only when such conclusions are logically compelled, or at least supported, by the *stated* facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that 'conclusions' become 'facts' for pleading purposes." Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989) (emphasis added).

(c) Sections 2(c), 2(d) and (e)

Caribe also alleges claims under sections 2(c), 2(d) and 2(e) of the Robinson-Patman Act. In doing so, Caribe simply quotes or paraphrases statutory language without providing any factual support.

HN8[] The mere incantation of antitrust "buzzwords" cannot substitute for necessary factual allegations **[**30]** establishing a valid claim for recovery. Since plaintiff's bald statements **[*814]** that these antitrust violations occurred are not supported by facts, it has failed to state a claim for which relief may be granted. *See, e.g.,* Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1110 (7th Cir. 1984) ("Invocation of antitrust terms of art does not confer immunity from a motion to dismiss . . . ."), *cert. denied, 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)*; Kaiser Aluminum v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied, 459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983)*; Klebanow v. New York Produce Exchange, 344 F.2d 294, 299 (2d Cir. 1965).

(d) Section 2(f)

Caribe also charges BMW NA with knowingly receiving a forbidden price discrimination in violation of section 2(f) of the Robinson-Patman Act. This claim must be dismissed as well.

HN9[] A customer cannot claim injury under the Robinson-Patman Act for preferences allegedly given to another customer with whom it does not compete. *See, e.g.,* White Indus., Inc. v. Cessna Aircraft Co., 845 F.2d 1497, 1498-1500 **[**31]** (8th Cir.), *cert. denied, 488 U.S. 856, 102 L. Ed. 2d 118, 109 S. Ct. 146 (1988)*; Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1987); National Distillers & Cham. Corp. v. Brad's Machine Prods., Inc., 666 F.2d 492 (11th Cir. 1982).

As already explained, Caribe's Complaint alleges solely that Caribe is an "importer-retailer" selling to the "motoring public" in competition with dealers purchasing from BMW NA. Nowhere is it alleged that Caribe is in competition with BMW NA for sales to dealers, as it must be alleged for Caribe's claim under section 2(f) to withstand dismissal.

2. *Sherman Act Claims*

Caribe alleges that it was forced--on threat of termination of its contract with BMW AG--to agree not to *raise* its retail prices above levels set by BMW AG, in violation of section 1 of the Sherman Act. Caribe claims that it lost profits as a result of this alleged maximum resale price maintenance agreement.

However, plaintiff lacks standing to pursue such relief. ***HN10***[] Section 4 of the Clayton Act limits standing to bring an action for treble damages under the Sherman Act only to "persons who **[**32]** shall be injured in [their] business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. Thus, to have standing under section 4, a plaintiff must have suffered "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. *See also* *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 1889-90, 109 L. Ed. 2d 333 (1990)*.

In *USA Petroleum,* the Supreme Court limited ***HN11***[] dealer standing for maximum resale price maintenance claims to three kinds of injury: (i) injury caused when prices are fixed too low for the dealer to furnish services essential to the value which goods have for the consumer, or to furnish services and conveniences which consumers desire; (ii) injury caused to smaller dealers when the fixed prices channel distribution through a few large or specifically advantaged dealers; and (iii) injury that results when the maximum price approaches the actual cost to the dealer and acquires the attributes of an arrangement fixing **[**33]** minimum prices. Because it is not included in any of these categories, recovery of profits alleged to have been lost as a result of a maximum resale price maintenance scheme--the *only injury claimed* by Caribe--is barred by *USA Petroleum.* [9]

[34] [*815] 3. *Puerto Rico Antitrust Laws***

Caribe also seeks relief under the antitrust laws of Puerto Rico, *P.R. Laws Ann. tit. 10, §§ 258*, *264*. We look, as we must, to the jurisprudence interpreting the federal antitrust laws as a guide in applying the statute. *See Diario de Sesiones,* 1964, Vol. 18, Part 4, pp. 1425-26, 1509, 1512, 1707-1709; *see also* *Whirlpool Corp. v. U.M.C.O. Int'l Corp., 748 F. Supp. 1557, 1565 n.4 (S.D. Fla. 1990)* (Puerto Rico ***antitrust law*** claims).

Accordingly, Caribe's claims under the antitrust statute of Puerto Rico are dismissed for the same reasons that dismissal of Caribe's federal antitrust claims is required.

4. *Conclusion*

It is by now clear to us that plaintiff's repeated failure to cure the defects in its Complaint are not problems with drafting, but of substance. After three failures to meet its burden of properly pleading antitrust claims, the issue should be foreclosed permanently. *Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 n.2 (1st Cir. 1988)* ("To borrow a baseball aphorism, three strikes and out seems to us not unfair . . . where--as here--plaintiff has had (and **[**35]** used) several prior opportunities to amend his complaint"); *see also* *Albrecht v. Lund, 845 F.2d 193 (9th Cir. 1988)* ("Plaintiff was given every opportunity to cure a formal defect in his pleadings, it now appears to a certainty that plaintiff cannot state a claim.").

Therefore, plaintiff's antitrust claims are hereby DISMISSED with prejudice.

C. FORUM-SELECTION CLAUSE

Plaintiffs' breach of contract and violation of Act 75 claims (collectively the "contract claims") are predicated, *inter alia,* on allegations that BMW AG breached various provisions or representations in the Importer Contract and terminated the same "unjustifiably" or "without just cause." Although there is a dearth of facts in the record to

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[9] The Supreme Court has consistently recognized that ***HN12***[] lost profits, without more, is *not* antitrust injury. *USA Petroleum, 110 S. Ct. at 1890-91*; *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-10, 116, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*; *Brunswick Corp., 429 U.S. at 488*. In any event, the assertions underpinning Caribe's maximum resale price maintenance claim are inconsistent with the facts allegedly at the heart of this dispute. Caribe's basic claim is that it could not compete with dealers located in the continental United States because those dealers' prices for BMW automobiles were allegedly too low to permit Caribe to compete. Yet, in its Sherman Act claim, Caribe contends that it has been damaged, through the loss of profits, by its alleged inability to *raise* its prices above a level purportedly set by its supplier. Surely, Caribe cannot have it both ways.

support these two causes of action, we must first determine the effect to be accorded the forum-selection clause negotiated by the parties.

BMW AG moves the Court to dismiss the contract claims and requests that the Court enforce the forum-selection clause in the Importer Contract calling for Germany as the exclusive jurisdiction. BMW AG also argues that Germany would be the more convenient forum for this dispute.

In opposition, Caribe **[**36]** argues [10] that the forum-selection clause cannot "oust this court of jurisdiction;" that the clause does not cover Caribe's claims; that Caribe could not have "foreseen litigating in Germany" and that the clause "offends" Puerto Rico public policy.

In sum, Caribe does not challenge the validity of the forum-selection clause, but questions its scope and enforceability. Caribe, however, has *not* even attempted to controvert any of BMW AG's statements of uncontroverted facts or affidavits that support its motion to dismiss for improper venue. Nor has Caribe specifically requested that it be allowed to conduct discovery on *this particular issue,* thus conceding the matter is ready for summary disposition.

1. *Applicable Law*

[37] (a) The Erie Issue**

Forum-selection clauses, particularly regarding international commercial agreements, have long been enforced by the federal courts as a matter of federal common law. *M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972)*; *Lambert v. Kysar, 983 F.2d 1110 (1st Cir. 1992)*. Historically, however, such clauses were discouraged by federal and state courts as an unnecessary restraint on access to the courts. *See, e.g., Home Ins. Co. v. Morse, 87 U.S. (20 Wall) 445, 451, 22 L. Ed. 365 (1874)*. The *Morse* view, though now widely considered outmoded, apparently still **[*816]** has not been completely discarded by some state courts. *See, e.g., Lambert, supra* (discussing Massachusetts law).

In the context of a diversity case such as the present one, there is some confusion as to whether forum-selection clauses are to be treated as substantive or procedural under the *Erie* doctrine. *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*. The Supreme Court has not squarely resolved the issue [11] and the circuits are split. *See Lambert v. Kysar, 983 F.2d at 1116, n.10* **[**38]** (for a discussion of the cases). The issue seems important at first blush because were we to consider the matter procedural, federal law governs. If, however, we conclude it is a substantive issue, then we must apply Puerto Rico law. The choice could be significant if Puerto Rico, like other state fora, has not closely followed the more enlightened perspective first articulated by *The Bremen* Court two decades ago.

The First Circuit Court of Appeals has determined, in a case very similar to this one, that questions of venue are procedural in nature and, therefore, federal common law, and not Puerto Rico law, controls. **[**39]** *Royal Bed & Spring Co. v. Famossul Industries e Comercio de Moveis Ltda., 906 F.2d 45, 49 (1st Cir. 1990)* (Act 75 claims; diversity jurisdiction; Brazilian venue chosen under the *forum non conveniens* doctrine). In *Royal Bed,* the court considered significant a forum-selection clause that provided "that . . . Brazil is the proper forum to settle any disputes . . . ." and held that Act 75 was not a bar to dismissal for improper venue when there existed no fundamental unfairness in sending the case to the foreign tribunal.

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[10] Among its arguments, Caribe places great emphasis on the public policy behind keeping antitrust suits in the United States, and avoiding two separate actions involving BMW AG and BMW NA. We need not consider these arguments given our dismissal of the claims against BMW NA.

[11] *Cf.* Julia L. Erickson, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation, 72 Minn. L. Rev. 1090 (1988)* (for the proposition that after the Supreme Court's *Stewart* opinion, *487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)*, only federal common law applies to forum-selection clauses).

Royal Bed, therefore, did not specifically resolve the present issue: whether or not in diversity cases the enforcement of a forum-selection clause by itself is ruled by federal or state law.

Recently, however, the First Circuit discussed this problem in the context of a Massachusetts contract dispute that included a Washington choice-of-forum clause. In essence, the court found that the applicable state law (Washington) *did not conflict* with federal law. Therefore, the court declined to reach the *Erie* issue and held that the forum-selection clause was enforceable. *Lambert, supra.* **[**40]**

Thus, though we have the *Royal Bed* decision as an important beacon, the *Lambert* decision leaves us in the same twilight zone of uncertainty faced by many others over whether forum-selection clauses are procedural or substantive for purposes of *Erie.* Nonetheless, following the analysis in *Lambert,* we have carefully studied Puerto Rico law and conclude that it too is in accord with federal common law; thus, we need not try to resolve the vexing problem created by the *Erie* doctrine.

(b) Puerto Rico Law

The most recent pronouncement by the Supreme Court of Puerto Rico on forum-selection clauses is *Unisys P.R. Inc. v. Ramallo Brothers Printing Inc.,* 91 J.T.S. 69 (1991). In *Unisys,* the Court discussed the validity and enforceability of a clause requiring a Michigan venue in a contract between the defendant and the third party defendant. The plaintiff was not a party to that contract. The Court found that forum-selection clauses should be generally enforced, but that under the circumstances of the case, it would be patently unfair to enforce the clause because plaintiff was an indispensable party who would not be available in the Michigan forum.

The **[**41]** Court determined that since there was no Puerto Rico jurisprudence on forum-selection clauses, it would resort to the extensive federal common law on the issue. *Id.* at 8855.

The lucid opinion adopts step-by-step the basic tenets of federal common law on forum-selection clauses. To wit, the Puerto Rico Supreme Court held that:

(i) ***HN13***[] forum-selection clauses are *prima facie* valid if reasonable, absent any fraud or overreaching, *id.* (citing *Midwest Mech. Contr. v.* ***[*817]*** *Tampa Constructors, Inc., 659 F. Supp. 526, 530 (1987))*;

(ii) forum-selection clauses are "intimately related to the public policy of not imposing obstacles on interstate and international commerce." *Id.* (citing and quoting *The Bremen, 407 U.S. at 16*) (translation ours);

(iii) ***HN14***[] there is a "strong presumption" in favor of the validity of such clauses, and their application extends to all types of cases; *Id.* (citing and quoting *Houston Intern. Televideo v. Technicolor Inc., 647 F. Supp. 554, 555 (1986))* (translation ours);

(iv) "enforcing a forum-selection clause protects the legitimate interests of the parties, **[**42]** their expectations, and above all, fosters vital interests of the system of justice," *Id.* (citing *Stewart Organization v. Ricoh Corp., 487 U.S. 22, 101 L. Ed. 2d 22, 33-34, 108 S. Ct. 2239 (1988)* (Concurrence; Kennedy, J.)) (translation ours); and

(v) ***HN15***[] the party resisting enforcement of the clause bears a heavy burden of proof to show unreasonableness (citing *Kline v. Kawai America Corp., 488 F. Supp. 868, 871 (1980))*.

The Court thus held that forum-selection clauses are presumptively valid and necessary for the freedom of international commerce and to promote "vital interests of the system of justice." Consequently, a party trying to avoid its part of a valid bargain bears a very heavy burden to prove that the clause is unreasonable.

In sum, the Puerto Rico Supreme Court has fully adopted the federal jurisprudence on forum-selection clauses and established a doctrinal approach that is in complete accord with federal law, thus obviating any *Erie-type* problems at bar.

(c) Federal Common Law

The seminal case in the area of forum-selection clauses is *The Bremen.* In that case, an American and a German corporation entered into an international **[**43]** towage contract that required that all disputes be heard in England. The tug and tow were forced by a severe Gulf storm to safe harbor in Tampa, where the American corporation, in violation of its agreement, sued for damages caused to its property. The lower courts, reflecting the historical disdain for forum-selection clauses, denied the German corporation's motion to enforce the forum-selection clause. The Supreme Court reversed, holding that the enforcement of such clauses "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world." *The Bremen, 407 U.S. at 11*.

The Supreme Court found that forum-selection clauses are *"prima facie* valid and should be enforced" unless the resisting party meets its "heavy burden" and proves that enforcement would be unreasonable under the circumstances. *Id. at 10*. ***HN16***[] A clause is unreasonable only if it is invalid, or fundamental fairness compels that it not be enforced. The clause is invalid, said the Court, only if it is shown to have been the product of "fraud, **[**44]** undue influence, or overweening bargaining power." *Id. at 12*. It should be held unenforceable, added the Court, "if the chosen forum is *seriously* inconvenient for the trial of the action." *id. at 16* (emphasis in original), or enforcement would be manifestly unjust.

The Court made clear, however, that the issue was not one of convenience of the forum, as with the doctrine of *forum non conveniens,* [12] but of holding the parties to their " **[*818]** freely negotiated private international commercial agreement" absent a clear showing that the chosen forum "will be so manifestly and gravely inconvenient to [the resisting party] that it will be effectively deprived of a meaningful day in court . . . ." *Id. at 16* and 19-20. Indeed, the Court emphasized that: "where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, *it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable. Id. at 16* **[**45]** (emphasis added).

[46]** Finally, *The Bremen* Court rejected the lower court's outdated jurisdictional conceptions by articulating the forum-selection clause credo:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on the parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.

Id. at 9.

"While *Bremen* involved a suit in admiralty, its wisdom has been unhesitatingly applied in land-based diversity actions." *D'Antuono v. CCH Computer Systems, Inc., 570 F. Supp. 708, 711 (D.R.I. 1983)* (Selya, J.) (case citations omitted).

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[12] The lower courts in *The Bremen* approached the motion to dismiss as one under *forum non conveniens,* that is, whether the movant could prove that the London forum was more convenient than the Tampa forum. The Supreme Court said that this was the wrong approach since the contract "expressly resolved that issue [of convenience of forum]. The correct approach would have been to enforce the forum clause specifically unless [non-movant] could clearly show that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id. at 15*. Various federal courts have applied this approach, that is, specifically enforcing the forum-selection clause rather than analyzing the *forum non conveniens* doctrine. *See, e.g., Crown Beverage Co. v. Cerveceria Moctezuma, 663 F.2d 886 (9th Cir. 1981)* (antitrust and distributorship contract between American and foreign companies providing for Mexican forum); *Coastal Steel Corporation v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir. 1983)* (England); *Warner & Swasey Co. v. Salvagnini Transferica, 633 F. Supp. 1209* (W.D.N.Y.), *aff'd* on basis of opinion below, *806 F.2d 1045 (Fed. Cir. 1986)* (Italy); *Manetti-Farrow, Inc. v. Gucci, 858 F.2d 515 (9th Cir. 1988)* (Italy) (similar facts); ***Bonny v. Society of Lloyd's, 784 F. Supp. 1350 (N.D. Ill. 1992)*** (England); *Riley v. Kingsley Underwriting Agencies, 969 F.2d 953 (10th Cir. 1992)* (England); and *Paper Express Ltd. v. Pfankuch Maschinen, 972 F.2d 753 (7th Cir. 1992)* (Germany).

On the strength of *The Bremen,* the First Circuit has held that: ***HN17***[] "To establish that a particular choice of forum clause is unreasonable, a resisting party must present evidence of fraud, undue influence, overweening bargaining power or . . . serious inconvenience in litigating." *Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc., 492 F.2d 1294, 1297 (1st Cir. 1974)*. **[**47]** *See also* GKG Caribe, Inc. v. Nokia-Mobira, Inc., 725 F. Supp. 109, 112 (D.P.R. 1989) (Gierbolini, J.) (Act 75 claims) ("no basis for assuming forum inadequate or selection unfair absent a showing [of *The Bremen* factors]"); and *McCain Foods Ltd. v. Puerto Rico Supplies, Inc., 766 F. Supp. 58, 60 (D.P.R. 1991)* (Cerezo, J.) (Act 75 claim, Canada arbitration) ("the forum-selection clause must be strictly enforced").

As will be discussed in more detail, in the present case Caribe has failed to meet its burden of showing that, pursuant to *The Bremen* and its progeny, the forum-selection clause is invalid or should not be enforced. Thus, like *The Bremen* Court, we hold that "in light of present day commercial realities and expanding international trade, we conclude that the forum clause should control . . . ." *The Bremen, 407 U.S. at 15*.

2. *Scope and Validity of Forum-Selection Clause*

Caribe's argument regarding the scope of the forum-selection clause as it pertains to the contract claims seems to be that the clause is not as "narrowly drafted" as certain others that it cites, **[**48]** thus it cannot cover Caribe's contractual claims. This argument is misconceived. First, the clauses Caribe compares contain distinctions without any difference. This is particularly true regarding its reliance on *Bense v. Interstate Battery System of America, Inc., 683 F.2d 718, 720 (2d Cir. 1982)*. [13]

Second, we fail to see how the clear and mandatory import of the clause at issue here can be avoided. It reads: ". . . the *exclusive jurisdiction for disputes* concerning the . . . termination of this agreement as well as any rights and duties arising out of this agreement *is* . . . *Germany."*

[*819] The simple reading of the forum-selection clause is that Germany is the exclusive jurisdiction for all disputes. Caribe has failed to prove this language is in any manner permissive or ambiguous or that it does **[**49]** not cover contractual claims, particularly when plaintiff's main contractual claim is that it was unjustly terminated (and the text of the clause specifies termination). On its face, the clause appears fully applicable and enforceable. *Lambert, 983 F.2d at 1116* (citing *Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d 762, 764 (9th Cir. 1989)*("***HN18***[] The prevailing rule is clear . . . that where venue is specified with mandatory language, the clause will be enforced")).

Third, Caribe's attempt to challenge the scope of the clause by arguing tort-based theories is completely unconvincing. This is primarily because Caribe has not alleged any tort causes of action and even if it had, these would be inexorably tied to its contractual claims and thus bound to the clause. *See Clinton v. Janger, 583 F. Supp. 284, 287 (N.D. Ill. 1984)*; *Crescent Corp. v. Procter & Gamble Corp., 627 F. Supp. 745, 748 (N.D. Ill. 1986)*. *See also Ronar*, *Inc. v. Wallace, 649 F. Supp. 310, 313-314 (S.D.N.Y. 1986)*; *Weidner Communications, Inc. v. Faisal, 671 F. Supp. 531, 537 (N.D. Ill. 1987)*. **[**50]** Besides, "the better general rule, we think, is that ***HN19***[] contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties." *Lambert, 983 F.2d at 1121-1122*.

Lastly, Caribe's implication that the forum-selection clause "ousts" this Court of jurisdiction does not comport to the well-established modern view that such clauses do not deprive courts of jurisdiction, but simply may compel them to decline it. "The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction." *The Bremen, 407 U.S. at 12*; *LFC Lessors, Inc. v. Pacific Sewer Maintenance, 739 F.2d 4 (1st Cir. 1984)*; Frances M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place of Court in Which Action May be Brought,* 31 A.L.R. 4th 404, 409 (1992).

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[13] The clause in *Bense* read: "the exclusive venue of any suits or causes of action arising directly or indirectly from this Agreement shall be in Dallas County, Texas."

Therefore, we hold that the forum-selection clause is valid and that the contract claims are clearly within its scope.

3. *Application of Forum-Selection Clause*

[51]** The facts in this case, under a favorable reading for plaintiff, fail to reveal anything unreasonable about enforcing the forum-selection clause at issue. Quite the contrary, failure to enforce the clause would not only be unfair under the circumstances, but would violate the important public policy that sustains the doctrine itself: Unfettered international transactions, international comity and "sensitivity to the need of the international commercial system for predictability in the resolution of disputes," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 613, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)*, as well as judicial and contractual efficiency. *Carnival Cruise Lines, supra.*

The place of the execution and performance of the contract at issue was Germany. The parties freely negotiated the clause in Germany, and in the German language. Plaintiff's main principals are European citizens and sophisticated businessmen with extensive experience in the German market system as can be logically deduced from the transactions that took place between BMW AG and Caribe (through Messrs. Quintano and Benoit).

The main negotiations for the forum-selection and choice-of-law **[**52]** clauses, took place in Germany. These clauses called for German law and exclusive German venue to resolve any disputes. The venue clause was broad and mandatory. It was made an essential part of each contract renewal and was not altered despite other changes to the contract. Thus, the clause "could hardly have escaped [Caribe's] attention." *The Bremen, 407 U.S. at 15, n.16*. The parties exchanged communications in German. The products at issue were manufactured in Germany. They were bought in Germany with German marks. And title to them passed in Germany.

It is difficult to comprehend how Caribe can legitimately claim that it could not foresee **[*820]** litigating the termination of its contract with BMW AG--and matters related to that contractual relationship--in Germany given the extensive contacts with that jurisdiction and its agreement to litigate there. Indeed, the conduct of the parties revolved around Germany throughout the nine years of their relationship.

In addition, Caribe has not presented any evidence to show that it could not have its contract claims fully adjudicated in the German courts. Mr. Eberhard Rohm, one of Caribe's attorneys **[**53]** and apparently an expert on German law, submitted an affidavit which speaks only to the treatment German courts give antitrust claims, particularly regarding treble damages. Mr. Rohm's affidavit says nothing about any problem in Germany with Caribe's contractual claims. [14] Also, it would seem that with Mr. Rohm's assistance, plaintiff has little to fear of the German forum in which he voluntarily did business.

Caribe's failure to show that the German forum is unfavorable or that litigating there would be seriously inconvenient compels enforcement of the forum-selection clause. *The Bremen, 407 U.S. at 18* (***HN20***[ ] the party avoiding a choice-of-forum clause must show it would to so "gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding **[**54]** that it would be unfair, unjust or unreasonable to hold that party to its bargain.").

The international quality of the contract and the parties involved here is patent. This is not a local dispute. *The Bremen, 407 U.S. at 17*. BMW AG with its far-flung operations is entitled to the uniformity and predictability for which it bargained. *Carnival Cruise Lines, supra* ("A clause establishing *ex ante* the dispute resolution forum has the salutary effect of dispelling confusion as to where suits may be brought and defended, thereby sparing litigants time and expense and conserving judicial resources."). [15] The private international agreement at issue is

[14] Also, the fact that Germany has a civilist tradition and jurisdiction similar in many ways to Puerto Rico's code-ruled system, would seem more favorable than not.

[15] *The Bremen* Court has said about this issue that one of the compelling factors to enforce forum-selection clauses is that "at the very least [they are] an effort to eliminate all uncertainty as to the nature, location and outlook of the forum in which these companies of differing nationalities might find themselves . . . . The elimination of all such uncertainties by agreeing in advance

fundamentally fair and should be given full effect. *The Bremen, 407 U.S. at 12-13*; *see also* *Scherk v. Alberto-Culver Co., 417 U.S. 506, 519, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)*.

[55]** Finally, we reject plaintiff's reasoning that enforcement of the forum-selection clause regarding its Act 75 claims would violate Puerto Rico public policy.

First, the Puerto Rico Supreme Court itself has established that valid forum-selection clauses fulfill their own significant public policy of not imposing obstacles in interstate and international commerce, as well as "vital interests of the system of justice." *Unisys,* 91 J.T.S. at 8855. *See also* *Manetti-Farrow, 858 F.2d at 518* ("we conclude that the federal procedural issues raised by forum-selection clauses significantly outweigh the state interests and the federal rule announced in *The Bremen* controls enforcement of forum clauses in diversity cases."). The *Bremen* Court specifically held that in a *domestic* context choice-of-forum clauses should not be enforced if they "contravene a strong public policy of the forum . . . [However,] those considerations [of local public policy] are not controlling in an international commercial agreement." *The Bremen, 407 U.S. at 15-16*. The Importer Contract is clearly such an "international commercial agreement."

[56]** Second, plaintiff has not shown any evidence, let alone met its burden, that its claims, including its Act 75 claims, cannot be fairly heard in the German forum.

Third, and lastly, judges in this District and our Court of Appeals have dismissed Act 75 claims on grounds of forum-selection clauses, as well as *forum non conveniens,* **[*821]** with full knowledge of the local public policy implications. Therefore, it can not be said that such clauses "violate" that "public policy" nor that Act 75 concerns are paramount over other federal common law considerations. *See, e.g., Royal Bed, supra;* and *Royal Bed & Spring Co. v. Famossul Industria E. Comercio De Moveis Ltda.* (Civil No. 87-1054) 89 D.C.O. 164 (August 15, 1989) (Gierbolini, J.).

Caribe has failed to meet its burden. Therefore, finding nothing in the record that would support a refusal to enforce the forum-selection clause, we dismiss plaintiff's contract claims on the grounds of improper venue.

D. FORUM NON CONVENIENS

We echo the Court of Appeals for the Third Circuit in concluding that "because we hold that the forum-selection clause should have been enforced, the *forum non conveniens* **[**57]** ruling need not be addressed in detail." *Coastal Steel, 709 F.2d at 204* (holding in a contract dispute between an American and English corporation that "defendants' motions to dismiss the complaint so as to enforce the forum selection clause . . . which stated that disputes would be determined [in England] according to English law should have been granted").

As the preceding discussion demonstrates, there are various reasons requiring dismissal of the present action. The doctrine of *forum non conveniens* also mandates that result.

In presenting this alternative holding that Germany is a more convenient forum than Puerto Rico for this dispute, we have kept well in mind the Supreme Court's admonition in *The Bremen* that the correct approach is to "enforce the forum-selection clause specifically" and that "claims of inconvenience" should not defeat "freely negotiated private international commercial agreements." This is so precisely because any inconvenience--and the corresponding guaranty of predictability of the choice of forum of law--are factored into the benefits and costs of the bargain achieved between sophisticated businessmen experienced **[**58]** in international trade as in the present case. *The Bremen, 407 U.S. at 15-17*.

Essentially, ***HN21***[] the *forum non conveniens* doctrine permits discretionary dismissals on a "case-by-case" basis where an alternative forum is available in another nation which is fair to the parties and substantially more

on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting." *The Bremen, 407 U.S. at 13-14*.

convenient for them and the courts. *See* [Mercier v. Sheraton International, Inc., 981 F.2d 1345 (1st Cir. 1992)](). The Court's task is to determine whether the availability of an adequate alternative forum would in fairness be sufficient to overcome a presumption in favor of plaintiff's choice of forum. *Tramp Oil & Marine Ltd. v. M/V Mermaid I, 743 F.2d 48, 50 (1st Cir. 1984)*. To perform this task, we must consider the private and public interests at stake. *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947)* and *Mercier, supra* (discussing factors).

For many of the same reasons discussed in the prior section, we find that Germany is indeed the more convenient forum for this dispute.

The *availability* of Germany as a forum is unquestioned **[**59]** since BMW AG would clearly be amenable to process there. Likewise, the *adequacy* of the forum is also well-grounded insofar as the remedy that could be provided there is not "so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft v. Reynoso, 454 U.S. 235, 254, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981)*.

After all, "the parties did not enter into a contractual relationship in a foreign jurisdiction in reliance upon our courts. They cannot complain if our courts refuse to meddle in their affairs and remitted them to the place that established and would enforce their rights." *Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991)*. It is important to keep in mind that, pursuant to the uncontested facts in this case, Germany was the "place of performance and fulfillment of [the Importer Contract]" as the title of the forum-selection clause itself clearly states.

HN22[] While there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, the presumption is simply inapplicable where, as here, plaintiff brings its lawsuit **[*822]** in a forum different from that chosen in its *international* **[**60]** contract and where the dispute essentially is not a local one involving local interests.

This district, as well as the First Circuit, has recognized that the existence of a forum selection contract is relevant to the *forum non conveniens* analysis. In *Royal Bed,* 89 D.C.O. 164, this court (Gierbolini, J.) dismissed on *forum non conveniens* considerations an action brought by a Puerto Rico distributor against the Brazilian manufacturer pursuant to the provisions of Act 75. The agreement between the parties contained a provision which designated the courts of Brazil as competent to settle any disputes derived from the contract, and specified the Brazilian Civil Code as the governing law. *Id at 439-440*. Among others, the court considered the Act 75 public policy argument and concluded that:

> Here we are dealing with a freely negotiated international commercial transaction between a Brazilian and a Puerto Rican corporation for the distribution of Brazilian products in Puerto Rico. The choice of forum is a contract element which, like all others, is subject to negotiation between the parties. Clearly, whatever inconvenience plaintiff would suffer by being forced to **[**61]** litigate in the contractual forum was foreseeable at the time of contracting. Before we will upset the provisions of the contract, plaintiff must demonstrate that trial in the contractual forum will be so gravely inconvenient so as to deprive it of its day in court.

89 D.C.O. 164 at 441.

The Court of Appeals *affirmed* the dismissal of the action on *forum non conveniens* considerations, in spite of its recognition that Act 75 "refuses to enforce forum-selection clauses providing for out-of-state or foreign venues as a matter of public policy." *906 F.2d at 47*. The First Circuit concluded that "the convenience of a Brazil forum, given the parties' expressed preference for that venue, the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power, as well as their familiarity with the procedure and laws of that forum" required dismissal in favor of Brazil as the most convenient forum. *Id.*

In sum, the private factors in this case show that Germany is an adequate forum because the access to sources of proof is not difficult given the witnesses and records that are there and the transactions that took **[**62]** place there as well. The availability of compulsory process is unquestioned and the cost of obtaining witness attendance, from the plaintiff's perspective, is negligible given that BMW AG has its operations in Germany. There are no premises that need to be viewed in Puerto Rico and the practical problems inherent in all litigation seem not disproportionate regarding litigation in Germany since most, if not all, the substantial merits discovery will take place outside Puerto Rico, and much of it in Germany. *Mercier, supra.*

The public interest considerations equally weigh in favor of the German forum. There is an unchallenged choice-of-law clause for the application of German law by plaintiff. The calendar congestion of this Court is considerable not only in terms of an excessively demanding and complex criminal and civil caseload, but also because of the well-publicized fiscal crisis facing the federal judiciary which recently has triggered a proposed moratorium on civil jury trials because of the lack of funds to pay jurors. The considerable lack of discovery on the merits also militates toward the foreign jurisdiction. And, finally, as discussed **[**63]** above, there are no local interests violated by a dismissal based on this doctrine given that such dismissals have occurred in this District under very similar circumstances as, for example, in *Royal Bed, supra.* It appears to us that the foreign tribunal can more appropriately conduct this litigation, and should. *Howe v. Goldcorp. Investments Ltd., 946 F.2d 944 (1st Cir. 1991)*, *cert. denied, 117 L. Ed. 2d 418, 112 S. Ct. 1172 (1992)*; *Piper Aircraft Co., 454 U.S. at 235*.

IV. *CONCLUSION*

For the reasons discussed above defendants' motions are hereby GRANTED as follows:

[*823] Counts one and two (antitrust) of the Second Amended Complaint are DISMISSED WITH PREJUDICE for failure to state a cause of action;

Counts three and four (contract) are DISMISSED for improper venue and, in the alternative, on grounds of *forum non conveniens.*

Further, on July 12, 1991, El Fenix de Puerto Rico, Caribe's insurer, tendered an "Intervention Complaint." El Fenix sought leave to intervene claiming a right to any monies Caribe might obtain in the present suit. (Docket **[**64]** No. 12.) On July 10, 1991, the Court granted leave. Since the main action will be dismissed in its entirety, there is no need to discuss the particulars of El Fenix's complaint, and the same is hereby DISMISSED.

Judgment to be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 13th day of May, 1993.

RAYMOND L. ACOSTA

United States District Court Judge

Ghem, Inc. v. Mapco Petroleum, Inc.

United States Court of Appeals for the Sixth Circuit

May 13, 1993, Filed

No. 90-6604

Reporter
1993 U.S. App. LEXIS 12064 *; 1993-1 Trade Cas. (CCH) P70,236

GHEM, INC., Plaintiff-Appellant, v. MAPCO PETROLEUM, INC., Defendant-Appellee.

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Reported as Table Case at: *992 F.2d 1216, 1993 U.S. App. LEXIS 19982*.

Prior History: United States District Court for the Middle District of Tennessee. District No. 89-00949. Wiseman, Jr., District Judge.

Core Terms

summary judgment, district court, prima facie case, antitrust, supplemental brief, grant summary judgment, competitors, Petroleum, parties, sales

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Entitlement as Matter of Law, Appropriateness**

Before summary judgment may be granted against a party, *Fed. R. Civ. P. 56(c)* mandates that the party opposing summary judgment be afforded notice and a reasonable opportunity to respond to all issues to be considered by the court. Where a district court is contemplating entering sua sponte summary judgment against one of the parties, that party is entitled to unequivocal notice of the court's intentions.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] **Summary Judgment, Evidentiary Considerations**

The United States Supreme Court rejects the notion that a defendant seeking summary judgment must produce evidence disproving the plaintiff's case. The moving party need not support its motion with affidavits or other similar materials negating the opponent's claim. Once a defendant seeking summary judgment meets this threshold, the burden shifts to the plaintiff to show that its evidence is sufficient to establish the essential elements of its case. If the plaintiff cannot gather enough evidence to support its claim, a trial would serve no worthy purpose and summary judgment is warranted.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN3[] **Summary Judgment, Entitlement as Matter of Law**

A plaintiff opposing summary judgment has the burden of coming forward with evidence necessary to support its claim, regardless of whether the defendant moves for summary judgment or the district court notifies the plaintiff to identify its proofs in support of its claim.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Energy & Utilities Law > Oil & Petroleum Products > Processing & Refining > General Overview

HN4[] **Public Enforcement, State Civil Actions**

To establish a prima facie case under *Tenn. Code Ann. § 47-25-611(a)(1)*, a plaintiff must prove five elements: (1) that the defendant is a dealer; (2) that the defendant sells petroleum distillates at retail; (3) that the distillates were sold at a price below the dealer's cost; (4) that the below cost sales had an actual or threatened adverse effect on competition; and (5) that the plaintiff suffered "antitrust injury."

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN5[] **Regulated Practices, Market Definition**

The "injury to competition" inquiry demands a threshold examination of the geographic and product line markets as well as the number of competitors and their approximate market shares.

Judges: BEFORE: NELSON and SUHRHEINRICH, Circuit Judge; and HARVEY, Senior District Judge. *

Opinion by: PER CURIAM

Opinion

PER CURIAM. This is an appeal from a district court order granting summary judgment for Mapco Petroleum, Inc. (Mapco) in this diversity action brought by Ghem, Inc. (Ghem) under the Tennessee Petroleum Trade Practices Act (TPTPA), *Tenn. Code Ann. §§ 47-25-611 to 626*. Ghem alleged that Mapco violated *section 47-25-611(a)(1)* of the TPTPA by selling regular unleaded gasoline at retail at a price **[*2]** below cost to Mapco. The district court granted summary judgment on the ground that Ghem failed to establish a prima facie case under the TPTPA. Ghem appeals. After oral argument, we certified various questions to the Supreme Court of Tennessee. Having received answers to those questions, we **AFFIRM.**

I.

Ghem is a Tennessee corporation that operates a Shell service station in Murfreesboro, Tennessee. Mapco is a Delaware corporation that operates Delta Express stores. Two Delta Express stores in Murfreesboro sell gasoline at retail in direct competition with Ghem's Shell station. The Delta Express and Shell stations also compete directly with Dodge, Exxon, Gulf, Jiffy Oil, Jim Dandy, Marathon Oil, and Texaco stations.

In its amended complaint, Ghem alleged that on certain days in 1989, Mapco sold regular unleaded at its Delta Express stores at a price below cost to Mapco, with the intent to injure competitors and lessen competition. Arguing that Mapco's below-cost sales violated *section 47-25-611(a)(1)* of the TPTPA, Ghem sought compensatory and treble damages, attorney's fees, and an order enjoining Mapco from selling gasoline below cost.

Mapco filed a motion for **[*3]** summary judgment in which it conceded that it had made below-cost sales at retail, but argued that *section 47-25-611(h)* of the TPTPA exempted it from liability, because the sales were made in good faith to meet the equally low or lower prices of competitors. Before ruling on the motion, the district court ordered the parties to file supplemental briefs to assist the court in identifying the elements of a prima facie case under *section 47-25-611(a)(1)*. The district court's order suggested that the parties address the question of whether a plaintiff must prove antitrust injury, as required under federal ***antitrust law***, to recover under *section 47-25-611(a)(1)*.

In its supplemental brief, Mapco included antitrust injury and injury to competition as two of four elements that it believed the TPTPA requires a plaintiff to prove to recover damages. It asserted that Ghem failed to cite sufficient evidence to establish those two elements. Ghem's responsive supplemental brief also listed four elements

* The Honorable James Harvey, Senior Judge of the United States District Court for the Eastern District of Michigan, sat by designation; however, as a result of his retirement on June 30, 1992, Judge Harvey did not participate in the final opinion.

necessary to state a claim under *section 47-25-611(a)(1)*, but it rejected antitrust injury as an element. In addition, Ghem asserted that it had satisfied the injury to competition element.

[*4] After Mapco filed a supplemental reply brief, the district court granted summary judgment in favor of Mapco, holding that Ghem had failed to establish a prima facie case under *section 47-25-611(a)(1)* becasue Ghem had shown neither antitrust injury nor injury to competition. *Ghem, Inc. v. Mapco Petroleum, Inc., 767 F. Supp. 1418 (M.D. Tenn. 1990)*. This appeal followed.

II.

A. *Sua Sponte Summary Judgment*

Ghem first argues that the district court clearly erred when it failed to give Ghem notice of its intent to consider issues other than Mapco's good faith competition defense in deciding whether to grant summary judgment for Mapco. We disagree. [1]

As this court stated in *Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989)*, ***HN1***[] "before summary **[*5]** judgment may be granted against a party, *Fed. R. Civ. P. 56(c)* mandates that the party opposing summary judgment be afforded notice and a reasonable opportunity to respond to all issues to be considered by the court." We have also stated that "where a district court is contemplating entering sua sponte summary judgment against one of the parties, that party is entitled to unequivocal notice of the court's intentions." *Yashon v. Gregory, 737 F.2d 547, 552 (6th Cir. 1984)*. After reviewing the record, we conclude that the district court's grant of summary judgment comported with the requirements of *Routman* and *Yashon*.

The district court's order requiring supplemental briefs put the parties on notice that the court would consider the sufficiency of Ghem's claim at the outset, before it would consider the merits of Mapco's good faith competition defense under *section 47-25-611(h)*. The court stated that "before the issue of whether Mapco is entitled to the good faith competition defense can be addressed, *the court must first identify the elements necessary to a successful claim under § 47-25-611(a)(1)*." (emphasis added). The implication is **[*6]** clear that the district court suspected a deficiency in Ghem's claim under the TPTPA and endeavored to first establish the legitimacy of the claim before turning to the merits of Mapco's defense.

Our review of the parties' supplemental briefs reveals that they understood that the district court intended to consider whether Ghem alleged, and could support with evidence, a prima facie case under the TPTPA. In its supplemental brief, Mapco sought summary judgment on the ground that Ghem could not establish the elements of a prima facie case under *section 47-25-611(a)(1)*. It stated specifically that "plaintiff's inability to prove and its failure to even allege that any below-cost sales by MAPCO had an adverse effect on competition is sufficient grounds for granting MAPCO's Motion for Summary Judgment." In the last sentence of its supplemental brief, Mapco's challenge was explicit and unequivocal: "because Plaintiff in this case cannot prove, and has not even alleged, the elements necessary to establish a cause of action under *Tenn. Code Ann. § 47-25-611(a)(1)*, the Court should grant MAPCO's Motion for Summary Judgment." Ghem's supplemental response brief employs similar language regarding **[*7]** the adequacy of its averments and proofs as they related to the elements of a prima facie case under the TPTPA. In its brief, Ghem stated: "based upon the foregoing, GHEM, Inc., has set forth a legally sufficient cause of action under the Tennessee Petroleum Trade Practices Act." Thus, it was apparent to the parties that the issue of whether Ghem could establish the elements of its case was squarely before the district court on motion for summary judgment. Accordingly, we find no error.

B. *Shifting Burdens Under Fed. R. Civ. P. 56*

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[1] In its motion for summary judgment, Mapco argued initially that the good faith competition defense provided under *section 47-25-611(h)* of the TPTPA exempted it from liability.

Ghem also claims that the district court made a procedural error by forcing Ghem to come forward with evidence to support each element of its prima facie case. Ghem contends that the district court should have placed on Mapco the burden to produce evidence showing the absence of a genuine issue of material fact. We disagree.

In *Celotex Corp. v. Catrett, 477 U.S. 317 (1986)*, ***HN2***[] the Supreme Court rejected the notion that a defendant seeking summary judgment must produce evidence disproving the plaintiff's case. The Court noted that the moving party need not "support its motion with affidavits or other similar materials **[*8]** *negating* the opponent's claim." *Id. at 323*. Once a defendant seeking summary judgment meets this threshold, the burden shifts to the plaintiff to show that its evidence is sufficient to establish the essential elements of its case. *Id. at 322-23*. If the plaintiff cannot gather enough evidence to support its claim, a trial would serve no worthy purpose and summary judgment is warranted.

We see no reason why the Supreme Court's analysis should change merely because a district court, rather than a defendant, raises the question whether a plaintiff can prove its case. Thus, we hold that ***HN3***[] a plaintiff opposing summary judgment has the burden of coming forward with evidence necessary to support its claim, regardless of whether the defendant moves for summary judgment or the district court notifies the plaintiff to identify its proofs in support of its claim. Ghem's second claim, therefore, fails.

C. *The Prima Facie Case*

Last, Ghem contends that the district court erred in identifying the elements of a prima facie case under *section 47-25-611(a)(1)* of the TPTPA and erred in identifying the nature of the proofs **[*9]** required to establish a prima facie case. In relation to these claims, and after oral argument, we certified the following questions to the Tennessee Supreme Court:

> I. What are the necessary elements to a cause of action under *Tenn. Code Ann. § 47-25-611(a)(1)*?
>
> II. Is an actual adverse effect on competition, as opposed to an adverse effect on a competitor, a necessary prerequisite to a cause of action under *Tenn. Code Ann. § 47-25-611(a)(1)*?
> III. Is an "antitrust injury" an essential element to a cause of action under the foregoing statute, and, if so, what type of proof is sufficient to establish an "antitrust injury"?

In its opinion addressing these questions, the Tennessee Supreme Court stated, inter alia, that ***HN4***[] to establish a prima facie case under *section 47-25-611(a)(1)*, a plaintiff must prove five elements: (1) that the defendant is a dealer; (2) that the defendant sells petroleum distillates at retail; (3) that the distillates were sold at a price below the dealer's cost; (4) that the below cost sales had an actual or threatened adverse effect on competition; and (5) that the plaintiff suffered "antitrust injury." *Ghem, Inc. v. Mapco Petroleum, Inc., 1993 Tenn. LEXIS 113, 1993-1 Trade Cas. (CCH) P 70161 (Tenn. 1993)*. **[*10]**

The district court's order granting summary judgment is consistent with the dictates of the Tennessee Supreme Court. The district court's decision turned, in part, on Ghem's failure to prove injury to competition. The district court found that although Ghem alleged harm to itself, a mere *competitor*, it did not offer any evidence of harm to *competition*, as required by the Tennessee Supreme Court. Further, the district court noted that Ghem failed to offer any evidence regarding the relevant market for petroleum distillates. This failure was crucial, because according to the Tennessee Supreme Court, ***HN5***[] the "injury to competition" inquiry demands a threshold examination of the geographic and product line markets as well as the number of competitors and their approximate market shares. After reviewing the record, we agree with the district court's assessment of the evidence. Thus, we conclude that Ghem failed to plead and/or prove a prima facie case under the TPTPA. Summary judgment was therefore appropriate. [2]

[*11] III.

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[2] Ghem's failure to show an adverse effect on competition justifies affirmance and obviates the need to address the issue of whether Ghem proved "antitrust injury."

For all of the reasons stated, we **AFFIRM** the district court's order granting summary judgment in favor of Mapco.

DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.

United States Court of Appeals for the Eleventh Circuit

May 17, 1993, Decided

No. 92-8049.

Reporter

990 F.2d 1186 *; 1993 U.S. App. LEXIS 11156 **; 1993-1 Trade Cas. (CCH) P70,248; 7 Fla. L. Weekly Fed. C 318

DeLONG EQUIPMENT COMPANY, Plaintiff-Appellant, Cross-Appellee, v. WASHINGTON MILLS ELECTRO MINERALS CORP., f/k/a Washington Mills Abrasive Co., Washington Mills Ceramic Corp., John T. Williams and Peter Williams, Defendants-Appellees, Cross-Appellants.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia. DISTRICT/BKRPTCY COURT DKT# 1:86-cv-275-RLV. DISTRICT JUDGE Vining

Disposition: AFFIRMED.

Core Terms

media, damages, distributor, pound, manufacturer, sales, conspiracy, Robinson-Patman Act, antitrust, new trial, terminated, prices, resale price, Sherman Act, customer, wholesale price, district court, stock, retail price, products, dealer, discount, vertical, dollars, kickbacks, plant, designation, projections, delivery, profits

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

HN1[] **Antitrust & Trade Law, Sherman Act**

Resale price maintenance agreements are, of course, per se illegal restraints of trade within the Sherman Anti-Trust Act, 15 U.S.C.S. § 1.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN2[] **Standards of Review, De Novo Review**

A federal appellate court reviews de novo a denial of judgment notwithstanding the verdict, including in an antitrust case the question of antitrust injury which is one component of whether or not the plaintiff has standing, a question of law.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN3[] **Standards of Review, De Novo Review**

The grant of the motion for a new trial is generally reviewed under an abuse of discretion standard, though when it is on evidentiary grounds the verdict must be against the great weight of the evidence to sustain the grant.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN4[] **Preclusion of Judgments, Law of the Case**

A federal appellate court's decision at an earlier stage of the same case represents the law of the case as to matters decided explicitly and by necessary implication. A federal district court must follow the appellate decision as to these issues on remand, and generally speaking the appellate court must do so in future rulings in the case as well. The doctrine is not an inexorable command that rigidly binds the court to its former decisions, but rather n expression of good sense and wise judicial practice; thus an appellate court's decision of issues must be followed in all subsequent trial or intermediate appellate proceedings in the same case except when there are the most cogent of reasons, such as a change in controlling authority, new evidence or the need to avoid manifest injustice. The law of the case directs a court's discretion, it does not limit the tribunal's power.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN5[] **Preclusion of Judgments, Law of the Case**

The doctrine of the law of the case permits a change of position if it appears that the court's original ruling was erroneous.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Evidence > Burdens of Proof > General Overview

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

In an antitrust case, even where conduct complained of is illegal per se, a plaintiff must show that it is adversely affected by an anti-competitive aspect of the defendant's conduct.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN7[] **Price Fixing & Restraints of Trade, Vertical Restraints**

In general, of course, the fixing of wholesale prices poses no antitrust problem. However, complex wholesale price formulae may be the means by which resale price fixing is accomplished, where the formula so varies the wholesale price in accord with each dealer's resale price as to be the full or substantial functional equivalent of resale price-fixing agreements.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Evidence > Burdens of Proof > General Overview

HN8[] **Remedies, Damages**

The burden of putting forth substantial evidence is not satisfied by mere speculation and guess work.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN9[] **Robinson-Patman Act, Claims**

Section 1 of the Robinson-Patman Act, which amends and appears as *§ 2* of the Clayton Act, *15 U.S.C.S. § 13* makes it unlawful for a seller engaged in commerce to discriminate in price between different buyers.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

HN10[] **Remedies, Damages**

A new trial may be awarded when the verdict suggests that the jury was confused and misapplied the law.

Civil Procedure > Remedies > Judgment Interest > General Overview

Torts > ... > Types of Damages > Judgment Interest > General Overview

HN11[] **Remedies, Judgment Interest**

Under Georgia law, if a party admits liability in some amount, not necessarily the amount claimed or ultimately recovered by the other party, interest may be had from the date of such admission on that amount.

Counsel: For Plaintiff-Appellant, Cross-Appellee: William E. Sumner, SUMNER & HEWES, Nancy Becker Hewes, Stephen J. Anderson, David A. Webster, Ste 700, The Hurt Bldg., 50 Hurt Plaza, Atlanta, Ga 30303; 588-9000.

For Defendants-Appellees, Cross-Appellants: Paul Webb, Jr., WEBB & DANIEL, Philip S. Coe, 3100 IBM Tower, One Atlantic Center, 1201 West Peachtree St, N.W., Atlanta Ga 30309-3400; 881-0433.

Judges: Before KRAVITCH, Circuit Judge, GODBOLD and OAKES, * Senior Circuit Judges.

Opinion by: OAKES

Opinion

[*1189] OAKES, Senior Circuit Judge:

The critical question presented by this case involves a conspiracy between a manufacturer and a favored distributor. The object of the conspiracy was to raise wholesale prices to other distributors, including the plaintiff, on products to be sold to one large customer. It is of some significance that the wholesale price, as raised, was higher than prevailing retail prices. The ***antitrust law*** question is whether this conspiracy was a device to force an increase in the resale price, or a vertical agreement to fix the minimum resale price in violation of *§ 1* of the Sherman Anti-Trust Act, *15 U.S.C. § 1 (1988)* (the "Act"). *HN1*[] Resale price maintenance agreements are, of course, *per se* illegal restraints of trade within *§ 1* of the Act. Absent such *per se* illegality here, defendants concededly prevail.

This is the third time this court has addressed this **[**2]** case. The second time here, on appeal from a grant of summary judgment for the defendants, this court held that evidence proving such a conspiracy would support a finding of antitrust injury within the line of cases commencing with *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, extending through *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, to and including *Business Elecs. Corp. v. Sharp Elects. Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. *DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir.1989)*, *rehearing* and *rehearing en banc denied, 896 F.2d 560*, *cert. denied, 494 U.S.*

* Honorable James L. Oakes, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

1081, 110 S. Ct. 1813, 108 L. Ed. 2d 943 (1990) (*DeLong II*). [1] In *Delong II,* this court indicated that the essence of the alleged conspiracy between the manufacturer **[**3]** and the favored distributor was to inflate the price of the manufacturer's standard product by labeling it "special" and "charging Pratt [the Pratt & Whitney Aircraft Division of United Technologies Corp., a significant customer] a significantly higher price than Washington Mill's list price for [the] identical [product]." *887 F.2d at 1509*. Following this court's ruling in *DeLong II,* a jury trial resulted in a verdict for the plaintiff distributor against the defendant manufacturer, the favored distributor defendant having settled with the plaintiff after *DeLong I.* We are now faced with an appeal from the district court's denial of motions for judgment notwithstanding the verdict on the plaintiff-distributor's Sherman Act price-fixing, Robinson-Patman Act price-discrimination and common-law fraud verdicts; with a cross-appeal from the district court's grant of a new trial on Sherman Act damages and Robinson-Patman Act damages; and with an appeal from the awarding to the manufacturer defendant of pre-judgment interest on a counterclaim for outstanding debts.

[4]** Because the key questions in the case involve consideration of issues addressed in this court's last opinion, this appeal thus **[*1190]** requires consideration of the ancient but venerable doctrine of "the law of the case." In addition, the case raises questions of sufficiency of proof, injury in fact, and conspiracy. Problems of interlocutory review are not involved, however, since this court granted petitions for review of all of the issues following district court certification, pursuant to *28 U.S.C. § 1292(b) (1988)*.

I. BACKGROUND

A. *Facts*:

While the background facts were well set forth in *DeLong II,* in the interests of easier understanding, we will recount them here. The plaintiff distributor is DeLong Equipment Company ("DeLong"), a Georgia corporation wholly owned by Harold DeLong. DeLong distributes equipment and supplies used to polish and deburr metal parts in industrial manufacturing processes. The critical product in this process, called "media," consists of abrasive materials which are placed in vibratory machinery with the metal parts to be polished and deburred. Media can consist of natural products, such as sand without the backing **[**5]** paper used in sandpaper. The media involved in this case, however, known as "preformed ceramic media," is made from a blend of clays, sands and polishing agents, extruded through metal molds and cut into different shapes, such as cylinders, stars, rectangles or triangles, after which it is baked and dried. The media is packed by the manufacturer and shipped either to distributors such as DeLong or directly to customers. Distributors, as pointed out in *DeLong II,* not only provide regular and prompt delivery of media and related supplies, but also consult with the end user, helping it select the appropriate equipment, media, power, speed and time to bring the user's product to the correct state of polish.

The manufacturer defendants-appellants and cross-appellees are Washington Mills Electro Minerals Corporation, formerly known as Washington Mills Abrasive Company, located in North Grafton, Massachusetts and in the business since 1868, and its wholly-owned subsidiary Washington Mills Ceramic Corporation, located in Lake Wales, Florida. They are joined in their appeal by the two individual defendants-appellants, officer/owners John T. Williams and Peter Williams (who are not related). **[**6]** For simplicity, we will refer to the Washington Mills Electro Minerals Corp., its officers and its subsidiary collectively as "Washington Mills."

The other primary actor in this case, the BCS Company, Inc. ("BCS"), settled with DeLong before *DeLong II.* BCS, located in Thompson, Connecticut, is a distributor of media with a business quite similar to DeLong's. Both BCS and DeLong have distributed Washington Mills' products since the early 1980s, and BCS was Washington Mills' primary distributor in the northeastern United States during all times relevant to this litigation. Neither DeLong nor BCS itself manufactures media, but both distribute media manufactured by other companies, including but not limited to Washington Mills. Like other Washington Mills distributors, generally speaking, DeLong and BCS purchased media for resale at a wholesale discount rate of 25% off the retail list price. Since no Washington Mills distributors had exclusive territories or franchise areas, the distributors competed for end-user accounts. They

[1] *Delong I, Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843 (11th Cir.1988)*, involved issues of personal jurisdiction.

received standard price lists showing the size, shape, composition and price per pound of each kind of "stock" media in the Washington Mills manufacturing **[**7]** inventory. The price list also indicated that customers could request "special" media if they met minimum volume requirements and paid for a new die if one was needed to produce the media.

The specific, key customer involved was the Pratt & Whitney Aircraft Division of United Technologies Corporation ("Pratt"). Pratt, which manufactures aircraft engines and uses ceramic preformed media to polish its jet engine blades, is not a party to this action but, before this case, was one of Washington Mills' largest end-user customers. As one might suspect, Pratt's engineering department tests and approves the use of specific materials in its manufacturing processes and issues specifications used by the purchasing department to solicit **[*1191]** bids for any given products necessary; these specifications appear on Pratt product material control dockets ("PMCs"). With exceptions not relevant here, the Pratt purchasing department may only purchase pre-approved items specified on the PMCs from pre-approved dealers and the materials delivered must have the PMC numbers stamped on the box. The media at issue here, manufactured by Washington Mills for Pratt and known as "special," were approved by Pratt after **[**8]** testing and designated on the appropriate PMCs as "P & W 5,000" (PMC 3175), "P & W 6,000" (PMC 3178) and "P & W 7,000" (PMC 3179). The testing and approval of the Washington Mills products was done by Pratt engineers in East Hartford, Connecticut, in consultation with William and Robert Biebel of BCS. James Neal, a Pratt engineer and a friend of the Biebels, obtained the issuance of the PMCs for the "special" Washington Mills media furnished by BCS. BCS was designated in the Pratt PMC as "manufacturer" and the product was labeled accordingly both by BCS itself and by Washington Mills on empty boxes for the products to be supplied to Pratt.

There was ample proof at trial to support the allegations in DeLong's complaint that the "special" media involved in this case was actually generic, that is, media that Washington Mills regularly produced and carried in stock, and that this "special" media, sold to the specific customer around whom this case revolves, did not differ in composition from the generic media stocked by Washington Mills. Thus, the evidence is essentially conclusive that it cost Washington Mills no more to produce the "special" media involved in this case than it did to **[**9]** produce its regular line set forth in its standard price list. Pratt, in other words, was duped.

At the time Pratt issued its PMC for the purchase of "BCS-manufactured" special media, Washington Mills was selling the very same media generically to BCS for .495 dollars per pound. This price was based on Washington Mills's standard distributors' discount of 25% off its retail price of .66 dollars per pound. BCS's resale price to Pratt on its initial sales from February through October 5, 1983, however, was .97 dollars per pound, giving BCS a profit of .475, or 96%. Meanwhile, Pratt was both designing a new jet engine and planning on building a new production facility; as of the spring of 1983 it did build such a facility in Columbus, Georgia, not far from DeLong's place of business. Harold DeLong became aware of Pratt's plans and decided to pursue the account as an approved vendor. He began by asking the Washington Mills sales representative, Peter Ford, what type of media was being provided to the Pratt East Hartford plant, but was told only that BCS was "handling" the Pratt account. Harold DeLong was not able to learn from Ford what specific products Pratt required.

Nevertheless, **[**10]** DeLong solicited business from Pratt as early as June, 1983. Evidently when word of this got back to Connecticut, the Washington Mills sales representative, Ford, asked Harold DeLong to meet in Atlanta with Robert Biebel of BCS in August, 1983. Biebel indicated to Harold DeLong that he was willing to work with DeLong in a joint venture and that there was "plenty of money in it" for both DeLong and BCS. Harold DeLong declined the offer, reasoning that he did not need BCS's help. After the Atlanta meeting and perhaps after Harold DeLong expressed his suspicions that the Pratt "special" media was really generic, stock Washington Mills media, BCS and Washington Mills agreed on the price-fixing scheme brought into question here. The scheme was that Washington Mills would raise the wholesale price paid by BCS for media to be resold to Pratt from .495 dollars to .85 dollars per pound, but Washington Mills would pay back to BCS the difference. This was to be and was in fact done by sending disguised payments through Wood & Thompson, a foreign corporation in Nassau, the Bahamas, created by BCS shortly after BCS learned that Pratt was locating its new jet engine facility in Georgia. The payback **[**11]** checks and internal vouchers did not identify BCS and were issued for fictitious invoices made payable to Wood & **[*1192]** Thompson and mailed directly to the Bahamas. The evidence was that the offshore company was established in order to keep such payments "private," and Washington Mills did not report them to the I.R.S. on a Form 1099. Not surprisingly, perhaps, the payback checks are called "kickbacks" by DeLong and "commissions" by Washington Mills.

At an August, 1983 meeting at Pratt's East Hartford, Connecticut plant between representatives of Washington Mills and Pratt, the Washington Mills personnel present gave Pratt the Washington Mills designation of "P & W special 5,000" in connection with the Pratt PMC 3175 and "P & W special 6,000 and 7,000" to correspond to the two Pratt PMCs, 3178 and 3179. As previously indicated, the "P & W special 5,000" was a stock item available at .495 per pound to all Washington Mills distributors, and the "P & W special 6,000 and 7,000" also were identical to media listed in the stock price list at .495 per pound for distributors (at the 25% discount from the retail list price of .66 per pound). On September 1, 1983, the day after BCS filled a purchase **[**12]** order for 10,000 pounds of PMC 3175 destined for the Columbus facility, various Pratt representatives visited DeLong to survey DeLong in response to its previous request for formal supplier qualification. In that meeting, they provided DeLong with a list of the products that Pratt needed, setting forth BCS computer code numbers. DeLong understood from this meeting that it was qualified as a Pratt vendor. On October 6, 1983, Pratt issued a blanket purchase order number 4929748 for 86,400 pounds of PMC 3175 for use at the Columbus plant. DeLong could not bid on this order because Washington Mills had not as yet supplied it with the product identification for Pratt media, with the result that BCS made the sale. Between October 7, 1983 and October 17, 1984 BCS was to fill this entire order at .91 dollars per pound, although at first the order was fulfilled from earlier purchases of media and before the kickback arrangement went into effect.

By letter of November 4, 1983, Washington Mills finally provided DeLong with Pratt media designations, but informed DeLong that the wholesale price to DeLong would be .85 dollars per pound. As stated, until that time Washington Mills had charged BCS **[**13]** only .495 dollars per pound for identical media. DeLong immediately called and questioned the "special" designation and the 85-cent price, stating that the media samples appeared to be standard Washington Mills stock media which could be ordered at .495 dollars per pound from the price list. When the Washington Mills representative insisted that the media were special, DeLong replied that "everyone had better be paying the same price for the 'specials'." Indeed, on January 18, 1984, in BCS's first purchase of PMC 3175 thereafter, BCS was charged 85 cents per pound for 12,500 lb. of a Pratt special. Pursuant to the payback agreement, however, Washington Mills paid .355 dollars per pound to BCS through Wood & Thompson, making the BCS price for the special media exactly .495 dollars per pound, the very same price that BCS had paid for the media prior to the Washington Mills November 4, 1983 letter to DeLong. Both Robert Biebel of BCS and the treasurer of Washington Mills testified that the payments to Wood & Thompson were calculated to maintain BCS's pre-November, 1983 price.

In the spring of 1984, the Washington Mills representative with whom DeLong had dealt left the company and two **[**14]** new salesmen, Robert Baldauf and Hans Van der Sande, began dealing with DeLong. According to them, DeLong raised the issue of "special designation of Pratt media every time he had the opportunity." DeLong also conducted independent laboratory tests, concluding that the media were identical. Nevertheless, Washington Mills continued to charge DeLong the .85 price and, while DeLong sold some small amounts to the Pratt plant at Columbus, Pratt's requirements for this plant were satisfied largely by deliveries from BCS under the prior October, 1983 order. There was no reason for Pratt to stop ordering media from BCS, though it could have canceled that order under its terms, since it was receiving the product at a price of 91 **[*1193]** cents a pound, which DeLong could not meet, given its cost from Washington Mills of 85 cents a pound F.O.B. Lake Wales, Florida. Consequently, DeLong sold a total of only 6,150 pounds of media to Pratt during 1984.

Van de Sande testified that after the last deliveries were made by BCS under the October, 1983 order, Biebel, Van der Sande and Baldauf visited Pratt in Columbus, Georgia (almost simultaneously visiting DeLong in Atlanta), to lay the groundwork for using **[**15]** Washington Mills trucks and Lake Wales warehousing to deliver media directly to Pratt at the rate of 750,000 to 1 million pounds per year. According to Biebel, BCS felt secure for three years, since that was the time it ordinarily took Pratt to get a material approved, "unless DeLong did not play the game." According to Van der Sande, this meant that DeLong might "upset the apple cart." As a result of this visit, Pratt's orders were placed directly with Washington Mills as of November 12, 1984, with special retail prices charged for what was actually generic media, and on these direct sales BCS continued to receive kickbacks, though in varying amounts. DeLong, smarting, perhaps, continued to raise concerns regarding the "special" designation and inflated price. Washington Mills terminated DeLong as a distributor in August, 1985, and while it introduced evidence to the effect that the termination was because DeLong had made incorrect payments and DeLong personnel had been abusive, the jury found these claims to be pretextual.

B. *Procedural History:*

DeLong brought this action in February, 1986, alleging violations of *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* **[**16]** and *2 (1988)*; *§ 2* of the Clayton Act as amended by *§ 1* of the Robinson-Patman Act, *15 U.S.C. § 13(a) (1988)*; § 3 of the Clayton Act, *15 U.S.C. § 14*, and various violations of Georgia law, including breach of contract, tortious interference with business relationships and fraud. DeLong alleged, inter alia, that it was terminated for failure to participate in the scheme between Washington Mills and BCS to fix the price of media sold to Pratt, and Washington Mills asserted as defenses that the termination was in response to payment delays and abusive DeLong employees. This court reversed the dismissal of Robert Biebel and BCS for lack of personal jurisdiction (affirming as to William Biebel) in *DeLong I, 840 F.2d 843 (11th Cir.1988)*. Thereafter, the district court granted the defendants' motion for summary judgment on all counts except some aspects of the Robinson-Patman Act count, but certified the grant under *Fed.R.Civ.P. 54(b)* to the Court of Appeals which, in *Delong II,* reversed. *887 F.2d 1499 (11th Cir.1989)*. After that reversal, the district court **[**17]** vacated its directed verdict in a trial limited to the Robinson-Patman Act count which had been held pending the appeal in *DeLong II,* granted a new trial as to the claims there tried, and consolidated all counts for a second jury trial which began July 30, 1990 and was concluded after five weeks with 19 witnesses and thousands of pages of exhibits. The district court directed a verdict for Washington Mills on a counterclaim for outstanding bills and submitted DeLong's Sherman Act, Robinson-Patman Act, and fraud claims to the jury. The jury returned a verdict for DeLong on August 21, 1990 on the Sherman Act count in the sum of $ 2,033,295, on the Robinson-Patman Act count in the sum of $ 50,216.25 and on the common law count for $ 117,824, including $ 100,000 in punitive damages. The district court entered its judgment on September 21, 1990, trebling the antitrust damages to $ 6,099,885 on the Sherman Act count and $ 150,648.75 on the Robinson-Patman Act count. On October 1, 1990, DeLong moved to alter or amend the judgment on the counterclaim to eliminate pre-judgment interest, and on October 5, 1990, Washington Mills moved alternatively for judgment notwithstanding the verdict **[**18]** or a new trial as to DeLong's judgment. On April 1, 1991, the district court entered an order deferring ruling on the post-judgment motions, held a hearing on May 2, 1991, and entered an order on September 30, 1991 denying the Washington Mills motions for judgment **[*1194]** notwithstanding the verdict on all counts, [2] and denying the motion for a new trial as to liability on the antitrust claims and liability and damages on the common-law fraud count. The district court, however, granted a new trial as to the measure of damages under both the Sherman Act and Robinson-Patman Act counts, and denied DeLong's motion for judgment notwithstanding the verdict as to the interest awarded on Washington Mills' counterclaim. The trial court granted cross motions to certify for interlocutory review pursuant to *28 U.S.C. § 1292(b)* on November 20, 1991, and this court granted cross petitions for such review.

[19]** C. *Standard of Review:*

HN2[] This court reviews de novo a denial of judgment notwithstanding the verdict, *see* *Watts v. Great Atl. & Pac. Tea Co., 842 F.2d 307, 309-10 (11th Cir.1988)*, including in an antitrust case the question of antitrust injury which is one component of whether or not the plaintiff has standing, a question of law. *See* *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir.1991)*. ***HN3***[] The grant of the motion, as here, for a new trial is generally reviewed under an abuse of discretion standard, though when it is on evidentiary grounds the verdict must be against the great weight of the evidence to sustain the grant. *E.g.,* *Rixey v. West Paces Ferry Hosp., Inc., 916 F.2d 608, 611-12 (11th Cir.1990)*; *Jackson v. Magnolia Brokerage Co., 742 F.2d 1305, 1307 (11th Cir.1984)*.

[2] Effective December, 1991, *Fed.R.Civ.P. 50(b)* refers to such motions as renewed motions for judgment as a matter of law. Since these motions were filed before the amendment became effective, we use the old language of motion for "judgment notwithstanding the verdict" or "JNOV."

Review is of course *de novo* where the trial court's order involves an error of law. *See, e.g.,* *Allstate Ins. Co. v. Springer, 269 F.2d 805, 808 (6th Cir.1959)*, *cert. denied, 361 U.S. 932, 80 S. Ct. 370, 4 L. Ed. 2d 353 (1960)*. **[**20]** We recognize that bearing on the above are the points that the grant of a new trial on an evidentiary basis involves a possible intrusion upon the function of a jury, *Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1556 (11th Cir.1984)*; *Spurlin v. General Motors Corp., 528 F.2d 612, 619-20 (5th Cir.1976)*, and that damages are an issue as to which considerable discretion is committed to the jury, *Quality Foods, Inc. v. U.S. Fire Ins. Co., 715 F.2d 539, 542 (11th Cir.1983)*; *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 903* (5th Cir.), *cert. denied, 412 U.S. 923, 93 S. Ct. 2736, 37 L. Ed. 2d 150 (1973)* (antitrust damages); *see* *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24, 89 S. Ct. 1562, 1576-77, 23 L. Ed. 2d 129 (1969)* (antitrust). At the same time, we recognize that both *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, **[**21]** involving a horizontal restraint on trade, and *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, involving a vertical restraint, limit the permissible range of inferences of conspiracy that may be drawn in the antitrust context of restraints of trade.

II. DISCUSSION

We will discuss the issues in the case much as the parties have in their briefs, *viz:* by separating the issues appealed by Washington Mills resulting from the denial of its motions for judgment notwithstanding the verdict and the issues on the cross-appeal by DeLong resulting from the grant of the Washington Mills motions for a new trial in respect to damages, on both the Sherman Act and the Robinson-Patman Act counts.

A. *Proof of Conspiracy:*

Washington Mills claims that there was insufficient evidence at trial to support a finding of conspiracy, and that the inferences of concerted action between BCS and Washington Mills were negated at trial by the testimony of plaintiff's own witnesses, Washington Mills having called Robert Biebel, Baldauf and Van der Sande. We note that Baldauf, a former southeastern **[**22]** sales **[*1195]** representative for Washington Mills, and Van der Sande, Washington Mills' former national sales manager, both left Washington Mills to form a competing manufacturer, Ceratech. Baldauf and Van der Sande testified that they had not known of any effort to fix prices of media or acted in furtherance of a conspiracy to fix those prices. Robert Biebel testified that he had nothing to do with the 85 cents per pound charged BCS or DeLong for the Pratt "special" media by Washington Mills, or had any agreement with anybody at Washington Mills as to the price at which BCS would sell media, whether before or after DeLong was terminated, or the price at which Washington Mills would sell media to DeLong, or with anyone as to termination of DeLong as a distributor. Washington Mills contends that against this "direct and positive evidence" DeLong offered only a string of inferences that an agreement on price could have been reached, and that this evidence is "so highly ambiguous" as not to support a finding of conspiracy according to the terms of *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763, 104 S. Ct. 1464, 1470, 79 L. Ed. 2d 775 (1984)* **[**23]** and *Riverview Invs., Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474* (6th Cir.), *cert. denied, 498 U.S. 855, 111 S. Ct. 151, 112 L. Ed. 2d 117 (1990)*. We agree with DeLong, however, that there was substantial evidence to support the finding of conspiracy. There was evidence that the so-called "special" media for Pratt was identical to stock media, and that the increased price charged by Washington Mills for the product to Pratt was not justified by any cost differential. Indeed, two of the "special" media, known as P & W 6,000 and P & W 7,000, were clearly identified as stock media on Washington Mills' price list. As for P & W 5,000, while it was not listed on a stock price list, it was available at all relevant times at the stock price on orders for more than 10,000 lbs. or at the stock price plus a nominal charge for producing a die on smaller orders; as to it, the actual added cost was minimal, and it was composed of the same materials as the other generic media. Moreover, Washington Mills sold all three types of "Pratt" media to other customers as well as to BCS, at the stock price.

[24]** In addition, it was the Washington Mills sales representative, Peter Ford, who arranged the meeting between Robert Biebel of BCS and Harold DeLong in August, 1983, at which meeting Biebel proposed a "joint venture," saying "there is plenty of money in it" for everyone. It was after this meeting that Washington Mills joined in the arrangement for special pricing of $ .85 per pound to BCS, with a "kickback" or "commission" to BCS through BCS's offshore affiliate, Wood & Thompson, reducing the effective price to the original $ .495 per pound.

At about the same time that Ford met with DeLong, he met with Pratt in August, 1983 and gave it the new Washington Mills special media designations for the stock media sold to distributors at .495 per pound, retailing for $ .66 per pound. BCS quoted Pratt a price of $ .91 per pound in its successful October, 1983 order but Ford ignored DeLong's September 1, 1983 request for confirmation of the identity and price of these "specials" and delayed giving DeLong a Washington Mills quotation long enough to prevent DeLong from bidding on the October, 1983 order. When Ford did finally write to DeLong on November 4, 1983, calling the Pratt media "specials" **[**25]** and quoting the distributor price as $ .85 per pound, BCS did not receive a price announcement letter. As DeLong points out, the jury could have concluded properly that BCS was not informed because it was part of the conspiracy which already knew the price arrangements, including the kickback arrangement, which would enable it to make up the difference between the regular price for generic media and the .85 quote to DeLong.

A year later, in October, 1984, Van der Sande and Baldauf came into the picture, at the time BCS was scheduled to make the last delivery to Pratt under the October, 1983 order. By this time, Washington Mills and BCS had a new scheme to support the Pratt price. They urged Pratt to purchase media directly from the manufacturer, bypassing DeLong, with Washington **[*1196]** Mills agreeing to pay kickbacks to BCS even on the direct sales. Indeed, Van der Sande's report of that meeting stated that Robert Biebel had said he had several good friends at Pratt who from time to time took trips on his boat to the Bahamas, which friendships gave him an edge on the competition. Van der Sande thought that Pratt would likely become Washington Mills' largest media customer, buying $ 750,000-$ **[**26]** 1,000,000 worth of media per year. Van der Sande reported to Washington that "Bob Biebel feels we are secure for at least three years unless DeLong does not play the game." Van der Sande did not mention his meeting with the Pratt people in Georgia the day before he visited DeLong, but he did say that DeLong was "not very happy" with BCS and Pratt.

Perhaps the critical fact in terms of a conspiracy is that Washington Mills rebated to BCS the total difference, right to the half penny, between its new 85 cent price and the 49.5 cent stock price. This totally destroyed any argument that increased costs justified a higher price. If it was supposed to reflect some greater care or concern on the part of BCS toward Pratt, then DeLong should have been allowed to accept the same degree of responsibility at the same price. Instead, Delong, when it continued to complain about the pricing and the use of stock media under "special" labels to Pratt, was terminated on what the jury found were the pretextual reasons of being behind in payments to Washington Mills and abusive to Washington Mills personnel, allegations that were identified by the Court of Appeals in *DeLong II* as "genuine issues **[**27]** of material fact…." *887 F.2d at 1513*.

The long and the short of it is that the jury could properly conclude that Washington Mills and BCS conspired to fix the price of Washington Mills media both to DeLong and to Pratt under the fraudulent cover that the generic media was "special," and by the fraudulent means of kickbacks by way of "commissions" to BCS's offshore shell corporation.

B. *Legal Arguments on the Sherman Antitrust Act Claims:*

Of considerably more stature are appellant's three principal legal arguments, namely, that DeLong failed to establish "antitrust injury"; that DeLong failed to establish "injury in fact" (because numerous other sources of supply were available to DeLong); and that DeLong failed to establish an agreement regarding resale price, as required by Business Electronics, on the basis that resale price maintenance is a required element of a vertical price-fixing claim, and that there was no evidence at trial of a fixed "pad" to be added to BCS's resale price or any other agreement or restriction on the price to be charged by BCS.

Each of these legal arguments runs headlong into the doctrine of "law of the case." As well **[**28]** put in another antitrust act case decided by this court's predecessor, the Fifth Circuit, ***HN4***[] a decision of the Court of Appeals at an earlier stage of the same case represents the law of the case not only as to matters "decided explicitly" but also as to those "decided by necessary implication." *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 19 (5th Cir.1974)*, *cert. dismissed, 419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974)*. The district court must follow the appellate decision as to these issues on remand, *id.,* and generally speaking the appellate court must do so in future rulings in the case as well, *id. at 19-20*. Recognizing that the doctrine "is not an inexorable command that rigidly binds the court to its former decisions, but rather is an expression of good sense and wise judicial practice," id. at 19, the general rule is that "an appellate court's decision of issues must be followed in all subsequent trial or intermediate appellate proceedings in the same case" except when there are "the most cogent of reasons," **[**29]** such as a change in controlling authority, new evidence or the need to avoid manifest injustice. Id. at 19-20. *See also, e.g.,* Virgin Atl. Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir.), *cert. denied,* __ U.S. ---- , *113 S. Ct. 67, 121 L. Ed. 2d 34 (1992)*. As the **[*1197]** Supreme Court has said, the "law of the case directs a court's discretion, it does not limit the tribunal's power." Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L. Ed. 2d 318 (1983). *See also* 18 Charles A. Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 4478 at 790 (1981).

Under the law of the case doctrine, *DeLong II* basically decided the Sherman Act liability claims against Washington Mills on the matters of law argued here, and there has been no intervening change in the law since *DeLong II* was decided. *See* DeLong II, 887 F.2d 1499. The *DeLong II* court addressed these issues in the context of a grant of summary judgment to the defendants **[**30]** on the theory that the conspiracy alleged and the evidence adduced to establish it did not describe a vertical restraint on trade. The *DeLong II* court held that the alleged conspiracy to restrain competition here was "to fix prices of media sold to Pratt by designating ordinary media as 'special' media and selling it at an artificially inflated price to Pratt." 887 F.2d at 1505. The *DeLong II* court ruled that such a conspiracy, if proven, was a vertical restraint within the meaning of *Business Electronics Corp.,* 485 U.S. at 730 & n. 4, 109 S. Ct. at 1522 & n. 4, DeLong II, 887 F.2d at 1505-06, and furthermore that it was a vertical restraint that "included some agreement on price or price levels." Id. at 1506 (quoting *Business Elecs,* 485 U.S. at 736, 109 S. Ct. at 1525). After pointing out that this case involves termination of DeLong as a distributor of Washington Mills "in furtherance of" the vertical price restraint conspiracy, DeLong II, 887 F.2d at 1505, **[**31]** the court in *DeLong II,* citing Monsanto v. Spray-Rite Service Corp., 465 U.S. at 760-61, 104 S. Ct. at 1469, distinctly held that the restraints alleged there and proven on remand were not "non-price in nature" as the district court had held, 887 F.2d at 1506-07, but, rather, constituted "a vertical *price* conspiracy," id. at 1507, within the meaning of *Business Electronics,* "to artificially inflate or 'pad' the price." 887 F.2d at 1507 & n. 11. The *DeLong II* court went on to hold that the conspiracy alleged was an objectively and economically reasonable one within the meaning of Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 and that there was not only evidence of concerted action by inference, but a tendency of the evidence "to exclude the inference of independent action." DeLong II, 887 F.2d at 1508-09 (quoting Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 & n. 4 (11th Cir.1987)). **[**32]** Reciting the evidence of conspiracy above mentioned, the *DeLong II* court went on to demonstrate how the evidence supported DeLong's assertion that it was an obstacle to the continuation of the scheme between Washington Mills and BCS to "pad" the Pratt price, and that DeLong was terminated to remove that obstacle, 887 F.2d at 1512-15, adding that DeLong had "adduced evidence which tends to exclude the possibility that Washington Mills was acting independently when it terminated DeLong." 887 F.2d at 1514.

Thus, the law of the case doctrine is applicable and we see no reason to hold otherwise. While *DeLong II* did not say that the evidence presented necessarily established the vertical price conspiracy, it did say that the evidence of such a conspiracy sufficed to defeat summary judgment. On remand, a jury presented with evidence at least as strong as that recounted in the *DeLong II* opinion concluded that such a conspiracy had been established.

Nevertheless, we realize that ***HN5***[] the doctrine of the law of the case "permits a change of position if it appears that the court's original ruling was erroneous." DiLaura v. Power Auth. of the State of N.Y., 982 F.2d 73, 77 (2d Cir.1992), **[**33]** *quoting Petitions of the Kinsman Transit Co., 388 F.2d 821, 825 n. 9 (2d Cir.1968)*. *See also* Arizona v. California, 460 U.S. 605, 618 n. 8, 103 S. Ct. 1382, 1391, 75 L. Ed. 2d 318 n. 8 (1983). Recognizing the great deference that is owing to the unanimous determination of the previous panel on summary judgment, "reached in a case that [was] already well advanced and designed to control further proceedings," 18 Wright, Miller & Cooper § 4478 at 796, we nevertheless in the interests of **[*1198]** certitude reexamine on the merits the points of law raised.

1. Injury in Fact.

Perhaps least susceptible to law of the case argumentation is Washington Mills' point that DeLong did not establish injury in fact because it was undisputed that numerous other sources of media were and are available to it; thus, the defendants argue that there is no causal connection between the termination and DeLong's claimed lost profits because there were "alternative comparable substitutes for the desired merchandise." *Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 148 (6th Cir.1972)*. The **[**34]** basis for this argument is an admission by DeLong's expert, Dr. Seaman, that it was a "possibility" that DeLong could capture all of Pratt's business, selling media furnished by other manufacturers DeLong "[could] get approved." That condition -- that DeLong could get other media approved -- was explicit in the question put to Dr. Seaman. [3] As we have noted, however, Pratt, presumably concerned with the extraordinarily high standards applicable to jet aircraft engine propellers, had careful procedures for approving products to which the Washington Mills media already had been subjected. It would not automatically approve any preformed ceramic abrasive media, made by any manufacturer. The verdict indicates that the jury rejected the "possibility" that DeLong could compete effectively by simply getting Pratt to approve alternative products.

[35]** Washington Mills' more significant argument is that DeLong failed to establish antitrust injury, that is, injury "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*. In other words, as later put in *Atlantic Richfield Co. v. USA Petroleum Corp., 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*, ***HN6***[] even where the conduct complained of is illegal *per se,* a plaintiff must show that it is "adversely affected by an *anti-competitive* aspect of the defendant's conduct." *Id. at 339, 110 S. Ct. at 1891* (re claims under § 4 of Clayton Act). *See also* *id. at 339 n. 8, 110 S. Ct. at 1890 n. 8* (quoting Phillip P. Areeda and Herbert Hovenkamp, ***Antitrust Law*** P 340.3b at 411 (1989 supp.); Areeda and Hovenkamp P 340.3b at 470 (1991 supp.). Washington Mills also refers to *Todorov v. D.C.H. Healthcare Authority, 921 F.2d 1438 (11th Cir.1991)*, **[**36]** for the proposition that determining antitrust standing "involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *Id. at 1448*. *Todorov* recognizes that a showing of antitrust injury, while necessary, is not always sufficient to establish standing. In short, these cases involve plaintiffs who protested their not being allowed to participate in an anti-competitive arrangement, or their loss of a monopolistic position.

However, DeLong's injury was a loss of opportunity to compete. DeLong made no further sales of preformed ceramic media to Pratt after its termination. DeLong sought to obtain the list price for purposes of its charges to Pratt, doing what it could to reveal the padded price, and, hence, it can be said that DeLong was willing to subject itself to the competitive market for Washington Mills media and was not in the quest for "super-competitive" profits. Washington Mills, with a better product, offered better-than-competitive prices for its stock media.

Todorov, which incidentally cites *DeLong II* with approval on the means of establishing conspiracy, *921 F.2d at 1456*, **[**37]** is not to the contrary. The plaintiff in that case relied upon a monopolistic profit theory to support recovery; unlike Dr. Todorov, DeLong was not interested in forestalling **[*1199]** competition and maintaining an inflated price, but in obtaining the stock price at which he could make a profit that was usual in the business with the basic markup. In short, nothing in this case indicates that DeLong sought to benefit from the Washington Mills-BCS anti-competitive conduct or to obtain super-competitive prices. DeLong's contentions properly gave it standing on the basis that Washington Mills, at BCS's instigation and with BCS's assistance, unfairly took advantage of its short-term position as the only approved source of media by artificially inflating the wholesale price and thereby extracting super-competitive profits which it shared with BCS by payment of "commissions" or "kickbacks"; that it blocked competition among distributors of its generic media in the market for one of its largest end-customers; and that it terminated DeLong as a Washington Mills distributor when DeLong threatened not to "play the game." Thus, DeLong has sustained antitrust injury by loss of its Washington Mills distributorship **[**38]** and consequent loss of sales and profits. Because Washington Mills media had certain competitive advantages over alternative media, DeLong has not suffered damage simply from its own failure to compete in an open market with identical media

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[3] Q. [By Mr. Coe]: Given his perfect setup and his positioning and his competitive pricing, Doctor, there's not a reason in the world why he [DeLong] can't capture all of Pratt's business selling Wisconsin Porcelain, Abrasive Finishing, Capco, Vibra-finish or anybody else he can get approved, is there, Ceratech; isn't that true? [Wisconsin Porcelain, Abrasive Finishing, Capco, and Ceratech are competing manufacturers of ceramic media.]

made by other manufacturers. DeLong was not allowed to participate in the competitive market for Washington Mills media because it refused to go along with the Washington Mills/BCS price-fixing scheme.

But Washington Mills goes a step farther in arguing that DeLong's claimed injury boils down to the contention that, absent Washington Mills overcharging, Pratt would simply have continued to purchase Washington Mills products, without examining alternative sources of supply. On this basis, it is argued that DeLong's injury results from increased competition, which is by definition not an antitrust injury. Washington Mills and BCS, however, had seen "a window of opportunity," according to the testimony of Washington Mills President and controlling shareholder John Williams, during which they could charge non-market prices without regard to competition. Given BCS's approval and Pratt's purchasing practices, the conspirators had the power to exclude **[**39]** competition and maintain high prices over a longer haul -- Biebel was quoted as saying "we are secure for at least three years unless DeLong does not play the game" -- so long as DeLong cooperated. True, Pratt has switched to another brand of media, and a witness for DeLong suggested that DeLong could have won that contract had it bid competitively. But DeLong was at a disadvantage in bidding for the Pratt business since it could not offer Washington Mills media. The jury could have decided that DeLong lost the share of the competitive market which it would have had if it had it been able to offer Washington Mills media in the future. No quarrel is had by Washington Mills with the court's repeated instructions to the jury that only losses of business which would have been retained in a competitive market were actionable.

2. Failure to show a conspiracy over resale prices.

Washington Mills argues, as best we fathom, that *Business Electronics* made it abundantly clear that the only vertical restraints deemed to be *per se* illegal under the Sherman Act are agreements relating to resale price, and that the relevant price in the vertical context is "agreement on the price or price **[**40]** levels to be charged by the remaining dealer." *Business Elecs. Corp.,* 485 U.S. at 726, 109 S. Ct. at 1521. The alleged agreement here, the argument runs, was not to fix the retail price, but to fix the wholesale price of media sold to DeLong, or at best to Pratt. Since there was no showing here of any agreement between Washington Mills and BCS as to the price at which the latter would resell to Pratt, the argument continues, there is no *per se* illegality.

This argument meets the law of the case doctrine head-on. As the *DeLong II* court recognized, all that is required is proof of a fixing of retail price "levels"; this is all that *Business Electronics* addresses, referring to "a further agreement on the price or *price levels* to be charged by the remaining **[*1200]** dealer." *Id.,* 485 U.S. at 726, 109 S. Ct. at 1521 (emphasis added). While there was no requirement of adding a "fixed pad" to the price to Pratt, there is no question but what Washington Mills and BCS voluntarily agreed to pad the Pratt price. It will be recalled that Biebel of BCS suggested that BCS **[**41]** and DeLong handle the Georgia Pratt business together, assuring DeLong that there was "plenty of money in it for both of us." When DeLong refused to "play the game," Washington Mills raised the price to DeLong to 85 cents and schemed with BCS so as facially to raise the BCS price to the same amount, while surreptitiously rebating the difference between the 85 cents and the 49.5 cent list price for the same stock media. By fixing the wholesale price level at 85 cents, DeLong or any other distributor would have been required to sell to Pratt at the wholesale price plus expenses and market profits, so that what would result would be the equivalent of resale price maintenance. Price-fixing at the wholesale level, as testified to by a DeLong expert economist, was the mechanism by which the retail price was maintained. The agreement in this case, then, was that future sales by anyone -- Washington Mills, BCS, or a duped distributor such as DeLong -- would be at the premium price.

HN7[] In general, of course, the fixing of wholesale prices poses no antitrust problem. *See* 8 Phillip P. Areeda, ***Antitrust Law*** P 1627 at 316 (1988) ("otherwise, every wholesale price would be illegal -- an obviously **[**42]** senseless result"). However, as Areeda notes, complex wholesale price formulae may be the means by which resale price fixing is accomplished, where the formula "so varies the wholesale price in accord with each dealer's resale price as to be the full or substantial functional equivalent of resale price-fixing agreements." *Id. at 317*. *See also id.* P 1627d at 319, *et seq.* As an example of such a functional equivalent retail price fix, Areeda cites *Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C.1977)*, in which a manufacturer raised the wholesale price to a particular dealer by the amount by which the actual retail price exceeded the manufacturer's suggested resale price, thus effectively preventing the dealer from charging more; there, it was significant that the increase was applicable only to one dealer. *Id.* P 1627 at 320-21. Here, to be sure, the wholesale price was not set in response to a dealer's price reduction or increase, but, rather, so as to retain the sweetheart arrangement between the manufacturer and the favored dealer BCS; when DeLong would not comply with the scheme, his dealership was terminated, and, as we read **[**43]** Areeda, he would find this "a vertical price-fixing agreement." *Id.* P 1627 at 321.

To be sure, Areeda recently criticized *DeLong II* as having "adopted an unduly broad concept of what constitutes resale price maintenance." Areeda and Hovenkamp P 1622' at 1049 (Supp.1991). The supplement's analysis of the *DeLong II* case in this respect is not up to that well-known treatise's customary high standards, however. It refers to the fact that the plaintiff was "allegedly terminated because it frequently called the attention of customers [sic] and others to this fraudulent scheme," a misstatement of fact. The analysis suggests that the defendant (Washington Mills) might be guilty "merely of successful product differentiation," a far cry from the facts of this case where there was considerable evidence of fraud; or of Robinson-Patman violations "(if the high-priced customer competes with low-price customers)," *id.,* surely not the case here. The supplement then says "but the supposition of the supplier and the actual charge of higher prices for supposedly premium products do not constitute an agreement setting a resale price…." *Id.* We do not know to which "supposition" the **[**44]** quotation refers, nor do we know how this squares with the analysis in the main volume of wholesale price schemes which operate as the functional equivalent of resale price-fixing. Certainly an agreement is required to present antitrust problems, but here we have one: an agreement between Washington Mills and BCS to inflate all distributors' end price of products destined for one large customer by eliminating price competition at the dealer level. The Areeda supplement **[*1201]** describes the supplier and distributor's agreement to divide the excess profits from their fraud-tainted sales as an agreement with "some" of the attributes of a resale price maintenance agreement, but treats the BCS-Washington Mills deal as "no more than the distributor's reward for participating in the fraudulent scheme." *Id.* It was not only a reward, however, but an integral part of the very scheme to inflate prices charged by both dealers, and thus a boon for eliminating distributor competition. While it may generally be true, as Areeda argues both in the supplement and in the main volumes, that the supplier would be better off if the distributor charged less than the agreed-on price, because then it would make **[**45]** even more fraudulent sales, the fact is that in this case the supplier's temporary monopoly position, achieved by fraud and by Pratt's careful approval practices for choosing media, allowed it to reap the benefits as well. This may have been short-sighted, in light of the fact that Pratt now uses another brand of * MESSAGE(S) * MORE SECTIONS FOLLOWmedia, but nonetheless Washington Mills evidently chose to combine with one of its dealers to eliminate price competition in the market for media sales to Pratt. We believe that the Areeda supplement analysis overlooks the functional equivalence argument made in the main volume and, as such, does not carry the day with us.

3. Argument that failure of proof of Sherman Act damages mandated a judgment notwithstanding the verdict, not merely a new trial on damages.

The defendants further argue that while the trial court correctly found that the verdict awarding lost profits was based entirely on unsupported assumptions and must be set aside, the appropriate relief should have been the grant of judgment notwithstanding the verdict. *Cf.* *Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575, 582* (5th Cir.), **[**46]** *cert. denied 459 U.S. 908, 103 S. Ct. 212, 74 L. Ed. 2d 169 (1982)* (defendant entitled to directed verdict on Robinson-Patman Act claims because "self-serving and unsupported assumptions cannot sustain a calculation of going concern value. ***HN8***[] The burden of putting forth substantial evidence is not satisfied by mere speculation and guess work."). However, as we note in the discussion of the new trial motion, DeLong provided substantial evidence of the damages resulting from its loss of the distributorship and consequent loss of sales and profits, based on evidence of its past performance in the marketplace and not simply on "speculation and guess work." As the Supreme Court has noted, antitrust damages of this sort are difficult to prove, and "it does not '"come with very good grace"' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566-67, 101 S. Ct. 1923, 1929, 68 L. Ed. 2d 442 (1981)* (quoting *Hetzel v. Baltimore & Ohio R. Co., 169 U.S. 26, 39, 18 S. Ct. 255, 260, 42 L. Ed. 648 (1898)* **[**47]** (in turn quoting *United States Trust Co. v. O'Brien, 143 N.Y. 284, 289, 38 N.E. 266 (1894))*.

C. *Legal Arguments on the Robinson-Patman Act claim:*

The district court's denial of judgment notwithstanding the verdict on the Robinson-Patman Act claims is unassailable. **HN9**[] Section 1 of the Robinson-Patman Act, which of course amends and appears as section 2 of the Clayton Act, 15 U.S.C. § 13 (1988), makes it unlawful for a seller engaged in commerce to discriminate in price between different buyers. This case involves Washington Mills' charging BCS $ .495 per pound for the same media it sold to DeLong for $ .85 per pound, thereby permitting BCS to sell to Pratt for $ .91, below DeLong's retail price of $ .97. On the surface, this is discrimination in price. It is not suggested that the statutory defenses of meeting competition or due allowance for differences in cost are available here, and the judicially-created "availability defense" as stated, e.g., in *Shreve Equipment, Inc. v. Clay Equipment Corp., 650 F.2d 101, 105* (6th Cir.), *cert. denied, 454 U.S. 897, 102 S. Ct. 397, 70 L. Ed. 2d 213 (1981)*, **[**48]** is foreclosed by the law of the case **[*1202]** under *DeLong II, 887 F.2d at 1516-17*. The only argument seriously advanced here -- and to state it makes it appear to border on the ridiculous -- is that DeLong and BCS were not in functional or geographic competition with one another, *see, e.g., Parrish v. Cox, 586 F.2d 9, 11 (6th Cir.1978)* (competition must be in same geographical market); *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc., 517 F.2d 1059, 1068 n. 20 (5th Cir.1975)*, *cert. denied, 424 U.S. 968, 96 S. Ct. 1466, 47 L. Ed. 2d 736 (1976)*. However, there is no doubt but that both BCS and DeLong were after the same Pratt dollar and, while BCS was primarily a New England distributor and DeLong a southeastern one, both were obviously in head-to-head competition for the Pratt Columbus, Georgia expenditures for jet propeller polishing media, and at corresponding or overlapping time periods. Both were competitors during the startup period for Pratt's Columbus plant beginning in 1983. Deliveries to BCS for fulfilling the Pratt Georgia orders **[**49]** were initially made to a warehouse in Manchester, Connecticut and transported to Columbus periodically for a year's period during which DeLong, which had begun soliciting business in June of 1983 from Pratt, made only minimal sales to Pratt's relatively nearby new plant. BCS sales to Pratt thus directly competed with potential sales by DeLong. *Cf. Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 921 (5th Cir.1962)* (competition could be established if plaintiff showed "that it had a substantial stock on hand ... and that in selling that stock it was in present and active competition with [the defendant]."). Moreover, at least by September 1, 1983, DeLong had been approved as a vendor by Pratt and the subsequent releases of sales under the earlier October contract made by BCS were thus directly competitive with any DeLong sales. True, BCS had no local Georgia warehouse to meet Pratt's 24-hour delivery requirements, but by virtue of its sweetheart price arrangements with Washington Mills it was enabled both to foreclose DeLong from competing in Georgia for a year and to weaken DeLong's long-term position. While there must be two sales made **[**50]** by the same seller to at least two different purchasers at two different prices, *Pierce v. Commercial Warehouse, Div. of Thompson Automotive Warehouse, Inc., 876 F.2d 86, 87 (11th Cir.1989) cert. denied, 493 U.S. 1045, 110 S. Ct. 841, 107 L. Ed. 2d 836 (1990)*, there is no requirement that the two sales be made at precisely the same time or place. It is sufficient if the complaining party demonstrates some sort of real competitive injury. *Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d at 581-82*; *M.C. Mfg. Co.,* 517 F.2d at 1065-68. Washington Mills' motion for judgment notwithstanding the verdict on the Robinson-Patman Act claim was properly denied.

Washington Mills also argues that there is no proof of recoverable damages under the Robinson-Patman Act since the jury awarded the exact amount of "commissions" or kickbacks received by BCS, $ 50,216.25, as damages under the Robinson-Patman Act claim. While this matter will be discussed further in connection with the motion granting a new trial, Washington Mills argues that whatever **[**51]** benefits accrued to BCS did not establish any injury to DeLong. However, this argument conveniently overlooks the fact that DeLong was qualified for approval as a Pratt vendor when the first purchase order let out for bid in late 1983, the October contract, went to BCS because BCS was given the lower $ .495 per pound price by Washington Mills and, hence, was able to quote to Pratt a $ .91 per pound price while DeLong was unable even to obtain from Washington Mills the necessary product identification for Pratt media.

D. *Motion for Judgment Notwithstanding the Verdict on the Common-Law Fraud Claims:*

Washington Mills argues that there can be no recovery on the common-law fraud claim of deceptive labeling of special media because DeLong's "admitted knowledge of the falsity of the representations negates any finding of reasonable reliance." This argument was addressed in *DeLong II, 887 F.2d at 1519-20* and, while **[*1203]** the law of the case is therefore a complete answer to this argument, the fact is that in reversing the district court's prior dismissal of this claim for lack of justifiable reliance, the *DeLong II* court specifically pointed out that where **[**52]** a plaintiff repeatedly confronts a defendant with the apparent falsity of its representations, and the defendant repeatedly confirms its original statement, asserting special knowledge, reliance is justified. *See* Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga.App. 747, 755, 266 S.E.2d 531, 539 (1980). Washington Mills argues that at trial Harold DeLong did not testify that he was deceived by the special label or that he relied on Washington Mills' alleged "superior knowledge," but, rather, said that he never believed Washington Mills "from day one." But DeLong's inward lack of belief in Washington Mills' fraudulent assertions did not demonstrate itself in any external manifestation other than continued questioning, only to be met by continued misrepresentation. We see no need for any further showing of reliance.

Washington Mills points out that the fraud was the sale by Washington Mills of essentially stock media (for which DeLong would normally have been charged $ .495 per pound), deceptively labeled as "P & W special" and bearing a premium price of 85 cents. It then goes on to say that, multiplying this extra $ .355 per pound by **[**53]** the pounds DeLong actually purchased and resold to Pratt, the total amount comes to $ 17,824, which, together with $ 100,000 in punitive damages, was the exact amount awarded by the jury. We find no fault with this judgment, since it appears to be an appropriate award, given a finding of liability.

E. *Washington Mills' appeal of the denial of its motion for a new trial on liability and DeLong's appeal on the grant of a new trial on antitrust damages.*

Washington Mills appeals, in connection with its argument that a new trial should have been awarded on liability, alleged errors in the district court's jury charges. First, on the Sherman Act claim, Washington Mills argues that the district court failed to charge that the jury must find some agreement to fix resale, not merely wholesale, prices; second, on the Robinson-Patman Act claim, that the court failed to charge that recoverable damages must reflect actual loss, if any, to the plaintiff, not just the benefit to the favored customer; and third, on the fraud claim, that the district court erred by charging that the plaintiff could recover the amount of the difference between the price actually charged for so-called P & W specials **[**54]** and the price that otherwise would have prevailed had the material been sold as generic. Each of these points is subsumed either in the arguments as to liability above or in the arguments as to damages below, and will not be dealt with further here.

DeLong appeals, first, the setting aside of the Sherman Act damage award of $ 2,033,295 for lost profits, before trebling. Before reaching that verdict, the jury was charged, essentially, to discount Pratt's usage of preformed ceramic abrasive media over the foreseeable future in order to arrive at DeLong's share of that market had DeLong not been terminated as a dealer. The jury verdict was based on the general factual evidence relating to DeLong's past and likely continued success as a dealer, favorable evidence of which was produced by DeLong; Pratt's needs at the Columbus plant; DeLong's willingness to meet price competition and special delivery requirements; DeLong's reputation for technical know-how, testing and delivery capacity, and willingness to work with customers; and DeLong's work history of long-term dealings with Pratt and its other customers. Evidence was adduced to show past loss profits including the amount of Pratt's **[**55]** media usage to the date of trial and its purchase prices. Bud Henry, Pratt's chief media buyer, testified as to Pratt's likely demand for media for 25 years after Pratt's achieving full capacity at its Columbus plant. Scott Thurman, a certified public accountant, provided expert testimony for DeLong in respect to lost profits during Pratt's startup period through its reaching of full capacity in 1994, but concentrating **[*1204]** on the computation of factors for inflation and discount to present value. Dr. Bruce Seaman, an economist and professor at Georgia State University, offered alternative projections of lost profits from 1994 forward to 2019, the life of the Columbus plant, and testified to the assumptions underlying the five damage alternatives he presented. The defendants cross-examined the witnesses as to their assumptions, but offered no expert testimony of their own.

The district court, in setting aside the Sherman Act damages verdict, indicated that it was doing so because the expert projections were based upon the key assumption that "every single pound of Pratt and Whitney's projected media usage to the year 2019 would be Washington Mills media and that every pound of it would **[**56]** be sold by plaintiff." DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., No. 1:86-cv-275-RLV, slip op. at 3 (N.D.Ga. Sept. 30, 1991) (order vacating judgment and, *inter alia,* granting motion for new trial on antitrust damages) ("*DeLong Order*"). This interpretation of the expert testimony, while apparently suggested by Washington Mills' post-judgment brief, does not comport with the testimony. Thurman's testimony that DeLong had suffered a loss of $ 694,743 in lost sales from 1985 to 1994 started from a base calculation of all sales to the Columbus plant by all manufacturers and distributors, but adjusted profits by assuming a discount of 10% in price, which, as the jury was correctly informed, is the functional and mathematical equivalent of assuming that a significant portion of the Columbus media business would go to other distributors or manufacturers. Thurman's assumption of a discount of sales price by 10% to only 90% of list, amounts to a loss of a third or more of the profit on each individual sale -- the substantial equivalent of losing the same proportion of sales. The evidence supports the Thurman calculations, and we find no error that would justify **[**57]** setting aside that portion of the verdict. To be sure, Thurman also offered one estimate of the damages for the entire projection period, through the year 2019, which utilized the constant assumption of this price reduction, and it was apparently on the basis of this assumption that the trial court was led astray. Thurman's calculation produced a figure almost identical to one of Dr. Seaman's five alternative damage scenarios, the one on which the jury settled. However, again, Dr. Seaman presented the jury with five scenarios in which DeLong achieved different degrees of success in the market for the Pratt media business, and the assumptions behind these were based in evidence and subject to cross-examination.

The trial court, in its review of the evidence completed more than a year after the verdict, made certain additional factual assumptions that were simply not the case. These include the following:

First, Thurman did not assume that all media sold to Pratt would be Washington Mills media, except in a pricing sense, that is to say, in his own words he "identified products from Washington Mills' price lists" and used the corresponding prices from those lists to arrive at his own **[**58]** list price assumptions. His method of arriving at sales volume did not attribute all sales to Washington Mills.

Second, the trial court questioned whether Pratt would continue to buy through middlemen as opposed to going directly to the manufacturer. True, the media purchaser for Pratt, Bud Henry, testified that Pratt had a "goal" of reducing prices by buying directly, but he did not suggest that all sales categorically would be made directly or that Pratt would ignore the advantages of going through distributors where they outweighed the advantages of direct sales. Pratt did and does in fact use distributors, since servicing capacity and timely delivery were and presumably are of value to the company, and at the time of trial Pratt was buying the bulk of its media through another distributor, not directly. There was ample evidence to indicate that special services were provided by distributors. One could just as well suppose that Pratt could make its own media. Henry himself concluded that there was no reason that DeLong could not have continued indefinitely as one of Pratt's suppliers.

[*1205] Third, as we have noted, Dr. Seaman examined the case for the lost future profits for 1994-2019 **[**59]** by addressing five alternative models. Despite Washington Mills' and the trial court's claims, he did assume that DeLong was not the only distributor and Washington Mills not the only manufacturer. While he assumed that in the early stages Washington Mills would have had the inside track, he also assumed that DeLong would have "made an adjustment" to be "better positioned to maintain the Pratt accounts." He thus chose different levels of competition and different responses to that competition to make his projections. His case one, not in issue here, was a mathematical extrapolation of "maximum damages." This case was based on the assumption that the trial court mistakenly thought all expert testimony rested upon -- "that every single pound of Pratt & Whitney's projected media usage to the year 2019 would be Washington Mills media and that every pound of it would be sold by DeLong." *DeLong Order,* slip op. at 3. Case one assumed no retail price discount and no lost sales volume, and projected damages of $ 5,659,618.

Dr. Seaman's case two adjusted for increased competition and assumed -- as had Mr. Thurman in his projections -- a 10% retail price discount to protect sales volume, **[**60]** which produced a damage figure of $ 3,371,865. His case three adjusted for increased competition by assuming that DeLong would continue charging the full retail price but lose 50% of sales volume to other distributors or manufacturers, resulting in a damage figure of $ 3,177,181. Case four, however, made both adjustments by assuming *both* a 10% retail price discount *and* a 50% loss of sales volume to other distributors or manufacturers, arriving at the figure which the jury apparently accepted, $ 2,033,295. Dr. Seaman's fifth case consisted of a variation of case four in which the retail price was further reduced from 63 cents to 55 cents, resulting in total damages of $ 1,468,355. All of the cases, as stated, incorporate Thurman's estimate of lost profits for 1985-94 of $ 694,743.

The damage figure which the jury selected, Dr. Seaman's case four, then, assumed that DeLong would cut its price to 90% of list in order to meet competition but would still suffer a 50% loss of Pratt sales, and assumed that DeLong would make only one-half of all sales to Pratt with Washington Mills media. It certainly did not assume that "every single pound of Pratt & Whitney's projected media usage" **[**61]** would be sold by DeLong. We see nothing to indicate that the assumptions made were unreasonable or fanciful.

In sum and substance, the combination of the basic evidence and the testimony of the expert witnesses supported the Sherman Act verdict by providing a basis for the jury to project DeLong's lost profits, assuming different levels of sales volume and profit per sale, and utilizing a discount factor reflecting all of these other potential sales. *See* *J. Truett Payne, 451 U.S. at 565-67, 101 S. Ct. at 1929 (1980)*; *Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 580-81 (5th Cir.1980)*. We think the assumptions used here were reasonable in light of the evidence.

Alternatively, Washington Mills argues that Dr. Seaman's case four assumption that DeLong would have captured half of the Pratt business to the year 2019 is subject to the same fundamental fallacies as Thurman's theory of damages through 1994, namely, that there is no more basis for assuming that DeLong would have had one-half of Pratt's future business but for the termination than there is for assuming that it would have captured **[**62]** it at all. But the damages proof here reduced DeLong's potential sales volume to show loss of profits in open competition, and the jury verdict, to the extent it rested on Dr. Seaman's case number four, also incorporated a second adjustment assuming sales at a 90% discount off list price. We are basically dealing with a hypothetical question, in any event: what would have occurred if the defendants had not violated the antitrust laws and terminated DeLong's distributorship? *See* *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24, 89 S. Ct. 1562, 1576-77, 23 L. Ed. 2d 129 (1969)*; *Malcolm v. Marathon Oil Co., 642 F.2d 845, 858-59 & n. 24 (5th Cir. Unit B* ***[*1206]*** *1981)*, *cert. denied, 454 U.S. 1125, 102 S. Ct. 975, 71 L. Ed. 2d 113 (1981)*; and *Lehrman v. Gulf Oil Corp., 464 F.2d 26, 46-47* (5th Cir.), *cert. denied, 409 U.S. 1077, 93 S. Ct. 687, 34 L. Ed. 2d 665 (1972)*. On the strength of the overall evidence, exclusive of the mathematical and economic **[**63]** projections, the jury properly could have concluded that DeLong would have continued to sell to Pratt on the basis of the advantages of the Washington Mills product and DeLong's superior servicing and delivery capacity. The fact that Washington Mills has in fact lost the Pratt media business to another manufacturer is, at most, an indication that its overcharging and fraud preempted its participation in future sales.

In sum, because the district court's grant of a new trial, in a 5-page order filed more than a year after the close of trial, was based on a misreading of the evidence, the court abused its discretion in discarding the jury's verdict.

DeLong also appeals the grant of a new trial on the Robinson-Patman Act damages, arguing that the jury's award of $ 50,216.15 should be reinstated. This sum, as we have said, is identical to the amount of kickbacks which BCS received for DeLong's sales of media to Pratt. The district court granted a new trial on these damages because it concluded that the jury had latched onto this figure despite the fact that "Robinson-Patman damages must be measured by what the disfavored buyer suffered, not by what the favored buyer gained." *DeLong* **[**64]** *Order,* slip op. at 4. *See also* *J. Truett Payne, 451 U.S. at 568, 101 S. Ct. at 1930* (must prove injury from price discrimination as well as fact of price discrimination in order to recover under Robinson-Patman Act), *and id. on remand,* *670 F.2d 575, 583* (concluding that there was insufficient evidence of damages).

Washington Mills defends the grant of a new trial on the theory that the *J. Truett Payne* cases, and *Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir.1988)*, *aff'd,* *496 U.S. 543, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*, bar the award of "automatic damages" in Robinson-Patman cases, and that the jury in this case has awarded just such automatic damages by reasoning that the benefit to BCS should be the measure of the Robinson-Patman award. However, the cases actually say something much narrower: that it is impermissible to assume, from evidence of price discrimination, that the plaintiff suffered antitrust injury. While we certainly agree that the appropriate measure of DeLong's damages should **[**65]** be the extent of DeLong's injury, and not the extent of BCS's gain, we note that these sums may be related. It may be that the extra money paid to BCS corresponded, at least roughly, to DeLong's lost profits on sales made of the media for which it was overcharged and on sales lost to BCS, and to other damage resulting from the drain on DeLong's business of competing with a distributor receiving favorable prices. Although DeLong still was able to make a profit on the sales it did make to Pratt, the Supreme Court has made clear that passing on the increased price does not prevent a middleman from collecting Robinson-Patman Act damages. *Kansas and Missouri, et. al. v. Utilicorp United, Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*; *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*; *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*; *see also* *Austin v. Blue Cross and Blue Shield of Ala., 903 F.2d 1385 (11th Cir.1990)*. **[**66]**

Nonetheless, we do not think it was error for the court to have concluded that the jury's award indicated that it had misunderstood or misapplied the law of Robinson-Patman Act damages by focusing not on the injury to DeLong but on the benefit to BCS. Nor did the trial court make any factual errors in setting aside the Robinson-Patman Act damages. While this is not a case in which the amount of the damages award was outside of the range of permissible verdicts, *see* 11 Wright and Miller § 2820, there are other circumstances in which ***HN10***[] a new trial may be awarded. In particular, where the verdict suggests that the jury was confused and misapplied the law, it is not an abuse of **[*1207]** discretion to grant a new trial. *E.g., Schneider v. Lockheed Aircraft Corp., 212 U.S. App. D.C. 87, 658 F.2d 835, 849 (D.C.Cir.1981)*, *cert. denied, 455 U.S. 994, 102 S. Ct. 1622, 71 L. Ed. 2d 855 (1982)*; *Wood v. Holiday Inns, Inc., 508 F.2d 167, 175 (5th Cir.1975)*. While we think it conceivable that the jury viewed the kickbacks as a likely minimum measure of DeLong's damages as a result of the price discrimination, **[**67]** we think the district court was in a better position to determine whether the verdict in fact was the product of confusion. In addition to the verdict itself, the judge might have considered the possibility that the jury was distracted by the much larger Sherman Act damages claim and confused by the comparative weakness of the instructions he gave for calculating Robinson-Patman damages. The judge admonished the jury generally that recovery on all antitrust claims should be for injury to the plaintiff's business, but he offered no specific instructions for calculating the Robinson-Patman Act damages. Indeed, the district court's only explicit statement to the jury on the subject was the following:

Now, in calculating or figuring the measure of damages for price discrimination, one way that you might do that is this: The plaintiff would be entitled to recover the difference in the price of the product -- strike that, that's not what I want to charge there.

In part because of this misstatement, Washington Mills sought a specific jury charge that DeLong could recover only in the amount of its own injury from the price discrimination, and not in the amount of BCS's gain. The court rejected **[**68]** this suggestion on the theory that the general admonition covered the point. He might have recalled, too, that DeLong's lawyers had advised the jury during closing argument that DeLong's injury, and not BCS's gain, was the appropriate measure of Robinson-Patman damages. Nonetheless, we cannot say that it was error to conclude, once the jury returned a verdict in the precise sum of the paybacks to BCS, that the jury had chosen this figure for impermissible reasons. Accordingly, we affirm the grant of a new trial on the Robinson-Patman damages.

Finally, the trial court did not err in allowing pre-judgment interest on Washington Mills' counterclaim on DeLong's open account. DeLong admitted owing the $ 24,532.68 amount awarded, and, hence, it is a liquidated sum within the meaning of Georgia law. *Council v. Hixon, 11 Ga.App. 818, 827, 76 S.E. 603 (1912)*. ***HN11***[] Under Georgia law, if a party admits liability in some amount, not necessarily the amount claimed or ultimately recovered by the other party, interest may be had from the date of such admission on that amount. *See* *Boston-Old Colony Ins. Co. v. Warr, 127 Ga.App. 364, 364, 193 S.E.2d 624, 625 (1972)*; **[**69]** *Walton Motor Sales, Inc. v. Ross, 736 F.2d 1449, 1459 n. 20 (11th Cir.1984)* (applying Georgia law).

CONCLUSION

The judgment of the district court insofar as it denied Washington Mills' motions for judgment notwithstanding the verdict is affirmed. The judgment insofar as it granted the motion for a new trial on Sherman Act damages is reversed, and on Robinson-Patman Act damages is affirmed. The judgment awarding pre-judgment interest on the counterclaim for open account indebtedness is affirmed.

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Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.

United States Court of Appeals for the Third Circuit

December 3, 1992, Argued ; May 18, 1993, Filed

No. 91-5932, No. 91-5965

Reporter

995 F.2d 425 *; 1993 U.S. App. LEXIS 11489 **; 1993-1 Trade Cas. (CCH) P70,228

GULFSTREAM III ASSOCIATES, INC. GULFSTREAM IV ASSOCIATES, INC. v. GULFSTREAM AEROSPACE CORPORATION, a Delaware Corp.; GULFSTREAM AEROSPACE CORPORATION, a Georgia Corp.; GULFSTREAM AMERICAN CORPORATION; ATLANTIC AVIATION CORPORATION; CESSNA AIRCRAFT COMPANY; GATES LEARJET CORPORATION; BRITISH AEROSPACE, INC.; CANADAIR CHALLENGER, INC.; MITSUBISHI AIRCRAFT INTERNATIONAL INC. Cessna Aircraft Company Appellant in No. 91-5932 Gulfstream III Associates, Inc. Gulfstream IV Associates, Inc. Appellants in No. 91-5965

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY. (Civil No. 88-00499).

Core Terms

settlement, district court, damages, antitrust claim, antitrust, purchaser, purchase agreement, aircraft, overcharge, Jet, fee award, attorney's fees, setoff, summary judgment, settlement agreement, settle, parties, trebled, plane, offset, assigned, general assignment, anti trust law, pretrial, Clayton Act, manufacturers, transferred, mandatory, allocate, rights

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Torts > ... > Elements > Causation > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN1[] **Private Actions, Standing**

The focus of the doctrine of antitrust standing is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. Whether a plaintiff is the proper party involves considerations of doctrines such as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN2[] **Private Actions, Standing**

To establish antitrust standing a plaintiff must show both: 1) harm of the type the antitrust laws are intended to prevent; and 2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] **Private Actions, Standing**

Antitrust standing requires proximate causation between defendant's conduct and the injury to plaintiff.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN4[] **Private Actions, Standing**

On their face, the antitrust laws purport to provide a remedy to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15*.

Contracts Law > Standards of Performance > Assignments > General Overview

HN5[] **Standards of Performance, Assignments**

Antitrust claims are assignable.

Contracts Law > Standards of Performance > Assignments > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN6[] **Standards of Performance, Assignments**

Federal rather than state law controls the issue as to whether there is an assignment of an antitrust claim, and such law requires specific reference thereto in the assignment to transfer such claim.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN7[] **Private Actions, Remedies**

The proper determination of damages requires a two-part calculation. First, the court must treble the jury's award. Second, the court must then set off any amounts that are received earlier as settlements of the antitrust claims involved in this case.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN8[] **Private Actions, Remedies**

The value of options received in an antitrust settlement must be considered when valuing that settlement, at least where the plaintiff intends to exercise those options.

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN9[] **Settlements, Settlement Agreements**

Where a plaintiff executes a general settlement instrument which settles multiple claims with a defendant, but a non-settling defendant is not a party to that agreement, the non-settling defendant need show only that the plaintiff settles a claim on which the non-settling defendant is found liable at trial. If the defendant makes this showing, the burden then shifts to the plaintiff to prove that, under the terms of its agreement with the settling defendant, the settlement or part thereof does not represent damages arising under the same theory of liability as those forming the basis for the jury award.

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Judges: BEFORE:SLOVITER, Chief Judge, GREENBERG and SEITZ, Circuit Judges.

Opinion by: SEITZ

Opinion

[*428] OPINION OF THE COURT Except as to Part II(A)(1)(c)

SEITZ, *Circuit Judge*.

Gulfstream III Associates, Inc. ("plaintiff"), instituted this antitrust action against seven manufacturers of business jet aircraft. It charged a horizontal price-fixing conspiracy among these manufacturers **[**2]** to fix, raise and stabilize the prices of new business jets in the United States, including those plaintiff agreed to purchase.

Six of the manufacturers settled. The seventh, Cessna Aircraft Company ("defendant") resisted the three claims asserted against it. The district court granted summary judgment to defendant on two of the three claims arising out of agreements to purchase aircraft. One of these claims, that of Gulfstream IV Associates, Inc., was abandoned on appeal. The judgments of the district court on plaintiff's two claims form the bases for these appeals. In resolving these issues, with one exception later addressed, neither party raises any objection to the fact that the district court decided all issues on a paper record.

I. BACKGROUND

Plaintiff's first claim against defendant arose out of an agreement made on March 25, 1983, under which plaintiff agreed to purchase a Gulfstream Model IV aircraft ("G-IV") from a settling codefendant, Gulfstream Aerospace Corporation ("GAC"), for $ 13,470,000. Subsequently, plaintiff settled its antitrust claims against GAC. Under the terms of the settlement with GAC, plaintiff transferred all of its rights in the G-IV Purchase Agreement **[**3]** back to GAC. The district court granted summary judgment for defendant after concluding that "plaintiff[] could have suffered no overcharge or consequential damages on a contract which was canceled." (J.A. at 35).

Plaintiff's second claim against defendant arose out of an agreement made in September 1981, under which plaintiff agreed to purchase a Gulfstream Model III aircraft ("G-III") from GAC for $ 9,975,000, subject to a price escalation clause. After the district court denied defendant's motion for summary judgment on the second claim, the claim went to trial and the jury returned a verdict for plaintiff which, when trebled, amounted to $ 2,992,500.

Thereafter, defendant moved for a judgment dismissing the second claim or, in the alternative, for a declaration that plaintiff was entitled to no damages. The district court found that plaintiff had received from pretrial settlements with codefendants an aggregate sum greater than treble the amount awarded by the jury in this action. As a result, although it did not dismiss the complaint, it reduced the verdict to zero and entered final judgment for defendant. However, it subsequently granted plaintiff attorneys' fees.

Despite the **[**4]** fact that defendant was the beneficiary of the judgment on the second claim, it filed a notice of appeal from the judgment except to the extent it ordered that plaintiff was entitled to no damages (No. 91-5932). The appeal asserts that its pretrial motion for summary judgment should have been granted. Thus, its appeal is taken to negate the jury verdict and the possible collateral consequence flowing therefrom, viz., the allowance of attorneys' fees. Thereafter, plaintiff filed an appeal attacking the final judgment of the district court as well as the denial of its motion to amend the judgment (No. 91-5965). Both sides later appealed the award of attorneys' fees (No. 92-5263 and No. 92-5273). Those appeals are decided in a separate opinion filed this day.

The district court had jurisdiction over this action under the federal antitrust laws pursuant to *28 U.S.C. § 1337(a)* and *15 U.S.C. § 15(a)*. This court has jurisdiction over the appeals from the final judgment of the district court pursuant to *28 U.S.C. § 1291*.

[*429] II. DISCUSSION

A. Defendant's Appeal

We turn first to defendant's **[**5]** limited appeal of the judgment in its favor on the second claim. We do so because the attacks on plaintiff's standing, if cognizable and meritorious, would result in a determination that defendant should have been granted pretrial judgment, thus vitiating the jury's verdict for plaintiff.

Plaintiff does not assert that defendant lacks standing to appeal the judgment because it was entered in defendant's favor. In any event, we conclude that defendant has such standing because it "retains a stake in the appeal satisfying the requirements of Art. III," viz., the allowance of attorneys' fees. *Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 334, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)*. We turn then to defendant's appeal mindful that these threshold issues were decided against defendant pretrial by the district court.

1. Plaintiff's Antitrust Standing

We understand defendant's appeal on these standing-related issues to be limited to the district court's denial of defendant's motion for summary judgment. Our standard of review is plenary. *See* *Schafer v. Board of Pub. Educ. of Sch. Dist. of Pittsburgh, Pa., 903 F.2d 243, 246 (3d Cir. 1990)* ("Our review of **[**6]** the district court's order . . . denying appellant's summary judgment motion is plenary.").

Before addressing defendant's specific attacks on plaintiff's standing, some exposition of the law of antitrust standing is in order. "***HN1***[] The focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a *proper party* to bring a private antitrust action." *Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 535 n.31, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (emphasis added). Whether a plaintiff is the "proper party" involves considerations of "doctrines such as foreseeability and proximate cause, directness of injury, certainty of damages and privity of contract." *Id. at 532-33* (footnotes omitted).

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, the Supreme Court set forth a two-part test for antitrust standing that has recently been applied **[**7]** by our court. *See* *International Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1327-28 (3d Cir. 1992)*. ***HN2***[] To establish antitrust standing a plaintiff must show both: 1) harm of the type the antitrust laws were intended to prevent; and 2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful. *Id.*

Based on the pretrial record, the first requirement is easily satisfied. The "decreased competition" in the business jet market is "the type of harm targeted by the antitrust laws." *Id. at 1328*. The second requirement is generally met if the plaintiff is a "competitor []or a consumer in the relevant market." *Id.* Alternatively, this requirement is fulfilled if there exists a "significant causal connection" such that the harm to the plaintiff can be said to be "inextricably intertwined" with the antitrust conspiracy. *Id.* (quoting *Blue Shield v. McCready, 457 U.S. 465, 484, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982))*.

As to the second requirement, plaintiff was either a consumer or a competitor, or both, in the relevant market. [1] In addition, the harm to plaintiff through lost profits **[**8]** (or increased losses) on the G-III Purchase Agreement was inextricably intertwined with the horizontal price fixing conspiracy. Thus, unless certain other issues raised by defendant negate plaintiff's standing, defendant was not **[*430]** entitled to summary judgment based on lack of standing. We turn to those issues.

a. Proximate Causation

HN3[] Antitrust standing requires proximate causation between defendant's conduct and the injury to plaintiff. *See* *Associated Gen. Contractors, 459 U.S. at 535-37*. Defendant asserts that plaintiff **[**9]** lacks standing to bring the G-III claim because defendant's antitrust violation was not the proximate cause of the injury to plaintiff. It says that, on the contrary, the proximate cause of plaintiff's injury was its inability to find a lessee for the G-III.

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[1] Plaintiff enters into purchase agreements with manufacturers years in advance of the date on which the planes will be ready for delivery. In that sense plaintiff is a consumer. In addition, however, plaintiff routinely sells its interest in these planes/purchase agreements shortly before the planes are ready for delivery. Thus, in some instances plaintiff is competing with the manufacturer who is also selling another such product, at the same time, to the same consumers.

The defendant's argument is without merit even though the record shows that plaintiff contemplated taking title to the G-III only if it could find a lessee. Plaintiff's financing for the G-III Purchase Agreement was conditioned by plaintiff's bank upon plaintiff's doing one of two things when the plane was ready for delivery; *either*: 1) selling the plane/purchase agreement to a third party; or 2) entering into an agreement to lease the plane to a third party and then taking title to the plane. Under either of these options, the defendant's antitrust violation (which caused an overcharge in purchase price) would have been the proximate cause of plaintiff's injury. Under the first option plaintiff would suffer the injury because the amount of the overcharge would reduce plaintiff's profits (or increase plaintiff's losses) from the sale of the plane/purchase agreement. Under the second option, plaintiff would suffer injury because **[**10]** plaintiff would pay the full purchase price (including the overcharge) before taking title to the plane.

In sum, defendant's antitrust violation caused an overcharge in the purchase price of the plane. That overcharge was incorporated into the purchase agreement signed by plaintiff. From the date plaintiff signed that agreement through the date the plane was delivered to a third party, subsequent to an assignment by plaintiff, it is not disputed that plaintiff remained obligated to pay the overcharge upon exercising either option. Thus, defendant's proximate cause argument did not entitle defendant to summary judgment.

b. "Purchase" of the G-III

Defendant next asserts that plaintiff lacks standing to bring the G-III claim because plaintiff assigned the agreement and thus never "purchased" the G-III. Defendant's argument seems to be predicated on the assumption that *only* a purchaser can have antitrust standing.

Almost fifty years ago, the Supreme Court rejected such an argument. *See* *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)* ("The statute does not confine its protection to consumers, or *to purchasers* **[**11]** , or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (emphasis added)). ***HN4***[] On their face, the antitrust laws purport to provide a remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." *15 U.S.C. § 15*. Recent Supreme Court cases have espoused a narrower reading of the statutes' coverage. *See*, *e.g.*, *Associated Gen. Contractors, 459 U.S. at 529* & n.19 (quoting *Mandeville*; rejecting argument that "statute is as broad as its words suggest"). Nevertheless, the Supreme Court has never intimated that only purchasers have standing.

In addition, even if this court accepted the view that standing should generally be limited to purchasers, defendant's argument seeks to exalt form over substance. Admittedly, plaintiff assigned its rights in the plane and purchase agreement and never took title to the G-III. Thus, plaintiff was not a purchaser in the ordinary sense of that word. Nevertheless, plaintiff executed **[**12]** a purchase agreement and remained contractually bound to pay the G-III's total purchase price up to and including the date of delivery. We believe in these circumstances that plaintiff's continuing contractual obligation nullifies this objection to its standing and, thus, summary judgment was properly denied.

[*431] c. Assignment of the G-III Purchase Agreement

Defendant next argues that plaintiff lacks standing to bring this action because it unconditionally assigned its antitrust rights in January of 1984 when it transferred its interest in the G-III and purchase agreement to JB&A Aircraft, Inc. Under the terms of that assignment, plaintiff "[sold], assigned, transferred and set over . . . all of its rights, title and interest in and to the [G-III] and the Purchase Agreement . . . ." (J.A. at 356). This action was commenced against defendant in June of 1985, eighteen months after the assignment.

In a pretrial ruling, the district court recognized that antitrust claims are assignable, but rejected the argument that plaintiff had assigned its antitrust claim in this case. It contrasted this case with one previously decided by our court which involved, in part, an express assignment of **[**13]** antitrust rights and noted that no "language in plaintiff's assignment . . . so much as alluded to rights under the antitrust laws." (J.A. at 58). The court stated: "On this record, the Court will not infer an assignment of plaintiff's Clayton Act rights." The defendant takes issue with that ruling.

Under controlling federal law, as the district court recognized, ***HN5***[] antitrust claims are assignable. *In re Fine Paper Litig., 632 F.2d 1081, 1090 (3rd Cir. 1980)*. The critical question is whether the general assignment here encompassed plaintiff's federal antitrust claim despite the fact that it is not specifically identified in the assignment that transferred all of plaintiff's interest in the G-III and the purchase agreement.

In its separate opinion, the majority of this court holds that ***HN6***[] federal rather than state law controls the issue as to whether there has been an assignment of an antitrust claim and that such law requires specific reference thereto in the assignment to transfer such claim. The author of this opinion is *dubitante* as to the majority determination because he believes that the case for the application of state law rather than federal "common **[**14]** law" may be more compelling and thus dictate a contrary conclusion. However, since the vote of the majority constitutes the holding of this court, it follows that there is no merit to defendant's argument that, because of the general assignment here, plaintiff lacked standing to maintain this antitrust action.

2. Refusal to Compel Production of Settlement Documents

In its brief on its cross appeal, defendant argues in a footnote that the "district court's refusal to permit Cessna access to the settlement agreements relied upon by the court in its summary judgment holding is reversible error."

The defendant's argument is not clearly discernible. We will therefore first interpret it to be an attack on the court's pretrial denial of defendant's motion for summary judgment. We understand such an argument to be premised on defendant's contention that the amount of the setoffs exceeded any reasonable potential verdict.

Even if one assumes that summary judgment would be appropriate in such a case, the short answer to this contention is that we cannot find in the record any application for the production of the settlement documents before the argument and decision on the summary judgment **[**15]** motion. Thus, given the record, defendant cannot rely on any such refusal as the basis for holding that the court's ruling constituted error entitling it to a pretrial judgment. Nor is our conclusion changed because the court had *in camera* access to the settlement agreements.

Alternatively, if defendant's footnote can be read to attack the denial by the court of defendant's later formal pretrial motion for production of the settlement agreements, the answer is that had they been produced they would not, without more, have entitled defendant to summary judgment even assuming that the motion was timely. This is so because further evidentiary proceedings would have been necessary, at least with respect to the *Falcon Jet* settlement, before the court could possibly have determined that the settlement proceeds exceeded any potential verdict. [2] **[**16]** **[*432]** Thus, defendant did not show that it was entitled to pretrial judgment. [3]

3. Exclusion of Certain Defense Evidence

Finally, defendant contends that the district court erred in its pretrial ruling on plaintiff's motion-in-limine that excluded evidence at trial tending to show that plaintiff resold the G-III Purchase Agreement. The district court ruled that such evidence was "irrelevant and inadmissible for the purpose of showing that plaintiff did not suffer the full amount of the alleged overcharge." (J.A. at 65). We review the district court's ruling under an abuse of discretion

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[2] Plaintiff brought a separate action against the Falcon Jet Corporation, a manufacturer of business jet aircraft that is not a party to this suit. The *Falcon Jet* litigation involved, in part, the same price fixing conspiracy. The *Falcon Jet* Settlement contained an express allocation of the monies received among claims and attorneys' fees. Only $ 1 was allocated to the category of "all other claims" which included the antitrust claims arising out of the price fixing conspiracy. Defendant argues that the $ 1 allocation was made in bad faith and that a substantially greater portion of the settlement should be set off from the jury's verdict in this suit.

[3] Although not specifically headed in its briefs, defendant also argues that the district court should have granted its post trial motion for judgment *nunc pro tunc* dismissing the complaint on the ground that the trebled jury verdict was wholly setoff by the amounts received by plaintiff in the prior settlements. We cannot find that the district court erred in declining to grant this relief post-trial. We so conclude because, as we have held, defendant was not entitled to pretrial judgment.

standard. *See* Pfeiffer v. Marion Ctr. Area Sch. Dist, Bd. of Sch. Directors, 917 F.2d 779, 781 (3d Cir. 1990) **[**17]** ("Relevance decisions are discretionary and reviewable only for abuse of discretion.").

We have affirmed the district court's conclusion that plaintiff had antitrust standing. We also agree with the district court that, because plaintiff was the proper party to bring this action, it had "a right to recover all damages for [the] overcharge, regardless of how much of the overcharge it actually absorbed . . . ." (J.A. at 63). *Accord* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977). Thus, there was no abuse of discretion in excluding this evidence if offered to "prove that plaintiff [could not] recover as damages the entire amount of the overcharge." (J.A. at 63).

The court therefore concludes that the various grounds asserted in defendant's appeal lack merit.

B. Plaintiff's Appeal

1. The G-IV Purchase Agreement

Plaintiff's appeal first attacks the order of the district court granting defendant's motion for summary judgment on plaintiff's claim arising out of its agreement to purchase the G-IV from GAC--the manufacturer of the G-IV jet aircraft and a codefendant in this case. Our review is plenary.

It is not seriously disputed **[**18]** that the price specified in the G-IV Purchase Agreement may have included an overcharge caused by defendant's antitrust violation. Pursuant to that purchase agreement, plaintiff made installment payments to GAC of approximately ten percent of the total purchase price. However, prior to the date on which the G-IV would have been delivered (and the remaining ninety percent of the purchase price would have been due), plaintiff settled its antitrust claims against GAC. As part of the GAC Settlement Agreement, plaintiff transferred all its right, title and interest in the G-IV and the G-IV Purchase Agreement back to GAC. In return for its interest in the G-IV and the purchase agreement, plaintiff received a payment of $ 2,171,866. This amount exceeded plaintiff's ten percent down payment on the G-IV by over $ 800,000. [4]

Plaintiff argues that because the GAC Settlement Agreement refers to the transaction **[**19]** as a "sale" of plaintiff's interest to GAC rather than a "cancellation" of the purchase agreement, plaintiff is entitled to recover damages from defendant in the amount of any overcharge reflected in the G-IV Purchase Agreement.

[*433] Plaintiff, in our view, seeks to attach unwarranted significance to the words "cancellation" and "sale." Whether the GAC Settlement Agreement is termed a cancellation or a sale, the substance of the transaction remains the same. Plaintiff was effectively released from any obligation under the G-IV Purchase Agreement prior to the date on which the plane would have been delivered and the bulk of the purchase price would have been due. In addition, plaintiff appears to have made a significant "profit" on the transaction.

The Supreme Court has cautioned against permitting "legality for antitrust purposes [to] turn on clever draftsmanship." Simpson v. Union Oil Co., 377 U.S. 13, 24, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964). Otherwise, the antitrust laws could be circumvented "merely by clever manipulation of words, not by . . . substance." Id. at 22; *cf.* Commissioner v. Danielson, 378 F.2d 771, 774 (3d Cir.) **[**20]** (applying similar rule under the federal tax laws), *cert. denied*, *389 U.S. 858, 19 L. Ed. 2d 123, 88 S. Ct. 94 (1967)*. The district court properly looked to the undisputed effect of the settlement agreement and concluded that plaintiff had received an amount that more than compensated it for its payment plus interest and thus it could not have suffered any overcharge or consequential damages. [5] The district court correctly granted defendant's motion for summary judgment on this claim.

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[4] Plaintiff also received an additional $ 400,000 in settlement of any antitrust claims it might have had against GAC.

[5] Plaintiff attempts to bolster its argument by asserting that it would never have agreed to cancel the purchase agreement because such a cancellation would have resulted in the loss of a $ 1,000,000 tax deduction. This argument was not raised before the district court and we decline to address it. *See* Knop v. McMahan, 872 F.2d 1132, 1143 n.20 (3rd Cir. 1989).

2. The G-III Purchase Agreement

As previously noted, plaintiff's G-III claim went to trial and the jury rendered a verdict for plaintiff. Thereafter, **[**21]** the district court determined, based on a post-verdict motion, that the sums the plaintiff received from the other six manufacturers by way of settlements exceeded the amount of the jury verdict. In accordance with the governing law, it therefore properly entered judgment for defendant, unless it committed error in calculating the setoffs. *See* Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 533 (3d Cir.), *cert. denied*, *429 U.S. 825, 50 L. Ed. 2d 87, 97 S. Ct. 78 (1976)*.

Both plaintiff and defendant agree that ***HN7***[] the proper determination of damages requires a two-part calculation. First, the court must treble the jury's award. Second, the court must then set off any amounts received earlier as settlements of the antitrust claims involved in this case. *See* Baughman, 530 F.2d at 533; Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir.), *cert. denied*, *355 U.S. 835, 2 L. Ed. 2d 46, 78 S. Ct. 54 (1957)*. The parties also agree that the district court correctly trebled the jury verdict of $ 997,500 to arrive at a total verdict of $ 2,992,500. Plaintiff argues, however, that the district **[**22]** court committed an error in arriving at the amount it received in settlement of its antitrust claims from the defendant Mitsubishi Aircraft International, Inc. ("Mitsubishi"). It was partly because of such error, says plaintiff, that the total setoff from the six settlements was in excess of the trebled verdict.

a. Mitsubishi Settlement

We address plaintiff's settlement with the defendant Mitsubishi, keeping in mind that the following facts are undisputed. Plaintiff ultimately executed two separate settlement documents with Mitsubishi. Pursuant to the First Mitsubishi Settlement, plaintiff was to receive: 1) $ 300,000 in cash; 2) one Mitsubishi Diamond II airplane for $ 2,600,000; and 3) options to purchase two additional Diamond II airplanes for $ 2,600,000 each. Mitsubishi represented to plaintiff that the market price for a Diamond II was approximately $ 3,200,000. The First Mitsubishi Settlement also obligated plaintiff to forfeit $ 75,000 of the $ 300,000 in cash if plaintiff did not purchase at least one Diamond II.

The First Mitsubishi Settlement contained a most favored nation clause under which plaintiff promised Mitsubishi that it would not settle its claims against any **[**23]** other defendant for less than a specified dollar amount. Despite the apparent value of the First Mitsubishi Settlement, the most favored nation **[*434]** clause stated in pertinent part: "The parties hereto stipulate that for purposes of this paragraph of this agreement only, and for no other purposes, this settlement has a present value of $ 400,000.00 for the benefit of the plaintiff[] and as a cost to Mitsubishi." (J.A. at 823).

Subsequently, when plaintiff tried to sell its options on the Diamond II's, it became aware that the market price for a Diamond II was actually $ 600,000 less than Mitsubishi had represented. Thus, plaintiff's right/options to purchase Diamond II's were worthless and the value of the Mitsubishi Settlement to plaintiff was reduced by approximately $ 1,800,000. Plaintiff contacted Mitsubishi and threatened, *inter alia*, to rescind the First Mitsubishi Settlement and/or to sue Mitsubishi under Texas law for damages for misrepresentation. Although plaintiff never formally revoked the First Mitsubishi Settlement, ultimately Mitsubishi paid plaintiff $ 1,800,000 in cash and plaintiff and Mitsubishi signed the Second Mitsubishi Settlement covering all claims between **[**24]** the parties (including the earlier antitrust claims).

The basic issue presented is whether, under the undisputed facts above, the district court was entitled to include the $ 1,800,000 in calculating the Mitsubishi setoff. [6] Plaintiff, relying largely on the most favored nation clause, says that the amount of the setoff should be no more than $ 400,000. It notes that it never formally revoked the first

[6] The parties do not explicitly contend that the resolution of this issue requires us to determine whether federal or state law applies. In either event, we think that the same considerations of preventing duplicative recovery would obtain. *See* *Restatement (Second) of Torts § 885(3)* (1979).

settlement and argues that the $ 1,800,000 in cash was received in settlement of a potential state law fraud claim and not in partial settlement of plaintiff's antitrust claim.

Momentarily passing over the fact that a most favored nation clause is generally included for the benefit of a settling defendant (rather than a plaintiff), **[**25]** by its express terms the most favored nation clause in this case is inapplicable to the valuation of the settlement for purposes of calculating setoff. Even if we were to indulge in the unlikely assumption that *plaintiff* intended that the most favored nation clause be somehow applicable for setoff purposes, the $ 400,000 amount improperly fails to include the represented value of the options that plaintiff received. *See* Merola v. Atlantic Richfield Co., 515 F.2d 165, 172 (3d Cir. 1975) (discussing valuation of antitrust settlement for purposes of attorneys' fees; "Where the benefit [from a settlement] is in non-monetary form, the district court must bring an informed economic judgment to bear in assessing its value. If probative evidence of the monetary value of such a benefit is available, it should of course be used."). As other courts have recognized, ***HN8***[] the value of options received in an antitrust settlement must be considered when valuing that settlement, at least where the plaintiff intends to exercise those options. *See* Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 640 F. Supp. 697 (S.D. Ohio 1986); **[**26]** *see also* Bal Theatre Corp. v. Paramount Film Distrib. Corp., 206 F. Supp. 708, 714 (N.D. Cal. 1962) (recognizing that in antitrust context, "the rule . . . seems to be that anything of value received should be set off in addition to the cash settlement").

It is true that courts have adopted the parties' valuation of their settlement, provided the record supported that valuation. In this case, however, we think the record supports the district court's finding that the $ 1,800,000 received in the second settlement was properly set off. The fact that plaintiff threatened to sue Mitsubishi for fraud does not alter the reality that the second settlement proceeds were part of the true value of the original settlement. [7] Any other approach **[*435]** to the second settlement would do violence to the equitable principle that one who has recovered from one coconspirator may not recover the same item of damage from another conspirator. Baughman, 530 F.2d at 533.

[27]** Finally, we do not consider that the affidavit of Mitsubishi's in-house counsel, Yukihisa Hotta, creates a disputed issue of material fact. Mr. Hotta stated that the $ 1,800,000 "represented threatened single damages under the Texas [fraud] statute . . . ." (J.A. at 913). [8] Plaintiff says this representation is unchallenged. Nevertheless, it amounts to no more than a mathematical truism. The pertinent question is not what the $ 1,800,000 may have "represented", but rather, what claim or claims it was in fact paid to settle. By the terms of the Second Mitsubishi Settlement, the $ 1,800,000 was paid to settle all claims between the parties--including the antitrust claims. In addition, we note that Mr. Hotta's affidavit refers to "threatened single damages" of $ 1,800,000. The

[7] As the district court stated:

> The Second Mitsubishi Settlement Agreement, although releasing Mitsubishi from any claims that could have arisen out of the options in the First Mitsubishi Settlement Agreement, also releases it from causes of action "specifically including but not limited to all causes of action pleaded or that could have been pleaded or asserted in" this action. Plaintiff[] [has] not explained this language away. Nor [has it] explained away the fact that . . . . the approximate value of each of plaintiff['s] three options . . . was $ 600,000. The amount of cash transferred in the second Mitsubishi settlement thus demonstrates the value of the options conveyed in the first Mitsubishi settlement.

(citation omitted).

[8] Mr. Hotta's affidavit states, in pertinent part:

> (3) The claims threatened by Gulfstream III Associates, Inc. and Gulfstream IV Associates, Inc. in the fall of 1986 related to alleged misrepresentations pertaining to the term of sale of a Diamond II aircraft and an option to purchase two additional Diamond II aircraft. The claims were threatened under the Texas Deceptive Trade Practices Act and were viewed as serious claims by myself and Mitsubishi's outside counsel, the law firm of Fulbright & Jaworski.
>
> (4) Mitsubishi denied liability, but agreed to settle these claims in December, 1986 for $ 1.8 million, which represented threatened single damages under the Texas statute, which provides for treble damages plus attorneys' fees.

(J.A. at 913).

amount of these threatened damages was simply the amount plaintiff believed it was defrauded in the First Mitsubishi Settlement.

[28]** The district court ruled that the total amount of this settlement set off from the jury award should be $ 2,025,000 rather than the $ 400,000 specified in the most favored nation clause of the first settlement agreement. Thus, whether presenting an issue of law or ultimate fact, we conclude that the district court committed no error in including the amount of the second settlement in the setoff calculation. In so concluding, we reiterate that neither in the district court nor on appeal does plaintiff challenge the district court's right to resolve the merits of this issue on the record before it.

b. Application Of Total Amounts of All Settlements

To Verdict on G-III

The amount of the total Mitsubishi Settlement when combined with the other five settlements exceeded the trebled amount of the jury verdict and thus seemingly dictated a judgment for defendant. However, plaintiff argues that the district court erred in refusing to allocate the proceeds received from the settlements among the three claims originally at issue in this lawsuit. It emphasizes that the settlements occurred prior to the date the district court granted summary judgment on two of the claims.

The allocation issue **[**29]** is important because, if meritorious, the so-called *Falcon Jet* settlement aside, [9] it would mean that the aggregate amounts of the setoffs would only partially cover the amount of the jury verdict and would thus require that the judgment for defendant be vacated. In refusing to make the allocations sought by plaintiff, the district court seems to have relied primarily on its conclusion that such an allocation would have been "irreconcilable with the outcome of this case" because "two of the three claims did not survive summary judgment." (J.A. at 81). While the district court also relied on the "equities," we need not reach that ground here.

We are not persuaded that hindsight evaluation of a general settlement of claims based on a subsequent determination of their relative merits as against a non-settling defendant should be dispositive of their settlement values. After all, the incentive to settle typically flows from uncertainty as to the outcome. But our disagreement with the hindsight **[**30]** approach here does not end the matter.

[*436] None of the six settlement instruments here purported to allocate the settlement proceeds among the three common claims asserted against all defendants on a joint-liability basis. Plaintiff, nevertheless, asserted in the district court as it does here that each settlement sum should be allocated for setoff purposes among the three claims, in certain percentages, based on the purchase prices of the three planes in question. Thus, in plaintiff's view, only 30 percent of each of the six settlements should be set off against the verdict, because of the relationship of the base price of the G-III to the total of the base prices of all three planes. Nevertheless, such an allocation, in and of itself, would have no inexorable relationship to the litigation value the settling parties attached to each claim when all were still viable. We therefore agree with the district court that such an approach is not acceptable here and that *Baughman* does not dictate otherwise. *See* *Baughman, 530 F.2d 529*.

Plaintiff next argues that the district court should have held an evidentiary hearing to determine a "fair" allocation of the **[**31]** claims for each of the six settlements. Determining after the fact how parties to a general settlement valued various claims in arriving at their settlement is inherently difficult. Consequently, such valuations would be unlikely to represent precisely what factors each party weighed and how it valued them in reaching the settlement. To add to the uncertainty, the settling defendants would ordinarily have no interest in how the proceeds were allocated among the various claims. On the other hand, the plaintiff would have a real interest in aggrandizing by hindsight the amounts attributable to the claims now known to have been decided in favor of the defendant.

Given the foregoing considerations, we conclude that ***HN9***[] where a plaintiff executes a general settlement instrument which settles multiple claims with a defendant, but a non-settling defendant is not a party to that

[9] *See supra* note 2.

agreement, the non-settling defendant need show only that the plaintiff settled a claim on which the non-settling defendant was found liable at trial. If the defendant makes this showing, the burden then shifts to the plaintiff to prove that, under the terms of its agreement with the settling defendant, the settlement **[**32]** or part thereof did not represent damages arising under the same theory of liability as those forming the basis for the jury award. The view we adopt is consistent with the rule that a settling plaintiff is entitled to only one full recovery while at the same time it protects the plaintiff from the application of amounts received in settlement of unrelated claims.

We note that our conclusion is in substantial agreement with the position of the Court of Appeals for the Tenth Circuit, albeit in a federal securities law context. *See U.S. Indus., Inc. v. Touche Ross & Co., 854 F.2d 1223, 1262-63 (10th Cir. 1988)*. Nor does the rule we adopt do a disservice to the antitrust enforcement scheme. This rule does not deter a plaintiff from incorporating a good-faith allocation of the settlement proceeds among multiple claims. What it does do is prevent a plaintiff from waiting "for the jury's verdict to allocate the settlement in a way that reduces the remaining defendants' credit." *McDermott, Inc. v. Clyde Iron, 979 F.2d 1068, 1080 (5th Cir. 1992)*. To the extent other circuits can be said to have taken a different position, e.g., **[**33]** *I.T.O. Corp. v. Sellman, 967 F.2d 971 (4th Cir. 1992)*, we conclude that their rulings do not fully serve the purposes of meaningful predictability and certainty. Thus, we find no error in the refusal of the district court to allocate the amounts of the settlements of the six codefendants among all three claims for setoff purposes. [10]

3. Refusal of District Court to Enter Judgment Promptly

The judgment was not entered in this case until four months after the jury verdict in order to first resolve the

setoff issues. Plaintiff says the judgment should have been entered at once, thereby starting interest to run. The contention is based on the assumption **[*437]** that the judgment would be modified. Since we have not done so, the **[**34]** issue is academic.

III. CONCLUSION

The judgment of the district court will be affirmed as to the appeals at Nos. 91-5932 and 91-5965.

Concur by: GREENBERG; SLOVITER (In Part)

Concur

GREENBERG, *Circuit Judge*, filing the opinion of the court as to Part II. A. 1. c. and concurring in the balance of the opinion of the majority.

In this opinion I deal with two issues. Part I is the opinion of the court with respect to Cessna's argument that Gulfstream III Associates lacks standing to bring this action because it unconditionally assigned its antitrust rights by transferring its interest in the G-III and purchase agreement to JB&A Aircraft. Part II is my concurring opinion with respect to an issue raised by Cessna which I believe should be met by the court but which is not resolved in the majority opinion.

I.

Cessna has argued that Gulfstream III Associates is not a proper plaintiff because its antitrust cause of action was transferred to JB&A Aircraft, Inc. as part of a general assignment. Gulfstream III Associates entered into a "Purchase Agreement Assignment" with JB&A, assigning "all of [Gulfstream III Associates'] rights, title and interest in and to the [G-III] Aircraft and [the original Purchase **[**35]** Agreement between Gulfstream III Associates and manufacturer Gulfstream American Corporation]." (J.A. 356.) JB&A later assigned the Purchase Agreement to R.H.

[10] Because we have affirmed the judgment here, it is unnecessary to consider on these appeals whether, as defendant asserts, all or some part of the settlement in the *Falcon Jet* litigation should also have been set off against the verdict. *See supra* note 2.

Macy & Co., which ultimately took delivery of the completed aircraft. In asserting that this general assignment must include antitrust claims, Cessna relies upon a general provision of the Uniform Commercial Code, Section 1.201(36), enacted in, *inter alia*, Texas, Georgia, and New Jersey. [11] Section 1.201(36) provides *in toto* that "'rights' includes remedies," from which Cessna apparently concludes that the assignment of a contract necessarily includes the assignment of all related causes of action. To the contrary, Gulfstream III Associates argues that antitrust claims can be transferred only by means of an express assignment; in Gulfstream III Associates' view, the general assignment of the Purchase Agreement therefore did not abrogate its right to bring this action. We agree with Gulfstream III Associates' position, and thus will affirm the district court's holding that Gulfstream III Associates is the correct plaintiff to pursue this action.

[36]** There is no serious doubt that an antitrust claim can be expressly assigned. In many cases, such assignments are accepted *sub silentio*; indeed, it is commonplace for individual persons claiming antitrust injury to assign their claims to an association formed for the specific purpose of pursuing litigation. *See*, *e.g.*, *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Lab., 460 U.S. 150, 103 S. Ct. 1011, 74 L. Ed. 2d 882 (1983)* (trade association of retail pharmacists pursued Robinson-Patman Act claims as assignee of claims of its individual members); *Chiropractic Coop. Ass'n of Michigan v. American Medical Ass'n, 867 F.2d 270 (6th Cir. 1989)* (association brought monopolization claims that had been assigned to it by individual chiropractors); *Hahn v. Oregon Physicians' Service, 786 F.2d 1353 (9th Cir. 1985)* (podiatrists formed corporation to which they assigned their antitrust claims). *See also* *In re Fine Paper Litig., 632 F.2d 1081, 1090 (3d Cir. 1980)* (citing "a number of cases [which] have assumed that such assignments [of antitrust claims] are valid").

[37]** We believe it is also clear that the validity of the assignment of an antitrust claim is a matter of federal common law. We so stated, albeit without analysis, in *Fine Paper, supra*: "In any event, the status of assignments under the Sherman and Clayton **[*438]** Acts is a matter of federal law." There, numerous plaintiffs, including paper distributors and several states, had brought antitrust class actions against paper manufacturers. The distributors were granted class certification; but most of the states, including Washington, were denied such certification. However, Washington was also the assignee of certain distributors' antitrust claims pertaining to paper products that Washington had purchased. We upheld the validity of those partial express assignments. *Id. at 1090-91*.

There are two bases for considering the status of an assignment of antitrust claims to be a matter of federal common law. First, the issue of assignment is appropriate for the development of interstitial federal common law in harmony with the overall purposes of the antitrust statutes. Second, assignments of antitrust claims cannot appropriately be left to determination under possibly **[**38]** differing state law standards, because such assignments may implicate the "direct purchaser" rule enunciated in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, and in *Kansas v. UtiliCorp United Inc., 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*.

It has long been assumed that federal courts have the power to create so-called "interstitial" federal common law to govern issues closely interwoven with a broad scheme of federal statutory regulation. *See generally* 1A James W. Moore *et al.*, *Moore's Federal Practice*, pt. 2, P 0.324 (1993). This power is exercised frequently in ***antitrust law***. *See*, *e.g.*, *National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S. Ct. 1355, 1363, 55 L. Ed. 2d 637 (1978)* ("the legislative history [of the Sherman Act] makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition"). In particular, the assignment issue of the present case is analogous to a limitations question resolved by application of federal common **[**39]** law in *American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*. *American Pipe* was an action involving Sherman and Clayton Act claims, originally brought by the State of Utah as a class action. Class status was denied for failure to fulfill the numerosity requirement of *Fed. R. Civ. P. 23(a)*. Parties who would have been members of the rejected class later sought to intervene; the district court held the

[11] The Purchase Agreement Assignment provided that Texas law would govern its provisions (J.A. 360); New Jersey is of course the forum state; and the original Purchase Agreement provided that Georgia law would apply to its provisions (J.A. 416). Because we conclude that federal common law governs the assignment of an antitrust cause of action, there is no issue as to what state's law would apply.

intervenors' claims to be time-barred, because even though Utah's action was timely filed, the applicable limitations period had run before the filing of the motions to intervene. The Supreme Court held that the intervenors were not time-barred, because the filing of Utah's putative class action tolled the limitation statute for all purported class members who made a later, but otherwise timely, motion to intervene. The applicable limitation statute, Section 5(b) of the Clayton Act, *15 U.S.C. § 16(b)*, specified the limitation period but did not provide for tolling for purported class members. The Court nonetheless thought it appropriate to create the tolling provision in a situation where **[**40]** "tolling the limitation . . . is consonant with the legislative scheme." *Id., 414 U.S. at 558, 94 S. Ct. at 768*.

In *American Pipe*, the judicial creation of a tolling provision was proper because it furthered the Clayton Act limitation period's purposes of balancing a finite end to litigation against fair opportunity for injured parties to assert meritorious antitrust claims. In the present case, we believe that the determination of an assignment's validity similarly is related to the broader questions of antitrust injury and standing. We therefore make explicit what was implicit in *Fine Paper*, *i.e.*, that the status of an assignment of antitrust claims is a matter of federal common law. The analogy of *American Pipe* would itself be sufficient basis for this determination.

However, our foregoing determinations that express assignments of antitrust claims are permissible, and that the validity of assignments is determined by federal common law, do not fully answer the question raised by Cessna, namely, whether a general assignment can include antitrust claims. To answer that question, we must consider the potential relationship **[**41]** between the *UtiliCorp*/*Illinois Brick* "direct purchaser" rule and the assignments of antitrust claims. Because we conclude that the inclusion of antitrust **[*439]** claims in a general assignment would be disfavored under the direct purchaser rule, we hold that only an express assignment of an antitrust claim can be valid.

The direct purchaser rule had its genesis in *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, which held that a Clayton Act defendant could not assert a defense that the plaintiff had suffered no "injury" because it had passed on any illegal overcharges to consumers. *Illinois Brick* subsequently made this "direct purchaser" rule bilateral, *i.e.*, that case held that a state, the indirect purchaser of concrete block, could not pursue price-fixing claims against manufacturers -- only the direct purchasers, masonry contractors, could pursue such claims. The rule of *Illinois Brick* was founded on the difficulty of analyzing pricing decisions, the risk of multiple liability for defendants, and the weakening of private antitrust enforcement that might result from splitting damages for **[**42]** overcharges among direct and indirect purchasers. *UtiliCorp* further strengthened the direct purchaser rule; there, the Court refused to create an exception to *Illinois Brick* for states suing in a *parens patriae* capacity to redress economic harms to their citizens from an alleged natural gas price-fixing conspiracy. The petitioner states had argued that an exception was appropriate where, as they claimed, it could be demonstrated that the direct purchasers, public utilities, had passed along all of the alleged overcharges to utility customers. The Court rejected this argument, noting that even in that instance, pricing decisions by utilities could be based on other factors. The Court cautioned that any suggestion in *Hanover Shoe* and *Illinois Brick* of a possible exception for pre-existing cost-plus contracts must be construed very narrowly.

In the present case, Cessna has argued both that the general assignment to JB&A precludes Gulfstream III Associates from pursuing its claim, and that the direct purchaser rule would not dictate that Gulfstream III Associates is the proper plaintiff. We agree with Cessna's approach insofar as we see the issues of assignment and **[**43]** application of the direct purchaser rule as corollaries. However, we disagree with Cessna in that we believe the present state of the direct purchaser doctrine requires that Gulfstream III Associates, and not JB&A or any later purchaser of the aircraft, is the proper party to seek a recovery for antitrust injury. It is true that this case as presented for trial dealt with only a single aircraft whose price when originally purchased by Gulfstream III Associates easily can be compared to the prices later agreed to by JB&A and by the ultimate purchaser, R. H. Macy & Co. Nonetheless, we believe that any exception to the direct purchaser rule would be inappropriate in this case for the same reasons that the Supreme Court held an exception would be inappropriate in *UtiliCorp*.

In our case, determining the relative extent of injury incurred by the direct or remote purchasers would entail several highly speculative inquiries. Could Gulfstream III Associates have charged JB&A the same price even absent the illegal overcharge? What alternative products might provide elasticity in the resale market for aircraft purchase agreements? What factors other than the original overcharge influenced **[**44]** the price of the product in the assignment to JB&A? In addition, direct purchaser Gulfstream III Associates probably remained liable by contract for any shortfall between prices paid by the remote purchasers and the original price it had agreed to pay the manufacturer. [12] Nor is there any indication that the indirect purchasers were interested in pursuing the antitrust claims. Those facts weigh heavily in favor of considering Gulfstream III Associates to have suffered the entire antitrust injury of the price-fixing **[*440]** overcharges. In this case, just as in *UtiliCorp*, unwarranted complexities would arise from trying to apportion losses among direct and indirect purchasers. *Id., 497 U.S. at 208-09, 110 S. Ct. at 2813-14*. Despite Cessna's arguments concerning the unique nature of the G-III aircraft transaction, we see no circumstances here that could justify disregarding the Supreme Court's clear admonition that "it [would be] an unwarranted and counterproductive exercise to litigate a series of exceptions" to the direct purchaser rule. *UtiliCorp, 497 U.S. at 217, 110 S. Ct. at 2817*.

[45]** Gulfstream III Associates' status as direct purchaser, and the concomitant inference that neither JB&A nor Macy could assert this claim, lends crucial support to our holding on the assignment issue, *i.e.*, that any assignment of antitrust claims, as a matter of federal common law, must be an express assignment; general assignments, without specific reference to antitrust claims, cannot validly transfer the right to pursue those claims. We so conclude because many routine transfers of ownership may involve a general assignment of rights. Because of the direct purchaser rule, such transfers cannot carry with them the right to assert antitrust claims. Therefore, interpreting a general assignment to include antitrust claims would run afoul of the direct purchaser rule. This conflict would be obviated by an express assignment, which entirely eliminates any problems of split recoveries or duplicative liability. There would be nothing to prevent a direct purchaser from expressly assigning its antitrust claims to a remote purchaser; *see*, *e.g.*, *Fine Paper Litigation, supra.* However, in this case, Gulfstream III Associates made no express assignment of its antitrust claims **[**46]** to JB&A or any other remote purchaser, and Gulfstream III Associates therefore remained the proper plaintiff. Thus, we will affirm the district court's determination that the general assignment to JB&A did not abrogate Gulfstream III Associates' right to pursue price-fixing claims pertaining to the G-III aircraft.

II.

I agree with the reasoning and result of Judge Seitz's opinion for the majority and thus join in the judgment of the court. However, I write separately to address an issue that I believe Cessna has squarely presented, but the majority has not confronted. The issue is whether, if an antitrust defendant can demonstrate before trial that prior settlements will offset any recovery of damages for the plaintiff, the plaintiff must nonetheless be permitted a trial on liability in order to establish that it is, within the meaning of Section 4 of the Clayton Act, *15 U.S.C. § 15*, a "person . . . injured in his business or property by reason of anything forbidden in the antitrust laws," who thus is entitled to a mandatory award of attorneys' fees. I conclude that the mandatory nature and the usual magnitude of antitrust fee awards dictate that **[**47]** a plaintiff must be permitted the opportunity to establish liability at trial, even when a fee award is the only remaining relief at issue. [13]

During the time that plaintiff Gulfstream III Associates was pursuing this case, it was also, along with other entities and individual plaintiffs, pursuing two related actions that had been filed separately in the District of New Jersey and were later consolidated: and *Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053* (collectively, the "*Falcon Jet* actions"). *See* *Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053 (D.N.J. 1988)*. The *Falcon Jet* actions asserted

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[12] The district court in its opinion of August 30, 1990, rejecting Cessna's argument that Gulfstream III Associates was not a direct purchaser and thus lacked standing, indicated that "Cessna does not dispute plaintiff['s] contentions that plaintiff[] remained liable for the balance of the contract price" after the assignment. In its opening brief on the appeal, Cessna did not dispute this statement, though in its reply brief it equivocated, indicating that it was "assuming, for argument's sake" that Gulfstream III Associates remained liable. We need not pursue the point because even if we concluded that the assignment terminated Gulfstream III Associates' liability under the original agreement, we would not change our result.

[13] My discussion presumes that the present state of the law would not permit set-offs to be applied against a fee award. *See* *Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 894 (2d Cir. 1988)*.

claims of price-fixing and monopolization substantively similar to the **[**48]** original claims in our case, although the *Falcon Jet* actions apparently sought recovery of overcharges for aircraft manufactured by Falcon Jet Corporation, whereas our case sought recovery of overcharges for aircraft manufactured by Gulfstream Aerospace Corporation. The *Falcon Jet* actions involved several contract and tort claims distinct from the antitrust allegations, and apparently involved different defendants than the present case. Those cases were settled by an agreement dated **[*441]** November 17, 1988, later amended as of March 30, 1989. The *Falcon Jet* settlement agreement called for a total consideration of $ 4,650,001.00 to be paid by the defendants. The agreement specifically allocated the settlement payment among the various claims, apportioning only a nominal $ 1.00 payment to antitrust claims, and apportioning all the rest of the payment to contract and tort claims.

In our case, Cessna brought a pretrial motion for summary judgment asserting, *inter alia*, that all possible damages had been satisfied by previous settlements with other co-defendants and with the *Falcon Jet* defendants. Cessna argued that the *Falcon Jet* allocation of $ 1.00 to antitrust claims **[**49]** was not a good-faith apportionment, and urged the district court to count a much larger part of the *Falcon Jet* settlement toward set-offs in the present case. By the time of Cessna's motion, plaintiff's expert economist had established the maximum possible measure of damages as a 15 percent overcharge due to price-fixing. While the district court did grant summary judgment to Cessna on claims relating to two other aircraft, it rejected Cessna's arguments as to the G-III aircraft. The district court reasoned that the total potential value of a damages award of 15 percent of the purchase price for that aircraft would be $ 4,488,750. Examining the confidential settlement agreements *in camera*, the court determined that the aggregate amount of all settlements with Cessna's former co-defendants in this case would be less than the maximum potential trebled damages. Further, the court held that Cessna would not be entitled to any set-off for the *Falcon Jet* settlement, because the settlement agreement applied the payments to claims distinct from the claims in this case. Thus, in resolving Cessna's summary judgment motion, the district court accepted the validity of the allocations **[**50]** of the *Falcon Jet* settlement payments.

Cessna renewed its argument on this point in two post-trial motions for a judgment dismissing the complaint, one motion brought before entry of judgment and a second motion to amend the final judgment. Cessna again asserted that some part of the *Falcon Jet* settlement actually related to claims identical to those in this case. By this point, of course, the jury had determined Gulfstream III Associates' damages to be only a 10 percent, not a 15 percent, overcharge, yielding trebled damages of $ 2,992,500. In response to Cessna's motions the district court reduced the amount of the verdict to zero, because the amounts received in settlement from Cessna's co-defendants in this action exceeded $ 2,992,500. However, the district court declined to revisit the question of whether Cessna was entitled to any set-off for the settlement of the *Falcon Jet* actions, reasoning that the issue was moot in view of the complete set-offs from settlements within the present action. The district court also refused Cessna's request to dismiss the complaint, and thus permitted Gulfstream III Associates to proceed with a fee application. The ultimate fee award **[**51]** exceeded $ 1.1 million.

I think the district court incorrectly characterized the *Falcon Jet* issue as moot in view of the continuing entitlement to a fee award. I believe that post-trial, Cessna clearly was arguing that some reasonable set-off for the *Falcon Jet* settlements would mean that Gulfstream III Associates would have had *no* potential damage recovery going into trial, and this would have required dismissal of the complaint and a denial of any fee award. This is also the point Cessna has, I think, clearly raised on appeal, though it again has been unsuccessful in this attempt, as the majority has determined that other

set-offs have rendered the *Falcon Jet* issue moot. See majority opinion, typescript at 27 n.10.

I would address Cessna's question, although I would not arrive at an answer to its liking. I do not think the validity of the *Falcon Jet* allocations needs to be revisited, because I would find that regardless of a complete set-off of any potential damages, an antitrust plaintiff, for whom a fee award is, of course, a mandatory part of the recovery dictated by statute, must be afforded an opportunity to establish, by trial if necessary, the liability **[**52]** of the defendant that is a predicate of the plaintiff's entitlement to fees.

It is axiomatic that Section 4 of the Clayton Act, *15 U.S.C. § 15*, is a *mandatory* fee award provision:

> **[*442]** any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The courts have often distinguished this mandatory fee award from the permissive fee award provision of the Civil Rights Act, 42 U.S.C. § 1988 ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"). *See*, *e.g.*, United States Football League v. National Football League, 887 F.2d 408, 412 (2d Cir. 1989) ("prevailing party" analysis under 42 U.S.C. § 1988 is not relevant to mandatory fee scheme of Section 4 of Clayton Act); *see also* Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 531 n.2 (3d Cir.) (fee **[**53]** award is mandatory under 15 U.S.C. § 15), *cert. denied*, *429 U.S. 825, 97 S. Ct. 78, 50 L. Ed. 2d 87 (1976)*; Home Placement Serv., Inc. v. Providence Journal Co., 819 F.2d 1199, 1210 (1st Cir. 1987) (award of fees is mandatory to encourage private prosecution of antitrust violations); Hydrolevel Corp. v. American Soc. of Mechanical Engineers, Inc., 635 F.2d 118, 130 (2d Cir. 1980) (15 U.S.C. § 15 "expressly requires" an award of attorneys' fees), *aff'd*, 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982).

It is clear that an antitrust plaintiff is entitled to recover substantial attorneys' fees even if it is awarded only nominal damages. That is exactly what happened in United States Football League v. National Football League, 704 F. Supp. 474 (S.D.N.Y.), *aff'd*, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, *493 U.S. 1071, 110 S. Ct. 1116, 107 L. Ed. 2d 1022 (1990)*. In that case, the jury had determined, on special **[**54]** interrogatories, that defendant NFL had monopolized the market for major league professional football in violation of Section 1 of the Sherman Act, and that the NFL's anticompetitive behavior had injured the plaintiff. However, the jury chose to award only nominal damages of $ 1.00. 704 F. Supp. at 476. The defendant asserted, by analogy to cases involving fee awards under 42 U.S.C. § 1988, that plaintiff USFL was not a "prevailing party" and had not achieved a threshold level of damages sufficient to be entitled to attorneys' fees. The district court rejected any analogy to permissive fee awards, and held that "the jury's finding of injury and an antitrust violation precludes the NFL's arguments that the USFL was not a prevailing party under Section 4 of the Clayton Act. . . . A reasonable fee award under the statute is mandatory." 704 F. Supp. at 480. The court awarded the USFL attorneys' fees of $ 5,515,290.81. Id. at 488. The court of appeals affirmed the fee award in its entirety. 887 F.2d 408 (2d Cir. 1989), *cert. denied*, *493 U.S. 1071, 110 S. Ct. 1116 (1990)*. **[**55]**

Even granting that a nominal damages award can support Clayton Act attorneys' fees, would a plaintiff whose entire damages are offset by prior settlement, and who therefore receives zero damages as a result of the trial, still be entitled to attorneys' fees? The Court of Appeals for the Fifth Circuit answered that precise question affirmatively in *Sciambra v. Graham News, 892 F.2d 411 (1990)*. In *Sciambra*, the district court had entered a default judgment against one remaining defendant because of discovery abuse. (A second defendant had settled previously for $ 165,000.) A damages judgment was entered for $ 271,896.00, but was reversed because the district court had applied an incorrect measure of damages. On remand, the plaintiff conceded that his damages according to the proper measure would be less than the amount of the prior settlement. The district court therefore awarded no damages, but did enter judgment for over $ 90,000 in attorneys' fees and costs. In affirming the award, the court of appeals found that in an antitrust case, an attorneys' fee award should not necessarily be dependent on a compensatory damages award: "the effect of the **[**56]** [prior] settlement on [plaintiff's] recovery of compensatory damages has no effect on [plaintiff's] right to recover attorneys' fees." *Id. at 416*. So long as plaintiff has established an antitrust violation and injury therefrom, the court concluded, an award of attorneys' fees is mandatory. That result, the court noted, was consistent with the established policies of encouraging private prosecution of antitrust violations and **[*443]** deterring violations of the antitrust laws. *Id. at 416*.

The reasoning and the result in *Sciambra* follow inexorably from the holdings of *USFL*, and both those cases follow from the classic rationales supporting mandatory Clayton Act fee awards. If one accepts that *USFL* and *Sciambra* were rightly decided, then it is clear that an antitrust plaintiff can proceed to trial for a determination of liability and a potential fee award, even where prior settlements already have clearly negated any actual receipt of further damages. The very magnitude of antitrust fee awards indicates that they are a crucial component of a plaintiff's recovery, and in many instances fee awards may exceed certain **[**57]** components of the compensatory damages. In *USFL* the plaintiff received over $ 5.5 million in fees; in our case, Gulfstream III Associates has been awarded fees of over $ 1.1 million, or more than 25% of the amount that it received in settlements. Surely such fee awards are a cornerstone of the accepted private-attorneys-general rationale of the antitrust statutes; and if a plaintiff has established violation of the law and injury, then, as the *Sciambra* court recognized, the amounts realized from settlements cannot properly be used to exonerate a non-settling defendant from liability for fees.

One might fear that permitting trials merely for the sake of determining fee awards would lead to frequent abuse and a waste of judicial resources. However, such fears are unfounded because of the rarity of circumstances that might require such trials. For example, it is exceptional to have a case, such as the present one, where maximum potential damages can be determined precisely and where one could ascertain clearly that settlement amounts exceeded the maximum damages. Even when such exceptional cases might occur, a plaintiff and remaining defendant(s) may well be more likely to settle **[**58]** without trial once they can focus on the amount of a potential fee award.

Moreover, a defendant need not remain inert while a plaintiff racks up ever-larger fees. At the point where a defendant thinks the plaintiff has settlements exceeding the amount of its damages as trebled, the defendant could move for partial summary judgment establishing that it could not be liable for additional damages. At the same time, at its option, the defendant, subject to the court's granting its motion on damages, could concede its liability for the plaintiff's fees to that point in the litigation, with the fees to be fixed by the court in the usual manner. [14] If the court determined that the settlements did offset any possible trebled damages, it would then fix the fees and the matter would be over in the district court. On the other hand, if the defendant obtained a judgment that the plaintiff could recover no further damages but did not offer to pay the plaintiff's fees to that point, the plaintiff would be forced to reappraise the strength of its case to determine if it wanted to proceed against the nonsettling defendant. Overall, I think it would be a rare case which would continue simply to **[**59]** determine a defendant's liability for fees after a court had held that the plaintiff's damages were offset completely by settlement.

Further, I would emphasize that in the present case the potential set-offs derived from settlements reached between the time of filing suit and the time the case came on for trial. This action originally was filed in the Central District of California in 1985 (having been transferred thereafter to the District of New Jersey); the *Falcon Jet* settlements were not reached until late 1988 and early 1989. We are not faced here with a situation in which a potential plaintiff receives from several potential defendants settlements that would be large enough to offset all damages before a suit is filed, but nonetheless commences an action purely to seek attorneys' fees from a recalcitrant defendant. I presume **[**60]** that, if faced with such a situation, a court rightly might reject such a plaintiff's claim for fees.

Altogether, holding that an antitrust plaintiff may proceed to trial even if only a fee award remains to be determined, is the only outcome consistent with the weight of authority on entitlement to antitrust fees. I do **[*444]** not think such a ruling would create significant practical problems for trial courts, because the cases in which it would be applicable would be very rare. Therefore, I would resolve the question raised by Cessna and would hold that even where settlements entered into following the commencement of litigation have offset all damages, an antitrust plaintiff may try the issue of liability as the necessary predicate to establishing an entitlement to attorneys' fees.

majority opinion in the above matter and in part is a concurring opinion. Judge Seitz has filed the lead majority opinion and Chief Judge Sloviter has filed a separate opinion. Please file the same. I am sending you a signed copy by regular mail.

Dissent by: SLOVITER (In Part)

Dissent

SLOVITER, *Chief Judge*, concurring in part and dissenting in part.

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[14] Cessna did not offer to pay Gulfstream III Associates' fees when it made its pretrial motion for summary judgment, so I do not consider the implications of such an offer in this case.

As the majority opinion recognizes, this appeal and cross-appeal raise several **[**61]** difficult and previously unaddressed issues about the calculation of settlement offsets in an antitrust case. Although the court is fractured on several of the issues raised by the appeal and cross-appeal, I note that we are unanimous on many of the issues resolved by Judge Seitz's opinion. I join all of that opinion except Part II B.2.a holding that all of the $ 1.8 million Second Mitsubishi Settlement was properly included in the $ 2,025,000 which the district court offset against the trebled jury verdict. [15] I also join in Part I of Judge Greenberg's separate opinion representing the majority view on the issue of the effect of the assignment of the purchase contract by Gulfstream III.

I.

Central to my view of the effect of the two settlement agreements Gulfstream III entered into with Mitsubishi are the following facts from the record. When Gulfstream III entered into the First Mitsubishi **[**62]** Settlement, dated August 6, 1985, settling its antitrust claims against Mitsubishi, it had been led by Mitsubishi to believe that the market price for the Diamond II aircraft which it agreed to purchase from Mitsubishi for $ 2,600,000 (and the two for which it received options to purchase) was approximately $ 3,200,000. After Alan Rosefielde, President of Gulfstream III, discovered that the market price for a Diamond II was approximately $ 2,600,000, he wrote to Raymond S. Vinton, Vice President and General Counsel of Mitsubishi, alleging that Mitsubishi had "defrauded" him by representing to him "as a material condition of [the first] settlement that the selling price of the Diamond II aircraft was to be held at $ 3,195,000" and asserting that "[a] review of [Mitsubishi's] files indicates that the [represented selling price] was an outright lie uttered in an attempt to deceive me into entering the settlement agreement." App. at 922. Rosefielde's letter identified three possible responses Gulfstream III could make to the alleged fraud: (1) sue for fraud; and/or (2) sue for rescission and put Mitsubishi back in the antitrust suit; or (3) reach a settlement. App. at 924.

In the letter **[**63]** Rosefielde suggested that as a settlement he would expect "a concession of $ 600,000 per aircraft for three aircraft for a total sum of $ 1,800,000" and that this alternative favored Mitsubishi because if, instead, Rosefielde were to "retain counsel in Texas [he would] seek this amount plus an equal amount in punitive damages." App. at 924.

On December 22, 1986, Gulfstream III and Mitsubishi, without rescinding the First Mitsubishi Settlement, entered into the Second Mitsubishi Settlement whereby Mitsubishi paid Gulfstream III an additional $ 1.8 million and in exchange Gulfstream III released all claims,

> specifically including but not limited to all causes of action pleaded or that could have been pleaded or asserted in [the antitrust suit] . . . *and all claims that have been made or could have been made by [plaintiff] relating to or arising out of the negotiation, entry, signing and performance of the following*:
> (a) The settlement agreement dated August 6, 1985 and all options and agreements referred to therein [the First Mitsubishi Settlement]. . .;
> (b) The Joint and Mutual Release in Full dated August 14, 1985;
>
> (c) The Diamond II Purchase Agreement **[**64]** dated August 21, 1985 and all options **[*445]** and agreements referred to therein.

App. at 803, 805 (emphasis added).

Notwithstanding the express reference in the Second Mitsubishi Settlement to the potential fraud claims, the district court included all of the $ 1.8 million from that settlement in the amount to be offset against the trebled jury verdict Gulfstream III received against Cessna. The court concluded that "the approximate value of each of plaintiffs' three options [to purchase an aircraft at a set price] in the First Mitsubishi Settlement Agreement [16] was $ 600,000" and

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[15] There is no dispute about the inclusion of $ 225,000, which was the total cash received from the First Mitsubishi Settlement.

[16] Notwithstanding the district court's reference to "three options," Gulfstream III agreed to purchase one Diamond II aircraft and had only *conditional* options to purchase two more, dependent on Gulfstream III taking financial delivery of the first aircraft. App. at 819, 822-23.

that the $ 1.8 million transferred in the Second Mitsubishi Settlement "demonstrates the value of the options conveyed in the First Mitsubishi Settlement." App. at 75. In reaching this conclusion, the district court rejected the parties' own valuation of the First Mitsubishi Settlement as $ 400,000. Instead, it included the full $ 1.8 million because the language in the Second Mitsubishi Settlement expressly released Mitsubishi from any of Gulfstream III's potential antitrust claims against Mitsubishi and because the $ 1.8 million paid in that settlement "approximately" equaled the difference between the misrepresented **[**65]** market price of the Diamond II aircraft and the purchase and/or option price in the First Mitsubishi Settlement.

The majority essentially agrees with the district court, stating that "the fact that [Gulfstream III] threatened to sue Mitsubishi for fraud does not alter the *reality* that the second settlement proceeds were part of the *true value* of the original settlement." Majority typescript op. at 21 (emphasis added). Assuming that a subsequent settlement and other evidence not known or available to the parties at the time of a settlement can be used to quantify the value of the initial settlement, I believe that there is no basis on this record to allocate the entire $ 1.8 million cash received to the First Mitsubishi Settlement. **[**66]** Moreover, the majority fails to elucidate the facts on record on which it relies to establish "the reality" of the settlement transaction. II.

In the portion of its opinion dealing with the allocation of settlements to multiple claims (Part II B.2.b), the majority establishes a sequential order of proof and burden shifting that I think is apt for all calculations of settlement offsets in antitrust cases. The majority states that a non-settling defendant meets its burden when it shows that the plaintiff settled the claim at issue, after which the burden shifts to the plaintiff to prove that the settlement did not represent damages arising under the same theory of liability as that forming the basis for the jury award. [17] I would adopt that framework in dealing with the issue whether the $ 1.8 million conveyed in the Second Mitsubishi Settlement represented only damages for the antitrust claim for which the jury awarded Gulfstream III damages against Cessna.

[67]** Cessna met its initial burden by showing that the Second Mitsubishi Settlement covered, *inter alia*, the antitrust claim. The burden then shifted to plaintiff to show that it covered more. However, the majority never discusses whether it is holding that plaintiff failed to meet that burden. It merely states that "the record supports the district court's finding that the $ 1,800,000 received in the second settlement was properly set off." Majority typescript op. at 21. The district court also **[*446]** failed to analyze this issue under that burden shifting framework. I think it is clear from uncontradicted evidence in the record that plaintiff met its burden to show that the Second Mitsubishi Settlement resolved more than just the antitrust claims resolved in the First Mitsubishi Settlement.

In the first place, we must look to the language of the settlement agreement itself. As the district court acknowledged, and as Cessna admitted at oral argument, the plain language of the Second Mitsubishi Settlement covers "all claims that have been made or could have been made by [plaintiff] relating to or arising out of the negotiation, entry, signing, and performance of" the First Mitsubishi Settlement, **[**68]** not merely the antitrust claims settled by the First Mitsubishi Settlement. App. at 75, 805. The plaintiff's claim of fraud arising out of the negotiation of the First Mitsubishi Settlement is obviously encompassed by this language.

The second inquiry must be the intent of the parties. In *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*, the Supreme Court stated that the intentions of the parties to a

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[17] Specifically, the majority's rule states:

> Where a plaintiff executes a general settlement instrument which settles multiple claims with a defendant, but a non-settling defendant is not a party to that agreement, the non-settling defendant need show only that the plaintiff settled a claim on which the non-settling defendant was found liable at trial. If the defendant makes this showing, the burden then shifts to the plaintiff to prove that, under the terms of its agreement with the settling defendant, the settlement or part thereof did not represent damages arising under the same theory of liability as those forming the basis for the jury award. The view we adopt is consistent with the rule that a settling plaintiff is entitled to only one full recovery while at the same time it protects the plaintiff from the application of amounts received in settlement of unrelated claims.

Majority typescript op. at 26.

settlement agreement in an antitrust case as to what that agreement covers were controlling in determining whether the settlement agreement should be offset against the jury verdict. Specifically, the Court said that

> to the extent that the . . . settlement which [plaintiff] received in return for the . . . release was *understood by the parties* to provide compensation for future damages[,]
>
> . . . [the antitrust coconspirator who was not a party to the release] would have available to it a defense of payment [for the same future damages it was ordered to pay]. . . . However, the record below indicates that a defense of payment could not here be sustained for . . . the *undisputed and unimpeached testimony* of [plaintiff's] **[**69]** witnesses was that the . . . settlement was understood by the parties as compensation only for [plaintiff's] damages up to the date of the release.

Id. at 348 (emphasis added) (citations omitted); *see also* Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 55 (5th Cir. 1976) ("The intention of the parties to the release is the controlling factor as to just what damages are covered.").

Here again, Gulfstream III has met its burden to demonstrate that the intent of the parties to the Second Mitsubishi Settlement was to settle more than Gulfstream III's antitrust claims by producing evidence to that effect from both parties to that agreement. Plaintiff filed a declaration by Rosefielde, its President and negotiator, stating:

> I considered this [state law fraud and misrepresentation] action against Mitsubishi to be very strong. I subsequently settled this matter . . . with Mitsubishi paying to [Gulfstream III] the single amount of damages for which Mitsubishi would be liable under the Texas statute, namely $ 1.8 million. . . . In short, [the Second Mitsubishi Settlement] *was for new claims of fraudulent conduct under state* **[**70]** *law* which I asserted against Mitsubishi, and not [a] settlement of the price fixing claims in this action, which had been settled in [the First Mitsubishi Settlement].

App. at 908.

Thereafter, plaintiff filed a supplemental declaration by Rosefielde that stated that the Second Mitsubishi Settlement

> *settled new, independent state law fraud and misrepresentation claims which had arisen* against Mitsubishi, as set forth fully in my prior declaration . . . and in the affidavit of Yukihisa Hotta. The [First Mitsubishi Settlement], which settled the price fixing claim on the Gulfstream airplanes at issue in this action, remained intact. That prior agreement was not rescinded, nor was the consideration Mitsubishi paid refunded.

App. at 935 (emphasis added).

Further, plaintiff filed an affidavit as to the intent of Mitsubishi, the only other party to that settlement, from Yukihisa Hotta (Hotta Affidavit), Mitsubishi's in-house counsel, stating:

> The claims threatened by [Gulfstream III] in the fall of 1986 related to alleged misrepresentations pertaining to the term of sale of a Diamond II aircraft and an option to purchase two additional Diamond **[*447]** II aircraft. The claims **[**71]** were threatened under the Texas Deceptive Trade Practices Act and were viewed as serious claims by myself and Mitsubishi's outside counsel, the law firm of Fulbright & Jaworski.
>
> . . . Mitsubishi denied liability, but agreed to settle these claims in December, 1986 for *$ 1.8 million, which represented threatened single damages under the Texas statute*, which provides for treble damages plus attorneys' fees. [18]

App. at 913 (emphasis added).

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[18] *See* Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. & Com. Code Ann. §§ 17.41-17.63 (Vernon 1987).

Cessna produced no refutation of the signed and sworn affidavits by the representatives of the two parties to the Second Mitsubishi Settlement Agreement and thus they remain unimpeached. The district court never found that the credibility of either of the affiants was at issue, nor is it likely that it could have since there was no evidentiary hearing on this issue. The majority opinion dismisses the significance of the statement in the Hotta **[**72]** Affidavit that the $ 1.8 million "represented threatened single damages" for fraud and misrepresentation, as a "mathematical truism." Majority typescript op. at 22-23. I do not understand that statement. If, as the majority acknowledges, the $ 1.8 million was paid to settle "all claims between the parties," Majority typescript op. at 23, then Hotta's statement that the money "represented" a settlement for the fraud and misrepresentation is not inconsistent with a finding that the settlement covered more than merely the antitrust claims.

Once plaintiff met its burden to produce evidence showing that the $ 1.8 million was not paid merely to settle antitrust claims which Mitsubishi had already settled and for which it already had a release, the burden of proof once again shifted to Cessna. Payment is an affirmative defense which must be proven by the party asserting it. *See* Fed. R. Civ. P. 8(c). In a comparable situation where an employer obliged to pay workers' compensation benefits seeks to offset a later settlement, the courts have held that the employer bears the burden of proof regarding the apportionment of that settlement. *See* I.T.O. Corp. v. Sellman, 967 F.2d 971, 973 (4th Cir. 1992), **[**73]** *cert. denied*, *123 L. Ed. 2d 147, 61 U.S.L.W. 3651, 113 S. Ct. 1579* (Mar. 22, 1993); *Force v. Director, Office of Workers' Compensation Programs, 938 F.2d 981, 985 (9th Cir. 1991)*.

In light of plaintiff's production of unimpeached and unrebutted evidence that it had a viable claim under the Texas fraud statute which was released by the Second Mitsubishi Settlement, defendant's burden to prove otherwise was not a light one. I do not think it was met by the slender reed of evidence that Rosefielde had accused Mitsubishi of overvaluing the price of the Diamond II plane by $ 600,000 and multiplying that amount by three because there were three planes referenced in the First Mitsubishi Settlement (one for purchase and two via conditional options to purchase). There is no other evidence of record to support the district court's conclusion, which the majority has adopted. There are many reasons on the record why that mere fact cannot support the conclusion reached.

First, it is based on the unreasonable assumption that Mitsubishi would settle with Rosefielde at the full demanded price. There is no evidence to support that; every other defendant settled plaintiff's **[**74]** claim at a discounted figure. Second, the district court valued no other option in an equal manner. For example, the district court valued the Atlantic Aviation Settlement based on actual receipts even though the settlement included an unexercised option (essentially valuing the option at $ 0). Third, it is unrealistic to value the option to purchase the plane at $ 600,000 (even if the represented price had been overvalued by $ 600,000) because of the transaction costs to Gulfstream III, a secondary seller, of financing the purchases, finding a buyer, and selling the planes. Fourth, valuing each option at $ 600,000 fails to account for the fact that the option to purchase the two planes was conditional on the purchase of the first, and in fact Gulfstream III never did so. Thus, even if those conditional options had some value, it could not have been **[*448]** the full $ 600,000 discount from the sales price.

Fifth, the $ 2,025,000 value which the district court assigned to the Mitsubishi Settlements is grossly out of line with the values of the other settlements which ranged from $ 251,392.58 (the Atlantic Aviation Settlement) to $ 600,000 (the Gates Learjet Settlement). Neither the majority **[**75]** nor the district court proffers any explanation why Mitsubishi, one of seven jointly and severally liable codefendants, would pay Gulfstream III in settlement almost $ 1.5 million more than any other defendant. Finally, the district court did not assign any value at all to the released claim of fraud, although it never made a finding that claim had no value under the Texas statute.

The majority sidesteps whether the issue of the allocation of the settlement between claims is one of fact or law. If it is an issue of law, then I believe the mere fact that the amount paid in the Second Mitsubishi Settlement approximated the claimed discrepancy in represented sales price is simply insufficient as a matter of law to overcome unrefuted evidence which shows that the Second Mitsubishi Settlement covered the potential fraud and misrepresentation claim. If it is a question of fact, then there was at least a genuinely disputed factual issue presented, and an evidentiary hearing should have been held.

It may be that it was a tactical error for plaintiff to have argued that *all* of the $ 1.8 million was paid solely to settle the potential state law fraud and misrepresentation claim against **[**76]** Mitsubishi for its conduct in the course of the first settlement and that none of that amount was attributable to the earlier antitrust claim. But it was no more, and probably less, of a tactical error than that committed by Cessna, who had the burden of proof on the payment issue, and who made no showing of the amount of the $ 1.8 million that should have been attributed to the fraud. Although it appears that neither party sought an evidentiary hearing on the apportionment issue, I believe that there was an inadequate evidentiary basis for the district court's conclusion and, in the present posture of the case, I would remand for an evidentiary hearing and appropriate factfinding.

The issue of valuation and allocation of settlement offsets is a significant one for antitrust policy. I fully agree with the majority that antitrust verdicts must be offset by settlements received from jointly and severally liable codefendants to prevent the plaintiff from receiving a windfall recovery from the non-settling defendants. *See Zenith Radio, 401 U.S. at 348* ("the law . . . does not permit a plaintiff to recover double payment"). However, as the majority recognizes, **[**77]** ensuring that plaintiffs receive a full recovery for their injuries is a second and equally important policy concern. *See Flintkote Co. v. Lysfjord, 246 F.2d 368, 398* (9th Cir.) ("a plaintiff is entitled to one full satisfaction of his claim in an action against joint defendants"), *cert. denied*, *355 U.S. 835, 2 L. Ed. 2d 46, 78 S. Ct. 54 (1957)*; *see also U.S. Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1236 (10th Cir. 1988)* ("where two or more defendants are responsible for separate injuries, an amount received in settlement from one defendant for one of the injuries may not be used to reduce the liability of the other defendant for the other injury").

This second policy is particularly applicable in the antitrust context where Congress enacted a treble damages provision and authorized private antitrust suits to ensure the most complete enforcement of the antitrust laws. *See Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 393 (4th Cir. 1982)* ("One purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totaling less than **[**78]** three times proven damages would weaken the statutory incentive through judicial construction."), *cert. denied*, *461 U.S. 914, 77 L. Ed. 2d 283, 103 S. Ct. 1893 (1983)*; *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc., 635 F.2d 118, 130 (2d Cir. 1980)* (same quotation), *aff'd*, *456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*; *Flintkote, 246 F.2d at 398* (holding that offsets are calculated after trebling the verdict because the "efficacy [of the treble damages provision] should not be weakened by judicial construction"); *see also Texas Indus., Inc. v.* ***[*449]*** *Radcliff Materials, Inc., 451 U.S. 630, 639, 68 L. Ed. 2d 500, 101 S. Ct. 2061 (1981)* (refusing to adopt contribution rule in antitrust cases and noting that Congress was not "concerned with softening the blow on joint wrongdoers").

I believe the majority's holding on the Mitsubishi offset undermines this strong policy.

In re Lower Lake Erie Iron Ore Antitrust Litig.

United States Court of Appeals for the Third Circuit

June 10, 1992, Argued ; May 27, 1993, Filed

Nos. 91-1526, 91-1586, 91-1587, 91-1588, 91-1589, 91-1590, 91-1591, 91-1592, 91-1593, 91-1594, 91-1595, 91-1627, 91-1628, 91-1629, 91-1630, 91-1631, 91-1632, 91-1633, 91-1634

Reporter

998 F.2d 1144 *; 1993 U.S. App. LEXIS 12501 **; 1993-1 Trade Cas. (CCH) P70,249

IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; WILLS TRUCKING, INC.; CONSOLIDATED DOCK AND STORAGE, INC.; TOLEDO WORLD TERMINAL, INC. vs. BALTIMORE & OHIO RAILROAD COMPANY, INC.; BESSEMER & LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; PITTSBURGH & LAKE ERIE RAILROAD COMPANY Wills Trucking, Inc. and Toledo World Terminal, Inc., Appellants in 91-1526; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION BESSEMER AND LAKE ERIE RAILROAD COMPANY, Appellant in 91-1586; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; WILLS TRUCKING, INC.; CONSOLIDATED DOCK AND STORAGE, INC.; TOLEDO WORLD TERMINAL, INC. v. BALTIMORE & OHIO RAILROAD COMPANY, INC.; BESSEMER & LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC.; PITTSBURGH & LAKE ERIE RAILROAD COMPANY Bessemer and Lake Erie Railroad Company, Appellant in 91-1587; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; C.D. AMBROSIA TRUCKING CO., INC. v. CHESAPEAKE & OHIO RAILWAY COMPANY; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; THE PENN CENTRAL CORPORATION, INC., Bessemer and Lake Erie Railroad Company,Appellant in 91-1588; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; REPUBLIC STEEL CORPORATION v. THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Bessemer and Lake Erie Railroad Company, Appellant in 91-1589; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; NATIONAL STEEL CORPORATION v. PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION, Bessemer and Lake Erie Railroad Company, Appellant in 91-1590; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; JONES & LAUGHLIN STEEL INCORPORATED v. THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION, Bessemer and Lake Erie Railroad Company, Appellant in 91-1591; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; WHEELING-PITTSBURGH STEEL CORPORATION v. THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION, Bessemer and Lake Erie Railroad Company, Appellant in 91-1592; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; TAURO BROTHERS TRUCKING CO. v. BALTIMORE AND OHIO RAILROAD COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; and NORFOLK AND WESTERN RAILWAY COMPANY, INC. v. PITTSBURGH & LAKE ERIE RAILROAD CO., Bessemer and Lake Erie Railroad Company, Appellant in 91-1593; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; SHARON STEEL CORPORATION v. THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD; CONSOLIDATED RAIL CORPORATION, Bessemer and Lake Erie Railroad Company, Appellant in 91-1594; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; ERIE WESTERN PENNSYLVANIA PORT AUTHORITY; and CODAN CORPORATION v. CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY, INC; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION, INC.; and THE PENN CENTRAL CORPORATION, INC., Bessemer and Lake Erie Railroad Company, Appellant in 91-1595; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; C.D. AMBROSIA TRUCKING CO., INC. v. CHESAPEAKE & OHIO RAILWAY COMPANY; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; THE PENN CENTRAL CORPORATION, INC., C.D. Ambrosia Trucking Company ("Ambrosia"), Appellant in 91-1627; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; REPUBLIC STEEL CORPORATION, v. THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; CONSOLIDATED RAIL CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; NORFOLK & WESTERN RAILWAY COMPANY; and THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY, Republic Steel Corporation, Appellant in 91-1628; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; NATIONAL STEEL CORPORATION v. PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION, National Steel Corporation, Appellant in 91-1629; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; JONES & LAUGHLIN STEEL INCORPORATED v. THE PENN CENTRAL CORPORATION, THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFOLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION Jones & Laughlin Steel Incorporated, Appellant in 91-1630; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; WHEELING-PITTSBURGH STEEL CORPORATION v. THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; NORFORLK & WESTERN RAILWAY COMPANY; NORFOLK & SOUTHERN CORPORATION; BESSEMER & LAKE ERIE RAILROAD COMPANY; CONSOLIDATED RAIL CORPORATION, Wheeling-Pittsburgh Steel Corporation, Appellant in 91-1631; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; TAURO BROTHERS TRUCKING CO. v. BALTIMORE AND OHIO RAILROAD COMPANY, INC.; BESSEMER AND LAKE ERIE RAILROAD, INC.; CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION; and NORFOLK AND WESTERN RAILWAY COMPANY, INC. v. PITTSBURGH & LAKE ERIE RAILROAD CO., Tauro Brothers Trucking Company, Appellant in 91-1632; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; SHARON STEEL CORPORATION v. THE PENN CENTRAL CORPORATION; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; CSX CORPORATION; BESSEMER & LAKE ERIE RAILROAD; CONSOLIDATED RAIL CORPORATION, Sharon Steel Corporation, Appellant in No. 91-1633; IN RE: LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION; ERIE WESTERN PENNSYLVANIA PORT AUTHORITY and CODAN CORPORATION v. CHESAPEAKE & OHIO RAILWAY COMPANY, INC.; BALTIMORE AND OHIO RAILROAD COMPANY, INC.; CSX CORPORATION, INC.; NORFOLK & WESTERN RAILWAY COMPANY, INC.; CONSOLIDATED RAIL CORPORATION, INC.; and THE PENN CENTRAL CORPORATION, INC., Erie-Western Pennsylvania Port Authority and Codan Corporation ("Erie"), Appellants in 91-1634

Subsequent History: As Corrected May 27, 1993. Petition for Rehearing Denied July 26, 1993, Reported at: *1993 U.S. App. LEXIS 19716*. *Second Amendment* June 9, 1993.

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Pennsylvania (MDL No. 587) (D.C. Civil No. 84-02010) (MDL No. 587) (MDL No. 587) (D.C. Civil No. 84-02010) (MDL No. 587) (D.C. Civil

No. 84-02012) (MDL No. 587) (D.C. Civil No. 84-02079) (MDL No. 587) (Civil No. 84-02134) (MDL No. 587) (D.C. Civil No. 84-02135) (MDL No. 587) (D.C. Civil No. 84-02138) (MDL No. 587) (D.C. Civil No. 84-02781) (MDL No. 587) (D.C. Civil NO. 84-05562) (MDL No. 587) (D.C. Civil No. 84-05760) (MDL No. 587) (D.C. Civil No. 84-02012) (MDL No. 587) (D.C. Civil No. 84-02079) (MDL No. 587) (D.C. Civil No. 84-02134) (MDL No. 587) (D.C. Civil No. 84-02135) (MDL No. 587) (D.C. Civil No. 84-02138) (MDL No. 587) (D.C. Civil No. 84-02781) (MDL No. 587) (D.C. Civil No. 84-05562) (MDL No. 587) (D.C. Civil No. 84-05760)

Core Terms

dock, damages, railroads, steel, steel company, district court, conspiracy, self-unloader, rates, antitrust, transport, handling, iron ore, vessels, competitors, trucking, anti trust law, trucking company, claim for damages, non-railroad, plaintiffs', lake, causation, factors, lease, limitations period, the will, calculation, asserting, savings

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN1[] **Railroads & Rail Transportation, Rates & Tariffs**

The Interstate Commerce Act ("the ICA") governs any individual or joint rate charged by the railroads. 49 U.S.C.S. § 15(1) (repealed, 1978).

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN2[] **Railroads & Rail Transportation, Rates & Tariffs**

The enforcement arm of the Interstate Commerce Act ("the ICA"), the Interstate Commerce Commission ("the ICC"), is charged with regulating the rates filed and charges levied by the railroads in a manner consistent with the purposes of the ICA. 49 U.S.C.S. § 15(1).

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN3[] **Procedural Matters, Jurisdiction**

Regulated industries are not per se exempt from the Sherman Act.

Civil Procedure > Appeals > Standards of Review > General Overview

Energy & Utilities Law > Financing > Grants & Reservations > Joint Ventures & Partnerships

HN4[] **Appeals, Standards of Review**

Given a jury verdict in favor of the plaintiffs, the court reviews the evidence in a light favorable to their position.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Torts > Transportation Torts > Rail Transportation > General Overview

HN5[] **Regulated Industries, Transportation**

Pursuant to precedent and 49 U.S.C.S. § 5(b), railroads may engage in some joint activity which might otherwise run afoul of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Transportation Law > Carrier Duties & Liabilities > Damages

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN6[] **Antitrust & Trade Law, Exemptions & Immunities**

Even though the Interstate Commerce Act does not immunize regulated carriers from government antitrust prosecution, it does preclude treble damage awards to private litigants.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN7[] **Pleadings, Amendment of Pleadings**

On remand, appellants should be afforded an opportunity, if they believe the facts justify it, to amend their complaint to state a proper claim for damages.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN8[] **Air & Space Transportation, Charters**

While the joint setting of rates is protected activity under 49 U.S.C.S. § 5(b), the statute strictly limits the exemption to actions that conform to the terms of the agreement approved by the Interstate Commerce Commission.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN9[] **Antitrust & Trade Law, Exemptions & Immunities**

Nothing in the language of the Interstate Commerce Act necessarily precludes a private antitrust treble damages remedy for actions that are not specifically immunized within the terms of the Reed-Bullwinkle Act, 62 Stat. 472, current version codified at *49 U.S.C.S. § 10706*.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Transportation Law > Carrier Duties & Liabilities > Damages

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN10[] **Private Actions, Remedies**

An award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the Interstate Commerce Commission was the product of an antitrust violation.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN11[] **Regulated Industries, Transportation**

The burden resting upon a plaintiff would not be satisfied by proving that some carrier would, but for an illegal conspiracy, maintain a rate lower than that published by the Interstate Commerce Commission. It would be necessary for the plaintiff to prove, also, that the hypothetical lower rate would conform to the requirements of the Act to Regulate Commerce. For unless the lower rate is one which the carrier could maintain legally, the changing of it could not conceivably give a cause of action.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN12[] **Railroads & Rail Transportation, Rates & Tariffs**

Collective rate-making activity by regulated railroads is afforded a measure of protection by § 5(a) of the Interstate Commerce Act, 49 U.S.C.S. § 5(a).

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN13[] **Railroads & Rail Transportation, Rates & Tariffs**

See 49 U.S.C.S. § 5b(9).

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Transportation Law > Rail Transportation > General Overview

HN14[] **Separation of Powers, Primary Jurisdiction**

A district court's decision not to submit an issue for initial determination by the Interstate Commerce Commission will be reversed only for an abuse of discretion.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN15[] **Clayton Act, Claims**

In addressing the "standing" of parties to bring a claim under *§ 4* of the Clayton Act, *15 U.S.C.S. § 15*, the United States Supreme Court has focused on the nexus between the antitrust violation and the plaintiff's harm, and on whether the harm alleged is of the type for which Congress provides a remedy.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN16[] **Private Actions, Standing**

Once antitrust injury has been demonstrated by a causal relationship between the harm and the challenged aspect of the alleged violation, standing analysis is employed to search for the most effective plaintiff from among those who have suffered loss.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN17[] **Clayton Act, Claims**

A number of factors to consider in *§ 4* of the Clayton Act, *15 U.S.C.S. § 15*, actions to determine if the plaintiff has suffered an injury which bears a causal relation to an alleged antitrust violation are: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Governments > Legislation > Statute of Limitations > Pleadings & Proof

HN18[] **Private Actions, Remedies**

An injurious act within the limitations period may serve as a basis for an antitrust suit.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN19[] **Private Actions, Remedies**

In the context of a continuing conspiracy to violate the antitrust laws, each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages caused by that act, and as to those damages, the statute of limitations runs from the commission of the act.

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN20[] **Legislation, Statute of Limitations**

The Ohio Valentine Act expressly provides that no statute of limitations shall prevent, or be a bar to any suit or proceeding for any violation of the Act. *Ohio Rev. Code Ann. § 1331.12* (1979).

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN21[] **Affirmative Defenses, Laches**

Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Real Property Law > Financing > Foreclosures > Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN22[] **Affirmative Defenses, Laches**

It is the law in Ohio that assertion of the equitable defense of laches, and its applicability, is one which should be presented to the jury.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN23[] **Standards of Review, Substantial Evidence**

Unless the evidence is critically deficient as to the prevailing party's side, so that no reasonable jury could grant it relief, the court will affirm the district court's denial of a motion.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN24[] **Private Actions, Remedies**

One pursuing antitrust recovery must establish that the damages suffered are caused by the defendant's participation in a scheme repugnant to the antitrust laws. Once causation is determined, the actual amount of damages may result from a reasonable estimate, as long as the jury verdict is not the product of speculation or guess work.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN25[] **Private Actions, Remedies**

Antitrust recovery can constitute compensation for only those damages directly caused by unlawful competition. The relaxed measure of proof is afforded to the amount, not the causation of loss - the nexus between the defendant's illegal activity and the injuries suffered must be reasonably proven.

Civil Procedure > ... > Methods of Discovery > Interrogatories > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

HN26[] **Methods of Discovery, Interrogatories**

Interrogatories are adequate if they will determine the facts essential to the judgment.

Civil Procedure > Remedies > Judgment Interest > Postjudgment Interest

Civil Procedure > Remedies > Judgment Interest > General Overview

HN27[] Judgment Interest, Postjudgment Interest

See 28 U.S.C.S. § 1961(a).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN28[] Entitlement as Matter of Law, Materiality of Facts

The facts must be viewed favorably to the non-movant, and if there is no disputed question of material fact, and a party is entitled to judgment as a matter of law, then summary judgment will be affirmed.

Governments > Legislation > Statute of Limitations > General Overview

HN29[] Legislation, Statute of Limitations

Three factors are necessary to forestall the running of the limitations statute by way of a fraudulent concealment allegation: (1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiff's inquiry, who (3) exercised due diligence in investigating his cause of action.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN30[] Tolling of Statute of Limitations, Fraud

The exercise of due diligence is required in antitrust cases to employ the fraudulent concealment doctrine to avoid bar of the statute of limitations.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN31[] **Regulated Practices, Private Actions**

If a plaintiff has delayed beyond the limitations period, he must fully plead the facts and circumstances surrounding his belated discovery, and the delay which has occurred and must be shown to be consistent with requisite diligence.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN32[] **Trials, Judgment as Matter of Law**

The specific grounds for judgment notwithstanding the verdict must be asserted in the motion for a directed verdict, and the lack of specificity on a particular issue will defeat a motion for judgment n.o.v. on that ground.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Torts > ... > Types of Damages > Judgment Interest > General Overview

Civil Procedure > Remedies > Judgment Interest > General Overview

HN33[] **Judgment Interest, Prejudgment Interest**

Under Ohio law, the prevailing party may recover prejudgment interest if the losing party failed to make a good-faith effort to settle the case. *Ohio Rev. Code Ann. § 1343.03(C)* (1979). This includes consideration of whether a party rationally evaluated its risks and potential liability and whether a good faith monetary settlement offer or response to an offer by the other party occurred. If a party has a good faith, objectively reasonable belief that liability does not exist, the party does not need to offer a cash settlement in order to avoid prejudgment interest liability in the event it does not prevail.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview

HN34[] **Standards of Review, De Novo Review**

The court exercises plenary review when constitutional questions are presented on appeal.

Civil Procedure > Trials > Separate Trials

HN35[] **Trials, Separate Trials**

Bifurcated trials are permitted only if the separate issues are so distinct that a trial of one without the other may be had without injustice.

Civil Procedure > Trials > Separate Trials

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN36[] **Trials, Separate Trials**

If the question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, this would amount to a denial of a fair trial.

Civil Procedure > Remedies > Damages > General Overview

HN37[] **Remedies, Damages**

Nominal damages are appropriate only when plaintiffs are unable to prove any amount of damages and are not properly awarded when a plaintiff has established a quantifiable loss of revenue.

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Judges: Before: MANSMANN, SCIRICA and ROTH, Circuit Judges.

Opinion by: MANSMANN

Opinion

[*1150] OPINION OF THE COURT

MANSMANN, Circuit Judge.

Industries involved in the transportation and manufacturing of iron ore are the adversaries **[*1151]** in this complex multi-district antitrust litigation. Five steel companies, three dock companies and three trucking companies filed **[**4]** civil actions in various federal district courts, alleging that the railroad companies serving the lower Lake Erie industrial region conspired in violation of federal and state antitrust laws to preclude potential competitors from entering the market of lake transport, dock handling, storage and land transport of iron ore. [1] The cases were consolidated and transferred to the United States District Court for the Eastern District of Pennsylvania for pre-trial proceedings.

[5]** The eventual trial was bifurcated into liability and damages phases. The liability jury reached a verdict against Bessemer and Lake Erie Railroad Company ("B&LE"), the sole remaining defendant, and in favor of all plaintiffs but one - David W. Reaney and Reaney Dock Co. The first jury was discharged and a new jury, empaneled for the damages phase, reached a verdict awarding all but one claim for damages. B&LE's motion for judgment n.o.v. was denied in most respects. Post-trial motions lodged by the Wills plaintiffs were likewise denied.

On appeal and cross-appeal, numerous issues have been raised. In its appeal, B&LE contends, as threshold arguments, that (1) the conduct complained of as violative of the antitrust laws was exempt from liability under the doctrine of *Keogh v. Chicago & Northwestern Railway, 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*, and the statutory immunity conferred by section 5a of the Interstate Commerce Act, 49 U.S.C. § 5(b) (1970); (2) some plaintiffs lacked standing under *Illinois Brick v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, and *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983),* **[**6]** to raise antitrust claims; and (3) the claims were time-barred by the federal statute of limitations and the doctrine of laches. B&LE also argues that the proof offered at trial did not establish that its misconduct caused damage to the plaintiffs. In addition, claims B&LE, the evidence of damages was too speculative to be sustained. Finally, as a post-verdict matter, B&LE asserts that post-judgment interest was calculated from the wrong date.

Cross-appeals include the issues of whether the district court erred in disallowing the steel companies' fraudulent concealment defense to toll the running of the statute of limitations and whether there was error in the district court's refusal to award prejudgment interest under Ohio law.

National Steel cross-appealed on the ground that judgment n.o.v. was improperly granted in favor of B&LE with respect to National Steel's investment cost damage claim.

Finally, the Wills plaintiffs claim that their *Seventh Amendment* right to a fair trial was violated because the district court allowed the damage phase jury to hear and evaluate liability evidence.

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[1] The steel company plaintiffs are Republic Steel Corporation, Jones & Laughlin Steel Incorporated (which includes Youngstown Sheet and Tube Company), National Steel Corporation, Wheeling-Pittsburgh Steel Corporation and Sharon Steel Corporation. The dock company plaintiffs are Erie-Western Pennsylvania Port Authority and Codan Corporation (Erie), Toledo World Terminal, Inc., and David W. Reaney and Reaney Dock Company. The trucking company plaintiffs are Wills Trucking, Inc., Tauro Brothers Trucking Company, and C.D. Ambrosia Trucking Company. Toledo World and Wills Trucking are corporate affiliates and will be referred to as the Wills plaintiffs.

When the action commenced, the railroad companies named as defendants were the Bessemer and Lake Erie Railroad Company, ("B&LE"), Chesapeake and Ohio Railway Company, Baltimore and Ohio Railroad Company, CSX Corporation, Pittsburgh and Lake Erie Railroad Company, Consolidated Rail Corporation, Norfolk and Western Railway Company, Norfolk Southern Corporation, Penn Central Transportation Company and Penn Central Corporation. The claims against all of the defendants, except B&LE, were settled or dismissed before or during trial, leaving B&LE as the sole defendant.

We will affirm, in most respects, the order of the district court. We will reverse the grant **[**7]** of judgment n.o.v. against National Steel and remand for entry of judgment for National Steel because the ground upon which it was based was not preserved by B&LE. We will also reverse the district court's denial of Wills' post-trial motions because as **[*1152]** to these plaintiffs, the conduct of the bifurcated trial violated the *Seventh Amendment*. We will, therefore, remand for a new trial limited strictly to a calculation of damages suffered by the Wills plaintiffs.

I.

A. Regulatory Background

HN1[] The Interstate Commerce Act ("the ICA") governs "any individual or joint rate . . . charged . . ." by the railroads. 49 U.S.C. § 15(1) (1970) repealed, Pub. L. 95-473, *§ 4(b)*, *(c)*, October 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3, 1980, 94 Stat. 427. [2] ***HN2***[] The enforcement arm of the ICA, the Interstate Commerce Commission ("the ICC"), is charged with regulating the rates filed and charges levied by the railroads in a manner consistent with the purposes of the ICA. 49 U.S.C. § 15(1)(1976).

[8]** Under the ICA and directly contrary to activity forbidden in other industries, the railroads were legally permitted to engage in joint rate-making activity. However, in 1944 the inevitable tension presented by the ICC's policy of condoning concerted action and the general prohibition against industry consortia embraced in the antitrust laws prompted the Justice Department to invoke the provisions of the Sherman Act in an effort to enjoin some railroad rate-setting practices. See *United States v. Association of American Railroads, 4 F.R.D. 510 (D.Neb. 1945)* (denying defense motion to dismiss). In that same year, the State of Georgia alleged that an eastern railroad conspiracy in restraint of trade caused an increase in freight rates throughout its state. *Georgia v. Pennsylvania Railroad Company, 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*. Sitting as the court of original jurisdiction, the Supreme Court responded to the defendants' allegation that Georgia's complaint failed to state a cause of action, by holding that ***HN3***[] "regulated industries are not per se exempt from the Sherman Act," *324 U.S. at 456-47*, and suit was permitted **[**9]** to proceed.

Congress responded by passing the Reed-Bullwinkle Act, ch. 491, 62 Stat. 472 (1948), (current version codified at *49 U.S.C. § 10706*), authorizing the creation of rate bureaus which would provide a sanctioned forum for the railroads to set agreements on rates. In section 5a of the 1970 version of the Act, Congress expressly granted railroads antitrust immunity for any collective rate-making activity accomplished in accordance with the procedures described in the Act. 49 U.S.C. § 5(b). Unless and until "suspended or modified or set aside by the Commission or be disapproved . . . by a court," these rates are lawful as between the carrier and shipper. 49 U.S.C. § 15(2).

B&LE was a member of the Coal, Coke and Iron Ore Committee, an ICC-approved rate bureau. Through this vehicle the defendants established the rates of concern here. At issue is whether the railroads' rate-making activity occurred within the legal framework of the ICA. The plaintiffs do not challenge the original agreement or the defendants' right collectively to set rates pursuant to the terms and conditions **[**10]** of the agreement. Instead the anti-competitive activity charged here allegedly arises from the collective response of the members of the rate bureau to a technological innovation in the iron ore industry.

B. Factual Background

HN4[] Given the jury verdict in favor of the plaintiffs, we review the evidence in a light favorable to their position.

The theory of the plaintiffs' case is that beginning approximately 25 years ago, B&LE conspired with its industry partners to eliminate competition and monopolize the transportation and handling of iron ore. The iron ore originates from mines in Michigan, Minnesota and eastern Canada. It is brought to the steel companies' plants by ship

[2] The Interstate Commerce Act was originally enacted in 1887 and was codified and recodified with little change until its substantial revision in 1980 by the Railroad Revitalization and Regulatory Reform Act and the Staggers Rail Act. These changes are not implicated here.

transport across the Great Lakes and is unloaded at railroad-owned docks along lower Lake Michigan, Lake Erie and the Detroit River.

[*1153] The traditional method of unloading ore from the vessels, known as bulkers, was by the use of huletts, large cranes affixed to the docks. The huletts lifted the ore from the bulkers and either placed it in waiting railroad cars for immediate shipment or positioned it for later movement to a storage facility. Some of the docks are located directly adjacent to steel mills, but **[**11]** most of the ore was reloaded at the dock onto land-based transportation, most often railroads, for delivery to the inland mills. The non-railroad docks were not competitors for this segment of the ore business because they were not equipped with huletts.

A change in ore producing technology catalyzed a different method of moving iron ore across Lake Erie. In the 1950s, some iron ore producers began to "pelletize" their ore. As the term implies, instead of a mud-like form, the iron was formulated into pellets. This innovation made possible the transport of the ore by means of self-unloading vessels, capable of unloading cargo by means of a conveyor belt without the use of a hulett.

Self-unloaders could carry greater loads than the conventional bulkers and could unload in significantly less time at docks which did not require special handling equipment. Using self-unloaders, non-railroad docks could now compete as unloading sites for iron ore, and could receive, store and tranship ore from self-unloaders at lower cost than railroad hulett docks because they did not need land-based unloading equipment and crews. In addition, demurrage charges, the amount assessed while equipment stands **[**12]** idle, were reduced. The non-railroad docks, in combination with self-unloaders, were able to compete directly with the railroad-owned docks for the iron ore transport market. The plaintiffs contend that the railroads, perceiving the threat presented by the existence of the non-railroad docks and unwilling to jeopardize their substantial investment in the off-loading equipment, plotted to halt the progress of self-unloader technology to maintain the railroads' dominance in the iron ore transport market.

Because the railroads also controlled access to their docks and provided inland transportation of ore from the docks only by rail, the self-unloader/non-railroad dock system also compromised the railroads' monopoly on the inland transportation of iron ore. With self-unloaders discharging cargo at private docks, less costly trucks could haul the ore from the non-railroad docks and provide land transportation savings to the steel companies.

Roused by the possibility of the demise of the railroad industry as the literal mover and shaker of the iron ore transport business, its high ranking officials convened to discuss a course of action designed to circumvent the incorporation of self-unloaders **[**13]** into the iron ore industry. Railroad officials orally agreed that leases of railroad docks or facilities should be examined or modified to frustrate the efforts of non-railroad docks to handle ore from self-unloaders. They also agreed to refuse to provide competitively-priced inland rail service, i.e., to publish commodity line haul rates for moving ore from such docks. Finally, it was agreed that railroad docks should assess the same handling charges for unloading ore from bulkers as from self-unloaders, regardless of the extent of service performed.

The words were converted into action. To effectuate the goal of market preclusion, the railroads used coercion to enforce adherence to the agreement to foreclose competition from private docks. B&LE and its co-conspirators did indeed restrict the lease and sale of railroad-owned dock property and boycotted non-railroad docks. These activities eliminated much of the economic incentives to use self-unloaders. By impeding the progress of the private dock system, the railroads were also effective in foreclosing competition from trucks.

C. The Litigation

On October 13, 1981, a federal grand jury returned an indictment charging **[**14]** B&LE and other railroads operating docks and inland rail lines with criminal conspiracy in violation of *section 1* of the Sherman Act. B &LE pled nolo contendere and was convicted and fined. The conviction was affirmed on appeal. *United States v. Bessemer & Lake Erie Railroad Co., 230 U.S. App. D.C. 316, 717 F.2d 593, 602 (D.C. Cir. 1983)*.

[*1154] After the indictment, between 1982 and 1984, the original complaints were filed in this civil action in various federal district courts. Seeking recovery under *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, *section 4* of the Clayton Act, *15 U.S.C. § 15*, and the Ohio Valentine Act, *Ohio Revised Code §§ 1331.01-1331.99*, the plaintiffs claimed that a conspiracy existed among the defendant railroads to delay the utilization of self-unloading vessels for the transportation of iron ore. On April 17, 1984, the Judicial Panel on Multidistrict Litigation consolidated the ten cases.

The steel company plaintiffs requested damages for the savings lost to them, alleging that the railroads' anti-competitive behavior generally denied them savings that would have resulted from **[**15]** swifter development of self-unloader technology. Specifically, the plaintiffs identified as compensable: (1) savings resulting from lower dock handling rates from private commercial docks had the self-unloader industry been more dynamic; (2) savings from lower dock handling rates at the railroad docks had there been competition from private docks; (3) savings from lower trucking rates had their market entry not been restrained; (4) savings lost because of the railroads' failure to publish commodity line haul rates and (5) in a catchall provision, the savings it would have enjoyed had the steel companies had the option to choose the most efficient and economical combination of transportation alternatives.

The dock company plaintiffs claimed injury due to the railroads' refusal to permit them entry into the iron ore unloading business. Their damage claims thus represented the profits that their industry would have realized had they been able to break into the market. The trucking companies' claim for damages is similar. Had they not been precluded from entering the market of the land transport of ore, they would have engaged in such operations and realized significant profits.

In **[**16]** a series of pre-trial rulings, the district court dismissed the steel companies' claims for the damages based on the allegation that, absent the conspiracy, these plaintiffs would have paid lower rates for costs associated with the transportation of ore. The court ruled that these claims were barred by *Keogh v. Chicago & Northwestern Railway, 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)* (antitrust liability in private action cannot be predicated on rates approved by the ICC). The district court, however, permitted to proceed to trial those damage claims that resulted from "defendants' elimination of competitive non-railroad dock facilities." These claims were not considered rate-related, because they required proof that the defendants conspired to exclude low cost competitors from the market. The court determined that Keogh did not bar the damage claims of the dock and trucking companies because they were competitors, and not customers, of the railroads.

In motions to dismiss, the defendants challenged the standing of some classes of plaintiffs to pursue antitrust claims. The court dismissed the steel companies' damage claim that was based on the theory that had the conspiracy **[**17]** not delayed the use of self-unloading vessels, the steel companies would have paid vessel companies a lower rate for lake transportation. Applying *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, and *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, the district court concluded that claims for such lake freight savings were indirect, potentially duplicative and too speculative. The court held that because the steel companies were only potential customers of non-conspiring competitors, (the vessel companies), damages could be ascertained only by speculating when the vessel companies would have begun using self-unloaders absent a conspiracy. Assessment of damages would also require additional conjecture related to the rates the private docks would have charged to handle the self-unloaders.

Because the steel company plaintiffs had also pled that they were directly involved in the ownership and operation of self-unloaders, however, the court held that self-unloader damages could sustain a standing challenge. Similarly, the steel companies' damages **[*1155]** resulting from **[**18]** the inability to use non-railroad docks were not barred because the court perceived that these damages arose from the inability to seek lower prices from competitors who were either denied participation or experienced entry delay in the relevant market due to the illegal conspiracy.

On the issue of whether application of the federal statute of limitations precluded recovery or whether the statute was tolled because the railroads fraudulently concealed the conspiracy, the district court granted B&LE's motion for summary judgment against the steel company plaintiffs and Erie but denied it against Wills and the trucking company plaintiffs. The court ruled that the steel company plaintiffs and Erie knew or should have known about the conspiracy, thereby denying the fraudulent concealment defense and limiting recovery to damages sustained within four years of the commencement of this suit. The period was, however, tolled during the pendency of the related criminal case.

The consolidated trial was bifurcated into liability and damage phases. After six weeks of trial, the liability phase concluded in a jury verdict in favor of all the plaintiffs except David W. Reaney and Reaney Dock Company. **[**19]** The jury's findings, as set forth on special verdict forms, are summarized as follows:

The conspiracy in which B&LE participated was a material cause of injury to each steel company plaintiff. Each injury resulted from foreclosure or delay in utilizing self-unloading vessels for the delivery of iron ore and from the inability to use non-railroad docks to handle iron ore.

With regard to the dock companies, the jury found, first, that Erie's injuries resulted from acts designed to prevent it from purchasing or leasing dock property at Erie, Pennsylvania, and from acts designed to foreclose competitive inland rail service from that dock. Second, the injury found that the Wills' injuries resulted from acts which precluded it from purchasing or leasing dock property at Toledo, Ohio and from trucking ore inland from that dock. The jury rejected Wills' claims that it had been injured by the railroads' refusal to sell or lease other dock property.

As to the trucking companies, the jury found that Ambrosia Trucking Company's injury resulted from acts which prevented or delayed the handling of iron ore by non-railroad docks which would have permitted the trucking of ore. The jury denied **[**20]** the recovery of damages on claims that B&LE interfered with Ambrosia's trucking from railroad docks and from one non-railroad dock in Ashtabula, Ohio.

The jury further found that Tauro Brothers Trucking Company's injury resulted from the foreclosure or delay in the utilization of self-unloading vessels to bring iron ore to docks that granted access to truckers, as well as the inability of steel mills to use to their fullest capacity non-railroad docks to which trucks were allowed access. The jury rejected Tauro's claim that it had been injured by unlawful acts designed to prevent trucking from railroad docks.

The court discharged the liability jury and subsequently empaneled a new jury for the damages phase. It reached a verdict awarding all but one claim of damages. The steel companies were awarded damages measured by the difference between the lower prices that would have been charged by the excluded competitors and the higher prices actually paid. Damages sustained by the docks and the trucking companies were measured by the profits that each would have earned on the businesses from which they had been excluded. Wills Trucking Company and Toledo World Terminal were awarded **[**21]** only nominal damages ($ 1) on their claim that the railroads refused to sell or lease dock property to them.

On February 27, 1991, the district court denied, in substantial part, B&LE's motion for judgment n.o.v., rejecting all of B&LE's arguments except that concerning National Steel's investment cost damage award. First, the court upheld the jury's determinations that 1) B&LE had violated the antitrust laws by conduct which was not immune, i.e., not protected by regulatory statutes or Supreme Court decisions, notably Keogh; and 2) the plaintiffs' damages were attributable to this conduct.

[*1156] The court next rejected B&LE's argument that the plaintiffs lacked standing to bring this action. Specifically, the court held that no serious standing issue arose with respect to the steel companies' dock handling awards nor with respect to the claims of the Erie or trucking company plaintiffs. The court, with admitted reservation ("although with less than complete confidence"), App. at 2108, also held that the steel companies had standing to seek self-unloader damages since the steel companies had assumed responsibility for financing and operating ore carrying vessels.

The district court **[**22]** also denied B&LE's argument that certain of the plaintiffs' Sherman Act claims were barred by the four-year statute of limitations and that laches barred all of the plaintiffs' Ohio Valentine Act claims. The court found that the injuries did not result solely from pre-limitations periods acts and that *Zenith Radio Corp. v. Hazelton Research, Inc., 401 U.S. 321, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*, did not require plaintiffs to trace each item of damages to specific overt acts within the limitations period. The court ruled alternatively that the plaintiffs' Sherman

Act claims fit within the Zenith exception that permits assertion of claims which were too conjectural to have been litigated earlier.

With respect to the Valentine Act claims, the district court held that under Ohio law, an equitable defense does not apply to actions at law for damages; but that, in any event, the jury's findings that the railroads acted affirmatively to conceal their conspiratorial activities, as well as B&LE's failure to show that significant prejudice attributed to any delay in filing suit, ruled out a laches defense.

The court further rejected B&LE's argument that plaintiffs' damages were not caused **[**23]** by the unlawful conspiracy. The court noted that throughout both phases of the trial B&LE vehemently argued and sought to prove that any damages actually sustained by the plaintiffs were attributable to economic factors other than the alleged conspiracy. The court stated that these factual issues were properly submitted to the jury and that viewing the record in the light most favorable to the verdict winner, there was no doubt that the evidence supported the jury's determinations.

B&LE has appealed the judgment of the district court. The plaintiff steel companies have cross-appealed on two issues: whether the district court erred in granting summary judgment in favor of B&LE on the statute of limitations concealment issue when it ruled that the steel companies, as a group, had knowledge of facts which would have reasonably given them notice of the conspiracy. Second, the plaintiffs argue that the district court erred in refusing to award them prejudgment interest under Ohio law. The Erie dock company and Ambrosia Trucking join in cross-appealing the issue of prejudgment interest.

As noted, the district court granted B&LE's motion for judgment n.o.v. with respect to National Steel's **[**24]** claim for investment cost damages. The court held that National Steel's claim was not recoverable under the antitrust laws because it represented inflation, a non-compensable loss. National Steel has cross-appealed on this issue.

The Wills plaintiffs, although prevailing on the issue of liability, were only awarded nominal damages. In their cross-appeal, the Wills plaintiffs contend that the district court impermissibly allowed the damage phase jury to re-examine a liability issue - the fact of damage of the Wills' antitrust claim - in violation of the *Seventh Amendment*. The Wills plaintiffs also argue that even if nominal damages were appropriate, the district court erred in not trebling them.

We turn now to discussion of each of the issues presented, beginning with the appeal brought by B&LE.

II. B&LE's Appeal

A. Antitrust Immunity

HN5[] Pursuant to *Keogh v. Chicago & N. R. Co., 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)* and 49 U.S.C. § 5(b) (1970), railroads may engage in some joint activity which might otherwise run afoul of the antitrust laws. A major issue permeating this case is whether the railroads' activity, upon which **[*1157]** the plaintiffs **[**25]** based their treble-damages causes of action, is protected by Keogh or by statute. It is a question of law over which we exercise plenary review.

1. The Doctrine of Keogh

In Keogh, a shipper sued a railroad carrier for participating in a conspiracy to fix rates in violation of the Sherman Act. The ICC had previously approved the rates. The Supreme Court held that ***HN6***[] even though the ICA does not immunize regulated carriers from government antitrust prosecution, it does preclude treble damage awards to private litigants. The Court gave a number of reasons for its holding. First, because the subject rates were accepted by the ICC, they were the "legal" rates. The Court believed it inconsistent that Congress, in enacting the ICA, would intend that carriers could be sued for price-fixing when they were charging the rates required by law. *260 U.S. at 162-63*. Second, if Keogh were to prevail, he would receive a lower rate not available to other shippers. This situation would create, in effect, a discriminatory rebate, avoidance of which was one of the reasons for the ICA. Id. Third, to establish injury, Keogh would be put to the task of proving hypothetical **[**26]** lower rates which would have been charged in the absence of the conspiracy and the acceptability of those rates to the ICC. Additionally, Keogh would have to overcome the problem of speculative calculation of damages. *Id. at 164*.

The Court re-examined the Keogh doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau Inc., 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986)*. In Square D, shippers brought antitrust actions against motor carriers and their rate-making bureau, claiming that the carriers and the bureau had conspired to fix rates without complying with their ICC-approved rate agreement. The shippers claimed entitlement to the difference, trebled, between the rates actually paid and the rates which would have prevailed in an open market. The district court dismissed the actions under the authority of Keogh.

While the Court of Appeals for the Second Circuit affirmed the district court's principal ruling, *Square D Co. v. Niagara Frontier Tariff Bureau, 760 F.2d 1347, 1349 (2d Cir. 1985)*, it noted a possible distinction between rate-making activity, shielded by Keogh, and other, unprotected, concerted activity. The Square **[**27]** D shippers had alleged that the defendant carrier rate bureau had: (1) used an unauthorized Committee to "set rates and inhibit competition"; (2) ignored "the notice, publication, public hearing, and recordkeeping requirements of its [freight agreement] and ICC regulations"; (3) strategized "threats, retaliation, and coercion against [rate bureau] members to inhibit independent actions"; and, (4) employed "pressures, threats, and retaliation to interfere with independent actions." *Square D, 476 U.S. at 412-13*. [3] The court of appeals identified these four allegations as potential support for a claim that the carriers jeopardized the shippers' economic health by blockading their ability to sell their goods. "Thus, ***HN7***[] on remand, appellants should be afforded an opportunity, if they believe the facts justify it, to amend their complaint to state a proper claim for damages." *Square D, 760 F.2d at 1366*.

[28]** On certiorari, the Supreme Court acknowledged that ***HN8***[] while the joint setting of rates is protected activity under 49 U.S.C. § 5(b), the "statute strictly limits the exemption to actions that conform to the terms of the agreement approved by the ICC." *Square D, 476 U.S. at 413-14*. The Court **[*1158]** also recognized that ***HN9***[] "nothing in the language of the Interstate Commerce Act, moreover, necessarily precludes a private antitrust treble damages remedy for actions that are not specifically immunized within the terms of the Reed-Bullwinkle Act," *476 U.S. at 414*. The Court nonetheless determined that, under Keogh, the Square D shippers could not bring a treble damages action because:

> Keogh simply held that ***HN10***[] an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation.

Id. at 422. The Court then affirmed the dismissal of the complaints, albeit without specific discussion of whether Keogh protected the carriers from liability for concerted, **[**29]** non-rate activity.

Thus the question left unresolved by Square D remains for us to answer today: Does Keogh, with its reaffirmation in Square D, preclude treble-damage recovery for private litigants claiming that members of a regulated industry conspired to preclude competition in which ICC-approved rates played a role in thwarting market entry? As with many of the other issues before us, our response differs depending upon the particular group of plaintiffs and the damages sought.

a. The Steel Companies [4]

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[3] According to one commentator, secret price fixing and retaliation against carriers exercising independent action were not unusual in the 1960s and 1970s, yet the ICC was apparently unaware of such activity until government and private antitrust lawsuits focused upon the problem. Dissatisfaction with the ICC's overall performance led to the 1980 enactment of the Staggers Rail Act which substantially deregulated rail and motor transportation. The legislation endorsed greater competition as the best way to stimulate transportation industry development, accomplished by circumscribing the immunity of a rate bureau's activities and by substantially removing from the ICC its rate setting function. This 1980 statute did not specifically overrule Keogh, but significantly undermines its central rationale. See William Eskridge, Jr., Overruling Statutory Precedents, *76 Geo. L.J. 1361 (1988)*.

The district court, without the benefit of the Supreme Court's Square D opinion, relied upon Keogh to dismiss the plaintiffs' original claims for damages based upon rates charged by the defendant railroads. According to the district **[**30]** court, two steel company antitrust claims survived this dismissal:

> (1) [a claim] that [the steel companies] could have paid lower dock-handling rates (sooner) to the private docks than they did to the railroad docks if the railroads had not retarded the development of the self-unloader industry; and (2) [a claim] that [the steel companies] could have paid lower land transport rates (sooner) to the truckers, had the railroads not restrained competition by that industry and monopolized line-hauling from their docks. In my view, plaintiffs' generalized claims regarding savings they would have realized had defendants not impeded self-unloader development and had they been able to choose the most economic combination of transportation alternatives come within these two categories.

App. at 234 (footnote omitted). [5]

[31]** In a subsequent order, the district court dismissed any damage claims that would require estimating what rates the ICC would have accepted, an estimation forbidden by Keogh. According to the district court, the sole remedy for these claims would be before the ICC. App. at 362-63.

As to the surviving claims, the district court reasoned:

> With respect to Keogh . . . plaintiffs need not prove what prices, but for the conspiracy, defendants would have charged; plaintiffs need prove only that, in the context of tariffs that I must accept as legitimate, defendants' exclusionary activities and other antitrust violations slowed penetration of the relevant markets by defendants' competitors. Thus, plaintiffs' damages do not depend on proof of price-fixing by defendants, which Keogh would bar, but on proof that defendants conspired to exclude low cost competitors from the market, which does not implicate the ICC's exclusive jurisdiction and therefore is not barred by Keogh. In short, as Judge Friendly as explained, '[a] shipper may **[*1159]** recover damages if it can show that carriers caused injury to the shipper's business or property other than by higher tariffs . . . .' *Square D, 760 F.2d at 1365.* **[**32]**

App. at 372-73.

The district court also discussed Republic Steel's claims for damages emanating from the delay in the construction and use of Republic's own dock facilities. To apply Keogh to bar this complaint, opined the court, would allow a blockade of a competitor to escape scrutiny. This would overextend Keogh's reach and could produce a rule that one who pays for services governed by ICC tariffs is foreclosed from asserting that antitrust violations prevented use of a less expensive, equivalent service.

Before the liability jury, the plaintiffs presented evidence of the railroads' agreements to restrict the sale and lease of dock property, boycotts of unregulated docks, refusals to handle self-unloaders in a way that would make economic sense for a steel company to utilize them, and coercion to prevent independent action. Indeed, the district court described the forcefulness of the evidence against B&LE as follows:

> Literally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy, dating back to at least 1950, to prevent self-unloading vessels, private docks, and trucking firms from gaining a foothold **[**33]** in the transportation of ex-lake iron ore. The record is so clear and complete, in fact, that it can be read to suggest that the participants may have genuinely believed that the antitrust laws did not apply to railroads at all.

App. at 2102.

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[4] National Steel, which invested in and operated its own self-unloading vessel, was a competitor, not a customer of the railroads. Thus, as to the various immunity issues, it stands in the shoes of the dock and trucking companies and not the steel companies.

[5] The district court elsewhere described these claims in terms of damages resulting from the defendants' conduct as:

> damages directly resulting from defendants' elimination of competitive non-railroad dock facilities from the market of providing unloading and trans-shipment services to plaintiffs . . . [and] damages directly resulting from the defendants' elimination of competition from trucking in the market of inland transportation services to plaintiffs.

App. at 372.

We conclude that the district court correctly characterized B&LE's anti-competitive activity as market preclusion, and Keogh's protective rule cannot apply to forbid recovery for the resulting economic detriment. As the Supreme Court has succinctly stated, Keogh merely prevents private shippers from sustaining an award of treble damages by claiming that ICC-approved rates were the product of an antitrust violation. *Square D, 476 U.S. at 422*. That statement of Keogh's protection does not preclude liability based on non-rate anticompetitive activity. Indeed, the steel companies' case involves damage claims based on non-rate activity that targeted potential low-cost competitors.

We recognize that the success of anticompetitive non-rate activity would coincidentally implicate rates promulgated under the jurisdiction of the ICC. It is fully consistent with Keogh, however, to accept these rates as lawful **[**34]** and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market. The instrument of damage to the steel companies was the absence of the lower-cost combination. In contrast, the Supreme Court in Keogh made it clear that "the instrument by which Keogh is alleged to have been damaged is rates approved by the Commission." *260 U.S. at 161*. As a result,

> ***HN11***[] the burden resting upon the plaintiff would not be satisfied by proving that some carrier would, but for the illegal conspiracy, have maintained a rate lower than that published. It would be necessary for the plaintiff to prove, also, that the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce. For unless the lower rate was one which the carrier could have maintained legally, the changing of it could not conceivably give a cause of action.

Keogh, 260 U.S. at 163-64.

The proof required to show the harm alleged here thus differs from **[**35]** that deemed objectionable in Keogh. In this case, the plaintiffs showed that the railroads conspired to protect their stronghold in the ore transport market by blocking entry by low-cost competitors, not that the railroads charged an unlawful rate.

The facts in Square D also differ from those proven at trial here. The Square D plaintiffs contended that unlawful conduct caused shipping rates to be higher than a freely competitive market. They sought treble damages measured by that difference. **[*1160]** Thus, the Square D plaintiffs, like the plaintiff in Keogh, grounded their damage claims on the allegation that the motor carriers, a group regulated by the ICC, would have charged a lower rate absent the conspiracy. Here, the question of hypothetical lower rates is ancillary. If the self-unloader/private dock/trucking triad had been permitted to develop, conceivably the steel companies would no longer be captive customers of the railroads and the rates charged by them would not be so pervasive a consideration. Admittedly, to remain competitive, the railroads would no doubt be forced to lower their rates, but the goal of the antitrust laws is to provide an open and competitive **[**36]** market place. It was the railroads' hindering the development of the market which defines this antitrust litigation.

The opinion of the Court of Appeals for the Sixth Circuit in *Pinney Dock and Transport Corp. v. Penn Central Corp., 838 F.2d 1445 (6th Cir. 1988)*, while not binding on us, does provide some guidance. The Pinney Dock case involves the same defendants and the same conspiracy at issue here. The plaintiffs were a dock company, Pinney, and a builder of self-unloading vessels, Litton. On motions to dismiss, the court of appeals held that Keogh would bar claims based on the handling and line-haul rates charged by the railroads. *Id. at 1457*. However, the court of appeals also deemed certain claims outside the scope of the Keogh doctrine. These claims included Litton's contention that the defendants refused to permit Litton to purchase, lease or use dock facilities that could have accommodated Litton's self-unloading vessels and the contention of both plaintiffs that "defendants used harassing tactics and spurious challenges to try to forestall legitimate business activities of competitors." Id. **[**37]** After a full trial, we are in a different procedural position than that of Pinney Dock. We have definite evidence of the railroads' refusal to handle self-unloaders at their docks, restrictions on the sale and lease of dock property to unregulated entities, boycotts of unregulated docks, and intra-industry coercion claims which mirror those deemed by the court of appeals in Pinney Dock to escape Keogh. Because the railroads derailed their potential competitors, the steel companies could not use alternative, lower-cost, private docks, and thus they lacked the economic incentive to develop self-unloaders. The by-product of this delay in introducing these vessels was that the steel companies were compelled to continue to pay the railroad fixed rates. Even strained to simplification, the railroads' anticompetitive behavior involved far more than the assessment of rates. The mere measure of damages, which begins with an ICC-approved rate, does not define the nature of the conspiracy.

Although we conclude from the evidence produced that the steel company plaintiffs proved at trial an antitrust conspiracy that was not grounded in rate-related claims, the question remains whether **[**38]** the district court properly instructed the jury concerning the types of rate activity protected by Keogh. In a liability segment of the trial, the district court charged on Keogh, in part, as follows:

> What is forbidden by the ***antitrust law*** are joint actions, actions taken pursuant to an agreement which restrains trade unreasonably -- that is, which adversely affect competition -- and which are not within the protection, the immunity, granted by the rate bureau proceeding -- that is to say, which are not rate related.

* * *

> But once a rate is being charged pursuant to a duly filed tariff which has not been disapproved by the Interstate Commerce Commission, then it is conclusively presumed so far as the law is concerned that the charge is a reasonable one. And what that means is that nobody can claim damages under the antitrust laws or any other law -- no shipper who pays railroad rates, who pays freight charges to a railroad -- can complain to have been damaged either by the antitrust laws or by other laws merely by the allegation that those charges were higher than they should have been.

App. at 4981-82.

The district court also instructed the jury concerning **[**39]** B&LE's good faith and regulatory climate defenses and informed the jury **[*1161]** that, if the company's conduct was consistent with the overall policies of the ICC, it was not in violation of the antitrust laws. App. at 5002.

B&LE takes issue with the charge, arguing that, under the Keogh doctrine, no matter how unlawful the means to fix or maintain rates, and no matter how anti-competitive those means may be, the tariff rates are the legal rates and cannot give rise to liability for antitrust damages. We disagree. Keogh does not give ICC-regulated industries carte blanche to preclude competition. The instruction, as a whole, recognized this principle and so did not misinform the jury as to the scope of the Keogh doctrine's protection.

In sum, we conclude that Keogh and Square D, prohibiting treble-damage recovery for private litigants based upon rate-related activity, cannot be applied here to deny antitrust recovery to the steel companies.

b. The Dock and Trucking Companies

The dock companies and trucking companies argue that Keogh does not bar their damage awards because Keogh and its progeny apply only to customers and not to competitors.

We have held **[**40]** that Keogh does not apply to claims of competitors. In *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co., 610 F.2d 1114 (3d Cir. 1979)*, we stated that "the filed tariff rule has little or nothing to do with [defendants'] duties under the antitrust laws toward its competitors . . .; competitors are not the intended beneficiaries of the rule of public utility regulation." *Id. at 1121*. We then distinguished Keogh as follows:

> In this case the plaintiff is not suing in the capacity of a customer for communication services. Essential seeks recovery for injury to its business or property from actions taken by the defendants in formulating a tariff, and in rendering customer services. The Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff. Indeed, it can continue to collect those revenues until a new tariff is filed. There is no policy conflict, actual or potential, therefore, between the *Section 4* Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule.

Id. at 1122; see also *Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 679 (9th Cir. 1985)*; **[**41]** *Kirkwood v. Union Electric Co., 671 F.2d 1173, 1179 (8th Cir. 1982)*, cert. denied, *459 U.S. 1170, 74 L. Ed. 2d 1013, 103 S. Ct. 814*

(1983); *Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981)*. But see *Pinney Dock, 838 F.2d at 1457* (applying Keogh to bar competitors' claims).

Although in Essential Communications we dealt with regulation of a utility by the FCC rather than of a common carrier by the ICC, our reasoning there is forceful here and we will apply this precedent. The *section 4* claims of the dock and trucking companies are therefore not impacted by the Keogh rule. [6]

[42]** **[*1162]** 2. Section 5a Immunity and the Doctrine of Primary Jurisdiction

HN12[] Collective rate-making activity by regulated railroads is also afforded a measure of protection by section 5a of the Interstate Commerce Act:

> ***HN13***[] Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

49 U.S.C. § 5b(9) (1970). B &LE argues that, under the doctrine of primary jurisdiction, the district court should have referred to the ICC the question of whether the railroads' activity was immune under section 5a. However,

> the doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination **[**43]** of the work of agencies and courts.

United States v. Bessemer & L.E. R. Co., 230 U.S. App. D.C. 316, 717 F.2d 593, 599 (D.C. Cir. 1983) (footnotes omitted), quoting *Cheyney State College Facility v. Hufstatler, 703 F.2d 732, 736 (3d Cir. 1983)*. Cf. *United States v. Western Pacific Railroad, 352 U.S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956)* ("No fixed formula exists for applying the doctrine of primary jurisdiction"). ***HN14***[] A district court's decision not to submit an issue for initial determination by the agency will be reversed only for an abuse of discretion. *Puerto Rico Maritime Shipping Authority v. Valley Freight Systems, Inc., 856 F.2d 546, 549 (3d Cir. 1988)*.

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[6] B&LE contends that the Supreme Court applied Keogh to bar suits by a competitor in *Georgia v. Pennsylvania Railroad Company, 324 U.S. 439, 89 L. Ed. 1051, 65 S. Ct. 716 (1945)*. In that case, the state of Georgia alleged that the defendant railroads had "fixed arbitrary and non-competitive rates and charges for transportation of freight by railroad to and from Georgia so as to prefer the ports of other states over the ports of Georgia." *Id. at 443*. Georgia sued both in its parens patriae capacity and as owner of a railroad and other public institutions. *Id. at 447*. Although Georgia's ownership of a railroad placed it in competition with the defendants, the court clearly focused on Georgia's parens patriae claim and treated the injury to the state as proprietor merely as "make weight." *Id. at 450*.

In dismissing Georgia's claims for antitrust damages, the Court held:

> We think it is clear from the Keogh case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. . . . The [Keogh] Court held . . . the legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added: "This stringent rule prevails, because otherwise the paramount purpose of Congress -- prevention of unjust discrimination -- might be defeated. If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." 260 U.S. p.163.

324 U.S. at 453.

Despite B&LE's diligence in presenting the pleadings in Georgia to support its cast of the case as one between competitors, it is obvious that in rendering its decision the Court's focus was on Georgia's claims as a customer. We, therefore, do not construe Georgia as Supreme Court precedent to apply Keogh to bar competitor suits.

In Pinney Dock, the Court of Appeals for the Sixth Circuit decided that whether the ICC-approved rate bureau agreement had been violated and thus whether section 5a immunity applied "should be addressed, at least first, to the wisdom and expertise of the ICC." *838 F.2d at 1459*. In the related criminal antitrust case, *United States v. Bessemer & L.E., 717 F.2d at 600*, in which B&LE pled **[**44]** nolo contendere and then appealed the sufficiency of the indictment, the Court of Appeals for the District of Columbia Circuit reached a different conclusion, holding that "the activities described in the indictment do not fit within the narrow 5a privilege." *717 F.2d at 600*. [7] We agree with the Court of Appeals for the District of Columbia Circuit that the conduct alleged and proven violated both the substantive and procedural requirements of section 5a. We therefore conclude that the district court exercised sound discretion in not referring the section 5a immunity issue to the ICC.

[45]** B&LE then argues that the jury instruction, particularly the district court's equation of the agreement not to establish line haul rates from non-railroad docks to an illegal refusal to deal - a rate-related activity subject to a section 5a immunity - manifestly prejudiced their case.

In the relevant portion of the charge concerning the refusal to deal, to which the defendant has lodged a specific objection, the district court instructed as follows:

> Now, I mentioned that we have various claims relating to the alleged agreement **[*1163]** not to establish line haul rates from non-railroad docks and not to allow the use of hopper cars by the steel companies in ways that would enable the trucking companies better to compete. A whole set of claims by various plaintiffs have to do with this allegation that the railroads refused to deal - that is to say, refused to enable the private docks to be established.
>
> I mentioned earlier that each railroad acting independently had a perfect right to decide whether to lease the property to another company or not, but that it would be a violation of the antitrust laws for them to get together and agree that none of them would lease land to a private dock **[**46]** that could be used for a private dock or that could accommodate self-unloader vessels or that could be used by trucking companies.

App. at 4996.

Reading, as we must, the jury instructions as a whole, we find that the district court competently charged the jury regarding the scope of immunity afforded concerted railroad activity under the Reed-Bullwinkle Act.

The district court did not, as B&LE contends, tell the jury that failure to establish line haul rates amounted to a boycott. Instead, the court recounted the plaintiffs' allegations that certain railroad activities were refusals to deal and informed the jury that it must decide whether or not the railroads did conspire to foreclose private dock competition. There is nothing erroneous about this charge. [8]

[47]** B. Standing

HN15[] In addressing the "standing" of parties to bring a claim under *§ 4* of the Clayton Act, the Supreme Court has focused on the nexus between the antitrust violation and the plaintiff's harm and on whether the harm alleged is

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[7] To reconcile its holding with that in the United States v. Bessemer & L.E. case, the court of appeals in Pinney Dock drew a distinction between the criminal enforcement role of the United States and the remedial nature of the ICC's jurisdiction. *Pinney Dock, 838 F.2d 1445 at 1460-61, n.15*. We, to the contrary, do not find these role classifications as indicative of whether the court properly exercised its discretion in retaining jurisdiction. The same conspiratorial conduct described in the criminal indictment is the subject of this civil antitrust suit.

[8] B &LE, citing, as authority, *49 U.S.C. § 10706(a)(3)(C)(ii)* of the Staggers Act, also challenges the issue's submission to the jury in the first instance. This issue has not been preserved for review, nor would it be of merit. The Staggers Act, enacted in 1980, has no application to this case.

of the type for which Congress provides a remedy. *Blue Shield of Virginia v. McCready, 457 U.S. 465, 478, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. [9]

[48]** In determining that the plaintiffs had standing here, the district court focused on *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, in which the Supreme Court held that *§ 4* does not generally permit indirect purchasers to sue on a "pass-on theory", that is, a theory that illegal overcharges have been passed on through a chain of distribution. Three important policies supported this holding: avoiding the risk of multiple liability for defendants, avoiding evidentiary complications in identifying affected parties and measuring their damages, and avoiding the difficulties of managing large and complex suits. *Id. at 741, 745*. [10] Later, in **[*1164]** Blue Shield of Virginia v. McCready, the Court discussed the range of *§ 4* plaintiffs, and while recognizing "a point beyond which the wrongdoer should not be held liable", *McCready, 457 U.S. at 477*, the Court also discouraged "engrafting artificial limitations on the *§ 4* remedy", *id. at 472*.

[49]** In *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* ("AGC"), the Supreme Court synthesized its prior decisions and outlined a multi-factor inquiry to determine standing questions. Although the development of the doctrine is important to understanding the concerns of the Court in granting or denying standing, it is the AGC analysis - the most recent, comprehensive and relevant statement by the Court - which will resolve the standing question here. We exercise plenary review over application of the legal principle of standing.

1. B&LE's Standing Arguments

B&LE challenges the standing of Republic, Wheeling-Pitt and J&L to claim "lake transport damages," that is, damages resulting from the steel companies' higher cost of shipping ore via vessel companies during the conspiracy-induced delay in introducing low-cost self-unloaders. [11] B&LE characterizes these payments of the steel

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[9] In *Alberta Gas Chemicals Ltd. v. E. I. DuPont deNemours & Co., 826 F.2d 1235 (3d Cir. 1987)*, cert. denied, ***486 U.S. 1059, 100 L. Ed. 2d 930, 108 S. Ct. 2830 (1988)***, we addressed whether antitrust injury and antitrust standing are distinct doctrines:

> It has been suggested that although standing is closely related to antitrust injury, the two concepts are distinct. ***HN16***[] Once antitrust injury has been demonstrated by a causal relationship between the harm and the challenged aspect of the alleged violation, standing analysis is employed to search for the most effective plaintiff from among those who have suffered loss. However, in the sense that plaintiffs who sustain no antitrust injury may not recover, they may be loosely said to lack standing. (Citations omitted.)

Id. at 1240.

[10] In Illinois Brick, a defendant manufacturer of bricks sold its product to masonry contractors, who provided the materials to building contractors. The contractor incorporated the bricks into buildings owned by the plaintiffs, numerous government entities. The plaintiffs claimed that they were injured by the prior purchasers' payment of excessive prices of the bricks charged by the manufacturer. The Court held that *§ 4* did not permit these indirect purchasers, with two narrow exceptions, to recover for the overcharge passed through the chain of distribution. The Court relied heavily on its earlier decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, that a seller who imposes an illegal overcharge on a direct purchaser cannot escape antitrust liability by arguing that the first purchaser passed on the illegal overcharge by increasing the prices it charged for the products when it sold them to the public. In Hanover Shoe, the Court rejected the pass-on theory for a seller and in Illinois Brick made the symmetrical decision, consistent with Hanover, to disallow an offensive use of the theory.

Although Illinois Brick is often cited as the standard bearer of antitrust standing cases, we note that the Court specifically stated that "we do not address the standing issue. . . ." *431 U.S. at 728 n.7*. Instead, the Court based its holding on the grounds of remoteness of injury and defined this consideration as analytically distinct from the issue of standing.

[11] National Steel Corporation, which owned and operated self-unloader vessels, offered substantial evidence that their intent and readiness to enter into the lake transportation business was frustrated by the conspiracy. National Steel actually purchased its own self-unloading vessel, the *Stinson*, in 1974. Because National Steel transported its own iron ore, rather than contracting

companies to the vessel companies as "inherently indirect" and argues that *Illinois Brick and Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979),* **[**50]** which hold that only those who suffer direct injury have standing to seek antitrust damages, prevent the steel companies from asserting a *§ 4* claim for lake transport damages.

B&LE also challenges the steel companies' standing to seek damages based on the difference between **[**51]** the dock handling rates that they actually paid to the railroad docks and Pinney Dock [12] and the rates that they would have paid in an open and competitive market. [13] B&LE contends that the amount of savings the docks would have passed on to the steel companies presents problems of double recovery and complex apportionment of damages condemned by the Supreme Court in Illinois Brick. [14]

[52]** The district court resolved the standing issue in its post-verdict opinion by concluding, with reference to the "indirect purchaser" rule of Illinois Brick, that the steel companies' de facto ownership of bulker vessels allowed the jury to conclude reasonably that, but for the conspiracy, the steel companies would have become similarly involved with self-unloaders. Ownership of the vessels, reasoned the court, translated to direct cost **[*1165]** reduction of the steel companies' cost related to the movement of ore.

Although de facto ownership of the vessels might well relieve that steel companies from dismissal under Illinois Brick, we conclude that the standing requirement is satisfied under a different rationale. [15] The Supreme Court's cumulative pronouncements concerning directness of injury in antitrust cases mandates a more complex and differently focused inquiry.

[53]** 2.Associated General Contractors, Inc. v. California State Counsel of Carpenters

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with outside vessel companies, it did not offer evidence concerning lake transport damages. Also, because it was a vessel owner, notions of indirect injury concerning dock handling charges do not apply to National Steel. Further, National's claim is not jeopardized by the threat of overlapping damages as no other plaintiff suffered this distinct type of injury.

[12] Although Pinney was a privately owned dock, the plaintiffs claimed that the rates charged by it were artificially inflated by the conspiracy. According to the plaintiffs, because Pinney was the only private game in town, it was not required to set its prices based upon competition from other privately owned docks.

[13] In addition to the three steel companies awarded lake transport damages, Sharon Steel and National Steel were awarded dock handling damages.

[14] Because the private dock companies themselves were direct competitors of the railroads and because they were injured by the conspiracy's goal to preclude them from market entry, no standing problem is posed by their quest for damages.

[15] The three companies averred in discovery that they were not in the business of purchasing, leasing, chartering, hiring or investing in vessels in the transshipment of bulk commodities over the Great Lakes. Indeed, the district court originally dismissed the self-unloader damage claims asserted by the steel companies, but gave the steel companies the opportunity to amend their complaints to allege the requisite ownership. To avoid a subsequent dismissal, the steel companies amended their complaint to allege that they had ownership interests in the vessels. However, the steel companies have not provided any record reference which points to an intent or preparation on their part to acquire self-unloaders. The only evidence of de facto ownership of the vessels that was offered was admitted during the damages phase of the trial. Nor were we directed towards evidence identifying the specifics of contractual relationships that would indicate ownership interests by means of either significant financing or other proprietary rights.

Moreover the jury was not required to find that the steel companies intended to acquire self-unloaders and were prevented by the conspiracy from doing so. The specific question submitted to the jury was whether the plaintiffs suffered antitrust injury from "foreclosure and delay in the utilization of self-unloading vessels for the delivery of iron ore." (Emphasis added.) True, the term "utilization" could be read to encompass an "ownership" determination, but, given the specific nature of the district court's reliance on the finding to confer entitlement to recovery, a definite statement by the jury that the lease and contracts conferred de facto ownership would be necessary. Given the evidence, we express concern that such a finding is supported.

In Associated General Contractors, Inc. v. California State Council of Carpenters ("AGC"), the Court reviewed concerns addressed in previous cases [16] **[**54]** and set forth an integrated *§ 4* "standing" analysis. In AGC, unions representing California construction workers sued an association of employers with whom the union had collective bargaining agreements. The complaint charged the association and its members with coercing some employers into doing business with non-union contractors and sub-contractors. In assessing the union's standing to sue, the Court did not distinguish between antitrust standing and antitrust injury. [17]

Instead, the Court provided a number of factors to consider in *§ 4* actions to determine if the plaintiff has suffered an injury which bears a causal relation to an alleged antitrust violation. These factors provided a theoretical framework for courts to utilize when **[**55]** presented with a standing challenge. ***HN17***[] They are: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of **[*1166]** damages. This fifth factor addresses the disfavor, expressed in Illinois Brick, of complex antitrust trials which not only "burden the courts, but also undermine the effectiveness of treble damages suits." AGC, 459 U.S. at 545, citing *Illinois Brick, 431 U.S. at 745*.

At least one commentator suggests that although deciphering a distinction between the two concepts is not obligatory, it is important to understand that even after the Court's consolidating opinion in AGC, antitrust **[**56]** injury is more than a component to be factored in a standing analysis, it must be present in every case. [18]

In a case decided shortly after the AGC decision, we characterized the Supreme Court's discourse:

> The Court's case-by-case approach reflects the fact that *§ 4* standing analysis is essentially a balancing test comprised of many constant and variable factors and there is no talismanic test capable of resolving all *§ 4* standing problems.

Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 965 (3d Cir. 1983), quoting *Bravman v. Bassett Furniture Industries, 552 F.2d 90, 99 (3d Cir.)*, cert. denied, *434 U.S. 823, 54 L. Ed. 2d 80, 98 S. Ct. 69 (1977)*. In Merican we indicated (albeit with citation to a different case) that the AGC factors should be weighed and balanced. The AGC opinion does not assign specific weight to its factors, **[**57]** individually, collectively or relatively. Nor for that matter does the decision explicitly instruct us to balance the factors, although implicit instruction is discernable from

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[16] See generally James R. McCall, The Disaggregation of the Damages Requirement in Private Monopolization Matters, *62 Notre Dame L. Rev. 643 (1987)* and Nat Stern and Kevin B. Getzendenner, Gauging the Impact of Associated General Contractors on Antitrust Standing under *Section 4* of the Clayton Act, 20 U.C. Davis L. Rev. 159 (1986), outlining the evolution of the antitrust standing doctrine.

[17]

> There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a blackletter rule that will dictate the result in every case. Instead, previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

459 U.S. at 535-37 (footnotes omitted).

[18] Julian D. Von Kalinowski, Antitrust Laws and Trade Regulation, § 11.04[1][c] n. 35 (1992).

the language - "other relevant factors . . . weigh heavily against judicial enforcement of the Union's antitrust claim." *459 U.S. at 545* (emphasis added). [19]

[58]** The plaintiffs in Merican were independent distributors who purchased Caterpillar-manufactured products from its authorized dealers for resale in the foreign market. The plaintiffs alleged that by imposing a service fee on its dealers for certain transactions, Caterpillar violated the Sherman Act. The service fee was characterized as a mechanism through which Caterpillar conspired with its authorized dealers to eliminate the plaintiff's position in the market place. While recognizing that the Supreme Court had recently enumerated the list of factors to be utilized in analyzing standing in *§ 4* cases in AGC, we decided the case solely on the operation of the Illinois Brick concern, i.e., that the potential for duplicative recovery and complex apportionment of damages meant that the plaintiffs were "not persons injured in their business or property by reason of violation of the antitrust laws within the meaning of *section 4*." *713 F.2d at 969*. See also *Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 932 (3d Cir. 1986)* (under Illinois Brick, threat of duplicative recovery and potential for complex **[**59]** theory of damages bars consumer price fixing claims against automobile manufacturer).

The facts of the present case, however, require, under AGC, a more complete analysis, **[*1167]** to which we now turn. [20]

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[19] Some elucidation concerning the balancing of factors was provided by the Court in its decision last term in *Holmes v. Securities Investor Protection Corp., 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*. In discussing the right to sue under the treble damages provision of the Racketeer Influenced and Corrupt Organization Act (borrowed from the Clayton Act), the Court stressed that although the AGC case did not identify directness of relationship between plaintiff and defendant as the "sole requisite of Clayton Act causation," *id. at 1318*, directness of injury was construed as the focal point by which the remainder of the AGC factors are guided:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributed to the violation as distinct from other independent factors. Second, quite apart from the facts of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts to obviate the risk of multiple recoveries. And finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general without any of the problems attendant upon suits by plaintiffs injured more remotely.

Id. (citations omitted).

[20] Before we undertake such an analysis, the most recent Supreme Court case discussing standing must be noted. This case is *Kansas v. Utilicorp United Inc., 497 U.S. 199, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990)*, where antitrust claims arose out of an alleged conspiracy to inflate natural gas prices. Defendants in this action were three companies and two limited partnerships that produced natural gas. Among the plaintiffs were three investor-owned public utilities that had purchased gas directly from the pipeline in the states of Kansas and Missouri, whose attorneys general asserted claims in parens patriae capacity on behalf of its residential customers who purchased gas from the utilities.

The gas producers in defense claimed that the public utilities, despite the fact that they were direct purchasers, lacked standing because they had raised their own prices to offset the illegal charge, and thus had not suffered any damage. The district court rejected this pass-on defense and, moreover, dismissed the states as parens patriae on the same theory. The court of appeals affirmed.

In a 5-4 decision, the Supreme Court rejected the States' argument that indirect purchaser standing should be allowed in cases involving a regulated activity that has passed on 100 percent of an overcharge to its customers. The Court opined that the mere fact that a price rise followed an unlawful cost increase was insufficient proof of antitrust injury. The indirect purchaser, stated the Court, would have to show that the utilities had not incurred any damage from the overcharge and would have to demonstrate that the utilities would not have raised prices had there not been an increase in fuel costs. The Court then took the opportunity to caution courts not to carve out exceptions to the general rules announced in its prior standing decisions:

> The rationales underlying Hanover Shoe and Illinois Brick will not apply with equal force in all cases. We nonetheless believe that ample jurisdiction exists for our stated decision 'not to carve out exceptions to the [direct purchaser] rule for

[60]** a. The Steel Companies' Lake Transport Charges

i. and ii. Directness of Injury and Causation

The lake transport injury asserted by the steel companies is that the payments made to the vessel companies to tranship their ore were inflated because B &LE illegally thwarted the development of self-unloaders.

To determine if lake freight savings are recoverable, our decision in *Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573 (3d Cir. 1979)*, is helpful. In that case, like this one, damages were predicated on amounts paid to a non-conspiring party. While recognizing that a non-conspiring competitor of a defendant supplier was included under the "umbrella" of those suffering economic impact from the defendants' conspiracy, we denied standing "in light of the tenuous line of causation between the defendants' price fixing and the prices paid by [the plaintiff]." *Id. at 583*. Standing was also denied because "the outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural." *Id. at 584.* **[**61]** [21]

Thus, Mid-West Paper instructs, consistent with AGC, that we inquire whether the injury resulting from payment of excessive lake transport charges is directly traceable to the railroad's anti-competitive behavior. This AGC causation focus is not an overruling of Illinois Brick - an AGC analysis **[**62]** incorporates the Illinois Brick principles of discouraging speculative and overly complex **[*1168]** claims. Thus, although we remain loyal to upholding the concerns voiced by the Supreme Court in Illinois Brick, echoed by our precedent in Mid-West Paper and Merican, the mere fact that monies paid to third parties (the vessel companies) represent a component by which the steel companies measure their damages does not foreclose further inquiry as to whether standing existed.

We agree with the district court and B&LE that the steel companies, in respect to lake transport damages, are, in some sense, "indirect" purchasers. Although B&LE suggests that indirect purchaser status is the death knell of plaintiffs' claim, this conclusion is not supported by the current law. We are, instead, instructed by AGC to ascertain the nature of the relationship between the parties. This directness factor thus sets the tone for our standing analysis.

The form of this conspiracy was market exclusion. B&LE concedes that an agreement existed among the railroads to take anticompetitive action to maintain its dominance in the ore transport market. Although this aim itself is not illegal, the nefarious **[**63]** means to achieve it were. By charging the same rate for unloading a self-unloader as for unloading a bulker, by refusing to approve commodity line haul rates from private docks which would have handled self-unloaders, and by concertedly refusing to make dock property available for use by private docks, the

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particular types of markets'. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.

497 U.S. at 216, quoting *Illinois Brick, 431 U.S. at 744*.

B&LE avers that this language in Utilicorp prohibits us from examining the facts of this case to determine if an exception lies under Illinois Brick. Utilicorp, however, does not rule because it concerned the pass-on theory of standing and whether the regulated consumer-energy market, or any other market involving a distribution chain that resembled a series of "cost-plus" contracts, would justify an exception to the unavailability of standing on the basis of the pass-on theory. The broader concerns of Illinois Brick and later cases are discussed infra.

[21] We do not, however, interpret this statement in Mid-West Paper or the "indirect purchaser" rule of Illinois Brick as announcing a strict prohibition against recovery by indirect purchasers. Despite the Court's remark in Utilicorp that permitting parties with indirect purchaser status to proceed with a *§ 4* claim would require it to "create an exception to the direct purchaser rule established in Hanover Shoe and Illinois Brick . . . ." *497 U.S. at 207*, we discount the import of this language because the Utilicorp decision was addressing the peculiarities of applying the pass-on theory of standing in the public utility arena. See n.9, supra.

railroads delayed the introduction of the more efficient self-unloader. This delay caused loss of the profits which would have been realized had the less costly transport system been in place.

The relevant question is whether B&LE's antitrust activity directly impacted the steel companies. Undeniably it did. The steel companies were the sole customers of the industry involved in the transhipment of ore; indeed, the industry existed for them. True, the steel companies made payments for ore movement services to various parties, defendants and non-defendants alike, but it was unquestionably the steel companies who bore the brunt of the increased costs attributed to the railroad's agreement to thwart development of the less expensive technology.

The direct nature of the injury absorbs the question of causal connection. There are no missing links in the causation chain here. **[**64]** The correlation between the steel companies' inability to utilize the lower cost method to carry its ore and the railroad's attempt to close the ore transport market is obvious. The goal of the railroads in preventing the self-unloader/private dock/private trucking company system from coming into existence left four victims in its wake, the three component industries, and the steel companies. However, the steel companies suffered the greatest harm in connection with the delay of the use of the self-unloader technology. This all-important, directness factor thus weighs greatly in the steel companies' favor.

iii. Goal of Antitrust Laws

We ask next whether the alleged injury was the type that Congress sought to redress in providing a private remedy for violations of the antitrust laws. AGC, 459 U.S. at 538, quoting *Blue Shield of Virginia, 457 U.S. at 483*. "The Sherman Act was enacted to assure customers [here, the steel companies] the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market. Id. (footnote omitted.) **[**65]** Thus, factor three clearly favors the steel company plaintiffs.

iv. Other Victims

As discussed, others suffering economic harm here included the vessel companies, the dock companies and the trucking companies. They, too, as competitors for the ore transport business, have suffered direct antitrust injury, yet the unique circumstances of this conspiracy compel us to classify their injuries as tangential to that of the steel companies. The economic health of the dock and trucking companies was, nonetheless, significantly compromised as part and parcel of the railroads' scheme to force the steel companies to remain loyal to a system where the railroads would reap the greatest profits. Therefore, other direct victims exist, but their presence does not diminish the directness of the steel **[*1169]** companies' injury. This factor, thus, weighs evenly.

v. Duplicative Recovery and Complex Apportionment

The concern for duplicate recovery and the potential for complex apportionment of damages are real. Nonetheless, the involvement of other parties and their resultant damages here are not the particular kind of double recovery Illinois Brick sought to prevent. In Illinois Brick the **[**66]** concern was that overlapping parties would compete for the same pool of illegal profits garnered from the antitrust activity. This type of duplication would be implicated here if B &LE's illegal activity were subject to suit by a "downstream" industry alleging, as was alleged in Illinois Brick, that the steel companies had passed on the transportation increase in the price of steel. Here, different parties allege different injuries - the steel companies' claim is for the savings which would be realized if the less expensive method of transport was in place, while the vessel and dock companies' claim focuses on lost profits.

The distinctive labelling of the claims does not solve the problem of overlap when the steel companies' claim of damages is called to proof. The steel companies would have to demonstrate meticulously that none of its lost savings includes any amounts which the vessel companies might potentially claim as lost profits. [22]

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[22] An illustration of why the steel companies' damages would not necessarily duplicate the damages of the vessel and docking companies can be made by hypothesizing that the steel companies paid $ 10 in transport and docking charges for a ton of ore under the old system; with self-unloading bulkers they would pay $ 7 for transport and docking the same amount of ore. The

Nevertheless, while complex apportionment problems are implicated here, we do not hold that litigation must be avoided solely because it might be difficult to ascertain damages. Injured parties cannot be penalized and left without recourse because **[**67]** measurement of their damages is difficult. In this vein, it is important to focus on the word "potential." We are either gifted or vexed by hindsight in this matter, but standing is a threshold determination. It decides if the plaintiffs have alleged a cause of action and have requested the recovery of damages that are cognizable under the law. The damage theories here should not be deemed complex simply because that is the way in which they were ultimately presented. Reliability is instead an evidentiary question properly decided under evidentiary standards - are the figures economically reliable? Was the expert witness credible? At the standing stage we look to the initial allegation of damages, and, at that point, the steel companies' damages did not appear incapable of accurate calculation.

The facts as found by the jury were that self-unloaders were generally less expensive to utilize. The steel companies' damages were measured as the difference between the amounts they actually paid to transport their ore and the lower prices they would have paid had the conspiracy not excluded a lower cost system. Although, as in antitrust matters involving traditionally defined direct purchasers, **[**68]** other pricing considerations no doubt would factor, that the operating costs would be reduced overall does not require undue speculation. While we recognize that the potential for overlap existed, we are not convinced that it should prevent the matter from proceeding. Thus, although this factor weighs against the steel companies, we do not find it a reason, standing alone, sufficiently compelling to support a standing challenge. A balancing of the AGC factors, thus, weighs in favor of the steel companies' standing; the lake transport damages are recoverable.

b. The Steel Companies Dock Handling Damages

B&LE contends that the steel companies' dock damages are also barred by Mid-West Paper, because these damages resulted from amounts paid to non-conspiring competitors of the defendant. In Midwest Paper we dismissed antitrust damage claims **[*1170]** of indirect purchasers of defendant's consumer bags under Illinois Brick. We held that direct purchasers from defendants' competitors lacked standing to sue on the grounds that the competitors' prices would have been lower but for the defendants' illegal price fixing. We concluded that this claim was highly speculative, and **[**69]** that any "attempt to determine the effect of the defendants' overcharges upon their competitors' prices would transform this antitrust litigation into the sort of complex economic proceeding that Illinois Brick Court was desirous to avoid if at all possible." *Id. at 585* (footnote omitted). B&LE characterizes the steel companies' request for dock damages as an attempt to recover the difference between the prices set and actually paid by the steel companies to the railroad docks and prices they would have paid private docks if their services had been available. Thus, B&LE argues, the claim is dependent upon prices paid to parties other than the defendants and Midwest Paper bars recovery.

The defect in this argument is apparent. The steel companies directly purchased from, and paid monies to, the railroads for dock services. Thus, the amounts contested as being paid to third parties reflect only the second part of the damage equation. To refute the directness factor, the railroads break down the component costs of the dock handling charge and argue that because a portion of the charge was actually paid by the vessel companies to the railroad, here too, the steel companies **[**70]** are indirect purchasers.

We disagree. The dominant relationship in the context of the steel companies purchasing dock services from B&LE is one of customer-provider. The specter of indirectness does not haunt us here and a full AGC analysis is not mandated. The presence of the dock companies as another direct victim does not dilute the causal connection between the inflated dock handling charges paid by the steel companies and the railroads' conspiracy. The jury awarded dock damages for the steel companies' inability to utilize the private docks to handle iron ore. Thus, the damages arose from the conspiracy's effective attempt to eliminate competition from private docks, not from the charges which might have been paid to those private docks.

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steel company damages would then be $ 3, the difference between $ 10 and $ 7. The vessel and docking companies' lost profits would, however, have been incorporated in the $ 7 and thus would not be duplicative.

We have already determined that the potential for complex apportionment is not a sufficient reason to deny standing. Therefore, the AGC factors likewise support and uphold standing of the steel companies to claim dock handling damages.

c. The Trucking Companies

In Pre-Trial Order 49 filed in this matter, the district court dismissed all trucking company claims "relating to the alleged suppression of self-unloader technology, denial **[**71]** of line haul rates, and suppression of (refusal to sell to) private docks." App. at 1429. Nonetheless, at the conclusion of the liability phase of the trial, the jury, in response to the special verdict questionnaire found that C. D. Ambrosia Trucking Company was injured by "acts to prevent or delay iron ore handling by private docks", App. at 1898, and that Tauro Brothers Trucking Company was injured by "foreclosure and/or delay in the utilization of self-unloader vessels" and the "inability of steel mills to fully use private docks." App. at 1899. The jury rejected other related claims of Ambrosia and Tauro. In response to the post-trial standing challenge levied against the trucking companies, in its judgment n.o.v. opinion the district court summarily stated that the rule of Illinois Brick did not arise in connection with the trucking companies' claims for damages.

In its main argument, B&LE does not urge that the jury instruction was faulty; rather, it argues that, under AGC, the trucking companies' injuries were too remote to confer standing to bring these claims. [23] B&LE also asserts, under the authority of *Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986),* **[**72]** that the trucking companies' **[*1171]** *§ 4* claims are barred because these companies were the benefactors of the excessive handling charges assessed by the railroads. By B&LE's logic, its refusal to provide lower line haul rates from private docks opens the door for the trucking companies to step in and offer their allegedly lower cost service.

The evidence, typified by the following excerpts from railroad communiques, shows that a primary goal of the railroad conspiracy was to prevent or delay the trucking of ore from non-railroad facilities: "We have strongly resisted for years all proposals to sell or lease Erie **[**73]** ore dock as a bulk materials handling facility which would be open to trucking . . ." (App. at 7952); providing line haul rates to a non-railroad dock "might influence a movement by truck" (App. at 6626); "There is one thing about rates from a private facility which has always bothered me, and that is the possibility of trucking ore and pellets to a steel plant" (App. at 7026); and, "If you lease ground to Litton, trucks could break the rail rate on iron ore - particularly on short haul moves" (App. at 7458). The actions taken by B&LE and the other railroads thus were clearly intended to inhibit the trucking companies' entry into the business of land transportation of ore. There is thus a direct relationship between the defendants' antitrust activity and the trucking companies' injuries.

This type of injury, a restraint upon market entry, is precisely the type of injury that the antitrust laws were designed to prevent. There is no question of overlap here because no other plaintiff could seek the lost profits that the trucking companies request.

While the concern for speculation regarding the measurement of damages is present, the nature of the speculation chiefly concerns when, **[**74]** absent the conspiracy, the steel companies would have adopted the self-unloader/private dock/trucking company system. It is the railroads who took measures to impede the development of the technology and who thus are responsible for any uncertainty concerning when market entry would have been accomplished. The AGC factors, thus, weigh in favor of granting the trucking companies standing to assert a claim for *§ 4* damages.

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[23] In its reply brief, B &LE also contends that it was unfairly prejudiced by what it refers to as the trial court's "subsequential overruling of PTO 49" in its judgment n.o.v. opinion. It does not, however, detail the form of the prejudice such as an allegation that it would have presented its evidence in a different manner or objected to testimony offered by the trucking companies regarding the fact of damage.

We, therefore, conclude that all plaintiffs, directly injured by B&LE's conspiratorial activity with the other railroads, have standing to assert § 4 claims for damages.

C. Limitation of Actions

B&LE claims that the federal actions filed against it are time-barred by the four-year Sherman Act statute of limitations. The Ohio actions suffer the same fate, according to B&LE, by application of the doctrine of laches. These issues present mixed questions of law and fact which implicate our plenary review of the questions of law and the clearly erroneous standard to the district court's factual findings.

1. Federal Law

Pointing out that the conspiracy began in the 1950's and that some plaintiffs had knowledge of the conspiracy as early as 1972, B&LE argues **[**75]** that those plaintiffs' claims were barred by the 4-year statute of limitations. [24] B&LE also argues that the statute of limitations permits recovery only of damages resulting from "injury-causing overt acts" that occurred within the limitations period; therefore, it would follow that the district court misapplied the statute of limitations by not requiring the jury to link damages to specific overt acts.

The Supreme Court has considered and rejected the argument that, in the context of a defendant's continuing violation of the Sherman Act, the statute of limitations runs from the violation's earliest impact on a plaintiff. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 502, n.15, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*. In Hanover Shoe, the defendant had initiated an illegal policy in 1912, some forty-three years before **[**76]** the plaintiff sued in 1955. The Court allowed damages within the limitations period, opining:

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we **[*1172]** are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm . . . . Although [the plaintiff] could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

Id. (citation omitted). To the extent that the steel companies' continued shipment of ore on Lower Lake Erie resembles the continued rents paid to the defendants in Hanover Shoe, the cases are indistinguishable.

The main thrust of B&LE's limitations argument has not been to distinguish Hanover Shoe, to which it refers briefly only in its reply brief. Rather, B&LE first argues that another Supreme Court decision, *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338-42, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*, applies. B&LE contends that Zenith generally requires proof that a newly accruing claim be based on an injurious act within the limitations period, then **[**77]** further argues that Zenith allows recovery of only those damages attributable to overt acts occurring within the limitations period. In Zenith, the Court articulated an exception to the general rule that a cause of action accrues each time an act causes an injury. The exception in Zenith was for damages that would be speculative at the time the injury-causing act was committed. Id.

We have held that ***HN18***[] an injurious act within the limitations period may serve as a basis for an antitrust suit. *Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 139 & n.45 (3d Cir. 1978)*. In the present matter, the plaintiffs have met their burden of showing that the conspiracy continued into the limitations period. For example, rebuffed efforts to lease dock property from the railroads extended into 1978. Also in that year, the refusal to grant commodity line haul rates from non-railroad docks was still at issue. Coercion to prevent independent action continued into the limitations period. Finally, post-October 1977, dock handling rates charged to discharge ore from self-unloaders remained artificially inflated. The existence of the continued conspiracy **[**78]** thus undermines B&LE's argument that damages within the limitations period were caused "solely from acts committed by the defendant outside the four-year [limitations] period."

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[24] B&LE's argument and this discussion do not apply to the trucking company plaintiffs and Reaney, who had no knowledge of the conspiracy until events within the limitations period.

B&LE's further argument - that Zenith and its progeny limit recovery to damages resulting "from injury-causing overt acts" - has no merit because it fails to recognize, in circumstances such as here, that continuing and accumulating damage may result from intentional, concerted inaction. The purposeful nature of the inaction - here an ongoing refusal to sell or lease - obviously constitutes an injurious act, although perhaps not an overt one in the commonly-understood sense.

B&LE's argument results from an overreading in which B&LE directs a myopic gaze at a general rule not at issue in Zenith:

> ***HN19***[] In the context of a continuing conspiracy to violate the antitrust laws . . ., each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages caused by that act, and . . . as to those damages, the statute of limitations runs from the commission of the act.

Zenith, 401 U.S. at 338. B &LE focuses tightly on the words **[**79]** "injured by an act . . . caused by that act" to propose a narrow rule that a plaintiff must tie all damages to specific overt acts within the limitations period.

B&LE's argument obfuscates the difference between, on the one hand, an "overt act" necessary to show the existence of a conspiracy, and, on the other hand, an "injurious act" causing damages within the limitations period. This argument fails to recognize that certain conspiracies, such as boycotts, operate through inaction. As the district court observed in this case, "overt acts aren't what cause damage. It is the effectiveness of the overall conspiracy that causes damages." App. at 2376. [25]

[80]** **[*1173]** Indeed, in *Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 (5th Cir. 1975)*, from which B&LE quotes out of context to support its proposed "injury causing overt act" rule, the Court of Appeals for the Fifth Circuit recognized that a conspiracy's refusal to deal, which began outside the limitations period, "may be viewed as a continuing series of acts upon which successive causes of action may accrue." *Id. at 125*. Far from requiring that the plaintiff tie its damages to specific acts, the court acknowledged that a continuing conspiracy may give rise to "continually accruing rights of action," and the court simply required the plaintiff to support its allegation that the defendant had "continued during the period in suit to refuse to deal." *Id. at 128*. [26]

[81]** Here, with respect to the statute of limitations, the district court instructed the jury during the liability phase of the trial that "the plaintiffs would have to establish that the conspiracy was still in effect after October 1977, and that at least one of the conspirators took some overt action in furtherance of the conspiracy after October 13, 1977, and that the particular plaintiff whose case you are considering was damaged after October 13, 1977." App. at 4999. While the interrogatories did not require the jury to link the overt act and injury-producing act, as a whole, the requisite findings to defeat a statute of limitations defense were present. Via separate questions, the compilation of the jury's verdicts was that B&LE committed Sherman Act violations within the limitations period which caused

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[25] Although B&LE has couched its challenge in terms of the limitations period and we therefore discuss the challenge in that context, we note that, at root, B&LE is arguing about proximate cause and attempting to limit its liability by seeking to narrow the scope of causes from the conspiracy itself (within the limitations period) to particular "overt acts" (within the limitations period). This argument formulation accounts for the district court's "cause and effect" description. We are in agreement with this observation by the district court.

[26] Our decision in *Pennsylvania Dental Asso. v. Medical Service Asso., 815 F.2d 270 (3d Cir.)*, cert. denied, *484 U.S. 851, 98 L. Ed. 2d 109, 108 S. Ct. 153 (1987)*, upon which B &LE in part relies, is not to the contrary. Pennsylvania Dental was concerned with the resolutions of various dental associations not to deal with Blue Cross and with the concomitant withdrawal from Blue Cross participation by numerous dentists. Most of the resolutions and withdrawals had taken place outside the limitations periods, but as none of the resolutions had been rescinded and there was evidence of overt acts -- within the limitations period -- in furtherance of the conspiracy, we held that the plaintiff's claim for injunctive relief, if subject to the limitations period at all, was not time barred. *Id. at 278*. Furthermore, citing Hanover Shoe, we opined that "damages caused by any overt act taking place from [the beginning of the limitations period] may also be recovered." Id. Although the clause, read narrowly, appears to support B&LE's proposed rule that damages must be tied to particular overt acts, it is clear from the context of the opinion that the conspiracy as a whole caused damages. The opinion, read in proper context, thus reiterates the rule that damages caused by injurious activity (such as an conspiracy active within the limitations period) could be recoverable.

injury to most of the plaintiffs. These responses, together with the district court's emphasis on causation in its charge to the jury, see App. at 4784-89, were sufficient to inform the jury that damages must have been caused within the limitations period by an active, injurious conspiracy. As the statute of limitations did not provide a basis to grant B&LE's motion for judgment **[**82]** n.o.v., the district court properly denied the motion. [27]

2. State Law - Laches

The state antitrust claims asserted are governed by the Ohio Valentine Act. ***HN20***[] The Act expressly provides that "no statute of limitations shall prevent or be a bar to any suit or proceeding for any violation of [this Act]." *Ohio Rev. Code Ann. § 1331.12* (Anderson 1979 and Supp. 1990). B &LE contends that the steel companies' and Erie's Ohio Valentine Act claims are nonetheless **[**83]** time-barred by the doctrine of laches.

The district court rejected B&LE's laches contention for three reasons. First, the court held that laches is an equitable defense that had no application under Ohio law to actions at law for damages. Second, the district court held that the liability jury's finding that the defendant railroads took affirmative **[*1174]** acts to conceal the conspiracy or conceal any act in furtherance of the conspiracy, precluded the application of laches. Finally, the district court found that B&LE had not demonstrated any significant prejudice attributable to the delay.

We need not determine whether the law of Ohio permits assertion of a laches defense to antitrust suits [28] or whether the fraudulent concealment claims of the steel companies and Erie should have been submitted to the jury. ***HN21***[] "'Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim.'" *Emrick v. Multicon Builders, Inc., 57 Ohio St. 3d 107, 566 N.E.2d 1189, 1194 (Ohio 1991),* **[**84]** quoting *Smith v. Smith, 168 Ohio St. 447, 156 N.E.2d 113, 119-20 (Ohio 1954)*.

[85]** The district court found that B&LE had not shown any significant prejudice attributable to the delay. Unless clearly erroneous, we will not disturb that finding. B&LE contends that it was prejudiced by the death of many critical witnesses and the loss of numerous documents; B&LE, however, details neither the substance of these witnesses' testimony nor the content of lost documents and what they would have revealed concerning its defense against the conspiracy. Given the number of witnesses and documents which were admitted in evidence, it is difficult to see how B&LE was prejudiced by the lack of either of those two components of evidence. We therefore conclude that laches is not a bar to the Valentine Act claims.

Since the plaintiffs have survived the threshold challenges to the legality of the lawsuit, we now address the issues raised concerning the evidence presented at trial and the amount of damages awarded.

D. Sufficiency of Evidence

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[27] Moreover, the district court alternatively found, on sufficient evidence, that damages were not ascertainable until within the limitations period. This would suffice to bring them within the Zenith exception for speculative damages. See *Zenith, 401 U.S. at 338-42*. Because we have concluded that an active, injury-causing conspiracy suffices to bring the cause of action, we need not address B&LE's disputations regarding Zenith's exception to the rule that an action for damages occurs at the time of an injurious act.

[28] It is not clear from the caselaw that laches, an equitable defense, applies only to defenses at equity. See *Smith v. Smith, 168 Ohio St. 447, 156 N.E.2d 113, 120 (Ohio 1954)* (recognizing equitable nature of laches doctrine, but noting its applicability in certain statutory actions). See also *Thirty-Four Corp. v. Sixty-Seven Corp., 15 Ohio St. 3d 350, 474 N.E.2d 295, 298 (Ohio 1984)* (court referred to mortgage foreclosure action as "lawsuit" and considered whether laches applied). ***HN22***[] It is also the law in Ohio that assertion of the defense and its applicability is one which should be presented to the jury. See, *Ferree v. Sparks, 77 Ohio App. 3d 185, 601 N.E.2d 568, 570 (Ohio App.3d 1991)* (evaluation of evidence concerning application of laches is for trier of fact). The jury's findings here concerning fraudulent concealment are not conclusive as to the steel companies, and, as to Erie, are not applicable since the jury found that the Erie plaintiffs had actual knowledge of the conspiracy prior to October 14, 1977.

In support of its argument that the plaintiffs failed to prove the necessary elements to establish both the fact of antitrust injury and the amount of damages, B &LE submits three reasons for reversal: (1) that unrelated economic factors **[**86]** impacted upon the steel companies' decisions to delay investment in self-unloaders; (2) even if injury was demonstrated, the jury was not instructed nor could it discern from the special verdict questions that a causal connection must be established between the alleged violations and the amount of damages awarded; and (3) the damage models upon which the awards were predicated were either speculative or unrealistic.

1. The Liability Verdict

While B&LE advances thought-provoking factual assertions that economic causes other than those connected to illegal antitrust activity made the use of self-unloaders financially unappealing, we are not free to revisit the factual issues other than to determine whether the evidence supports the jury's verdict.

The district court evaluated the sufficiency question as follows:

> Throughout both phases of the trial, the defendant vehemently argued, and sought to prove, that any damages actually sustained by the plaintiffs were attributable to economic factors other than the alleged conspiracy; that the economic studies upon which plaintiffs' damage claims were predicated were unreliable and erroneous; and that the damages claimed were either **[**87]** speculative, grossly exaggerated or non-existent. **[*1175]** It is certainly true, in my view at least, that the evidence of damages did not so heavily preponderate in favor of the plaintiffs as to render the jury's verdict a foregone conclusion. The evidence as a whole did not suffice to remove all reasonable questions concerning the timing and profitability of the charges in ore transport the defendants' conspiracy allegedly delayed.
>
> But these are all factual issues and were properly submitted to the jury. Viewing the record in the light favorable to the verdict, there can be no doubt that the evidence sufficed, in all respects, to support the jury's determinations.

App. at 2129.

Relying on our similarly circumscribed review and the deference owing to the trial judge presiding over this lengthy and complex matter, we agree that the evidence sufficed to establish liability. We have discussed, in the context of other issues presented here, the persuasive evidence against B&LE documenting anticompetitive behavior violative of the antitrust laws. The presence of contrary evidence does not eradicate the probative worth of the plaintiff's case. The jury heard all the evidence and rendered a **[**88]** verdict, in most part, favorable to the plaintiffs. ***HN23***[] Unless the evidence is critically deficient as to the prevailing party's side so that no reasonable jury could grant it relief, we will affirm the district court's denial of the motion. *Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958, 961-62 (3d Cir. 1988)*.

Our review of the record more than satisfies us that the jury's verdicts for the plaintiffs were bolstered by sufficient evidence. Documents from the railroads' files establish their agreement to prevent the steel companies from utilizing the self-unloader transportation alternative. Specifically, memos and letters chronicled cancellation of railroad services from non-railroad docks, denial of competitive rates for inland rail transport from private docks, and refusal to sell or lease dock properties - all aimed toward precluding entry of the plaintiffs into the ore transport business. Also documented were the railroads' refusal to accept self-unloaders at their docks and their assessment of the same rates for bulkers and self-unloaders, regardless of the difference in services performed.

At trial, steel company officials testified concerning **[**89]** their interest in investing in the more cost-effective self-unloaders but that they were discouraged from doing so by the railroads' refusal to alter their rates to make the system economical. In addition, expert economic testimony offered by the plaintiffs concluded that the railroad conspiracy, delaying the utilization of the self-unloader/private dock system, caused the steel companies to pay more to transport iron ore to its facilities.

Accordingly, as to the claim of insufficiency of the evidence, the district court did not err in refusing to grant B&LE's motion for judgment n.o.v.

2. The Antitrust Claims of the Erie Plaintiffs

B&LE contends that the Erie plaintiffs' damages, traceable to an alleged refusal by Penn Central to sell dock property to Erie, were caused by Erie's own financial disability and not by railroad misconduct. Once again, this is a point argued during trial which the jury heard and disregarded.

We have reviewed the record and find that the quantum of evidence needed to uphold this award is present. A former member of the Erie Port Commission testified that the sale of the dock property was unacceptable to it because it included a restriction on the **[**90]** handling of iron ore. When Penn Central offered to remove the restrictions in exchange for an approximately 40 percent increase in the selling price, the Commission deemed the sale uneconomical. In contrast, the documentary evidence which B&LE asserted demonstrated that the sale failed because of a funding shortfall was, at best, equivocal. The damages award granted on this basis will not be disturbed.

3. The Jury Instructions and Special Verdict Questions

B&LE asserts that only a retrial can cure the prejudicial windfall to the plaintiffs resulting from the district court's failure to provide the jury with proper guidance. According **[*1176]** to B&LE, the jury was never told to limit the plaintiffs' monetary recovery to amounts directly related to the defendants' illegal activity.

B&LE is correct when it asserts that ***HN24***[] one pursuing antitrust recovery must establish that the damages suffered were caused by the defendant's participation in a scheme repugnant to the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Once causation is determined, however, the actual amount of damages may result from a "reasonable estimate, as long **[**91]** as the jury verdict is not the product of speculation or guess work." *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983)*, citing *J. Truett Payne, Inc. v. Chrysler Motors Corp., 451 U.S. 557, 566-67, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. The Supreme Court, in its decisions of *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)* and *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*, did not impose stringent proof requirements regarding the damages alleged in the injury-causing acts. It was emphasized, however, in *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*, that antitrust recovery can constitute compensation for only those damages directly caused by unlawful competition. The relaxed measure of proof is afforded to the amount, not the causation of loss - ***HN25***[] the nexus between the defendant's illegal activity and the injuries suffered must be reasonably proven. **[**92]** *MCI Communications, 708 F.2d at 1081*.

We overturned a jury verdict when review of the evidence showed that a damage award was partially based on legally-permitted competition by the defendant, *Coleman Motor Co. v. Chrysler Motors Corp., 525 F.2d 1338 (3d Cir. 1975)*, but similar considerations are not operable here. The damages awarded here were not attributable, in any extent, to lawful railroad activity. Rather, B&LE asserts that outside economic factors, totally unrelated to its industry, made investment in self-unloader technology unattractive. And, forming the focus of B&LE's challenge, the jury instruction and special interrogatories were inadequate to convey to the jury the importance of the link of causation to damages. [29]

[29] B&LE contends that the district court erred as a matter of law in not instructing the jury on the fact and import of market power. The primary ground for this assertion is that the plaintiffs claimed and recovered damages for ore moved outside the lower Lake Erie region, on Lake Michigan and Lake Detroit.

We note that B&LE stipulated to the tonnages of ore involved in the conspiracy. During the damages charge, the district court informed the jury that "everyone agrees on the total amount of pelletized ore that was transported during the relevant time." App. at 6338. Because B&LE agreed to the specific tonnages involved in the conspiracy, it cannot now come forward and dispute the amount as improperly including tonnages which were moved beyond the geographic range of the conspiracy.

[93]** To the contrary, the instruction to the damages jury explained the proper focus of the jury's deliberation - how damages were to be calculated, how to evaluate the evidence and the ways in which the parties disagreed on the method of calculation of damages.

> What is required, and the burden is upon the plaintiff, is to provide you with a reasonable estimate of their damages, what your regard as a reasonably reliable estimate. You are not permitted to simply guess or speculate or pull figures out of the air. You have to have a rationale, reasonable basis for supposing the damages' figure that you come up with is a reasonable estimate, a fair estimate of the probable loss sustained by the plaintiffs. To the extent that you find that any money was lost because of general conditions in the steel industry not attributable to this conspiracy and so forth, you should, of course, not include any such sums in your calculation of damages . . . there should not be any overlapping or duplication of damages.

App. at 6377.

The jurors could deduce from the charge that they were to divorce from their deliberations any non-conspiratorial activity. Because **[*1177]** the language conveyed this clearly, **[**94]** the challenge to the instruction fails.

Concerning the specificity of the interrogatories, we must determine whether the district court abused its discretion in their formulation. *McNally v. National Ins. Co., 815 F.2d 254 (3d Cir. 1987)*. ***HN26***[] The interrogatories are adequate if they will determine the facts essential to the judgment. *Kornicki v. Calmar S.S. Corp., 460 F.2d 1134, 1139 (3d Cir. 1972)*.

Our review shows that the questions sent to the jury here met that criteria. There was no abuse of discretion calling for a new trial.

4. The Damage Models

B&LE next points to the models designed by the plaintiffs to assess damage and characterizes them as overspeculative and in conflict with the economic realities of the time. As with its sufficiency of evidence causation claim, B&LE was given the opportunity to confront the plaintiff's evidence, aggressively seized upon the opportunity to do so and presented its own version of the extent of damages to the jury.

Our review of the record convinces us that the jury's verdict in the plaintiffs' favor is fully supported. The district court did not err in refusing to award **[**95]** a new trial on the damages issue.

E. Post-Judgment Interest

The last issue we address on B &LE's appeal is the date from which post-judgment interest should be calculated. *28 U.S.C. § 1961*, the governing statute, reads in relevant part:

> *§ 1961*. Interest
>
> ***HN27***[] (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of judgment . . . .

With the statute in mind, we examine, under plenary review, the order of events here.

On April 19, 1989, the district court, in Pre-Trial Order No. 49, determined that "all claims against the defendant Penn Central Corporation are dismissed." App. at 1430. On July 18, 1989, the damages jury returned its verdict against B&LE in favor of the plaintiffs. On July 20, 1989, the court ordered judgment on the jury's verdict.

On August 2, 1989, B&LE moved for judgment n.o.v. and on February 27, 1991, the district court issued its opinion and orders on post-trial motions.

On March 5, 1991, B&LE filed a supplemental motion to correct the final judgment to substitute July 19, 1989 for July 18, 1989 as the date **[**96]** of final judgment and the date from which interest accrues. The court responded to the motion and amended its order to reflect that interest on the judgment runs from July 19, rather than July 18, 1989.

On March 28, 1991, B&LE filed its notices of appeal. Amended notices of appeal were filed on March 29, 1991. Then, on June 17, 1991, the district court re-entered judgment in favor of the appellees/cross-appellants against B&LE in accordance with its order on post-trial motions. At this time, the court also entered judgment in favor of the defendant Penn Central Corporation.

In response, on July 15, 1991, B&LE filed a supplemental motion to amend the judgment, contending that post-judgment interest should not run from July 19, 1989 as previously requested but rather from June 17, 1991, when the trial court for the first time entered the final judgment in this complex matter - the order in favor of Penn Central against plaintiffs. App. at 2205.

We conclude that July 19, 1989 - the date upon which judgment was entered in favor of the plaintiffs and against B&LE - is the appropriate date from which post-judgment interest should run. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990),* **[**97]** the Supreme Court identified the purpose of post-judgment interest as the successful plaintiff's compensation for the loss between determination of damages and payment by the defendant. *Id. at 835-36*; *28 U.S.C. § 1961*. The statute does not, by its terms, mandate that the judgment from which interest is calculated must be a final judgment. Our view is consistent **[*1178]** with the statute's philosophy of providing compensation from a point at which the loss-causing defendant's liability is entered on record.

Here, judgment against the loss-causing defendant, B&LE, was entered on July 19, 1989. The subsequent "housekeeping" entry, dismissing finally the plaintiffs' claims against Penn Central, was completely divorced from a determination of the prevailing plaintiffs' loss. While concerns of finality and appealability might be implicated by the eventual entry of judgment against Penn Central, the statute's purpose in awarding post-judgment interest was satisfied when judgment was entered against B&LE in July of 1989.

We turn now to the issues raised in the cross-appeals.

III. The Cross-Appeals

A. Fraudulent Concealment **[**98]** - The Steel Companies

To surmount the four year statute of limitations hurdle which would preclude recovery for pre-October 1977 damages, the steel companies claimed that the statute was tolled because the railroads fraudulently concealed the conspiracy.

In Pretrial Order 49, the district court granted summary judgment for B&LE on the steel companies' fraudulent concealment assertion. The court ruled:

> The steel company plaintiffs are precluded from recovering damages sustained more than four years before the respective complaints in this action were filed. Not only did they plainly have knowledge of facts which should have reasonably made them aware of a basis for asserting the very claims now being asserted, but it is also clear that they were specifically being urged to support an antitrust suit by Pinney Dock -- at least as early as 1972, and more than four years before the criminal indictment.

App. at 1427-28.

At a subsequent pretrial argument, the steel companies challenged the entry of summary judgment referring, as one basis, to the statement of the court regarding Pinney's request to the steel companies to support Pinney's antitrust cause of action. The steel companies **[**99]** disputed first, that Pinney was soliciting support for an antitrust lawsuit and, second, that each steel company was an individual recipient of Pinney's petition for participation. The court replied:

> Well there was a slight misunderstatement [sic] I agree. They were asked to support an application to the ICC. And certainly from the standpoint of Pinney it was also Pinney's knowledge that it was considering an antitrust action, and this would be the first step before it.
>
> I agree there is nothing in some instances at least to suggest that they were requested to support an antitrust action.

> The important thing is, however, that they were certainly aware of what the railroads' policies had been.

App. at 2321 (emphasis added). The court did not substantively respond to the challenge to the lack of evidence that some steel companies (National, Republic and Sharon), were even approached by Pinney.

On review, we apply the same test that district courts employ in summary judgment matters. ***HN28***[] The facts must be viewed favorably to the non-movant, B&LE. If there is no disputed question of material fact, and B&LE is entitled to judgment as a matter of law, then summary judgment **[**100]** will be affirmed.

The steel companies contend that because twenty-eight of its officials testified at trial that they had neither knowledge nor suspicion of the conspiracy, the question of fraudulent concealment was not factually foreclosed and should have been submitted to the jury.

We have not specifically elucidated the standards for pleading fraudulent concealment in the antitrust context. However, in a case decided under Pennsylvania law, *Bohus v. Beloff, 950 F.2d 919 (3d Cir. 1991)*, we identified the ***HN29***[] three factors necessary to forestall the running of the limitations statute by way of a fraudulent concealment allegation: (1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiff's **[*1179]** inquiry, who (3) exercised due diligence in investigating his cause of action. *Id. at 925-26*.

The Court of Appeals for the Sixth Circuit directly addressed the issue of the tolling of antitrust claims by fraudulent concealment in *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975)*. Holding that ***HN30***[] the exercise of due diligence is required in antitrust cases to **[**101]** employ the fraudulent concealment doctrine to avoid bar of the statute of limitations, the court referred to the requirement for the defense set out by the Supreme Court many years ago in *Wood v. Carpenter, 101 U.S. 135, 25 L. Ed. 807 (1879)*:

> Any fact that should excite his suspicion is the same as actual knowledge of his entire claim. Indeed, the means of knowledge are the same thing in effect as knowledge itself. *101 U.S. at 143*. ***HN31***[] If the plaintiff has delayed beyond the limitations period, he must fully plead the facts and circumstances surrounding his belated discovery and the delay which has occurred and must be shown to be consistent with requisite diligence.

523 F.2d at 394.

The Sixth Circuit revisited the issue of fraudulent concealment in the Pinney Dock case. There, the court rejected the defense because the antitrust causes of action "were nonetheless discovered or could with reasonable diligence have been discovered notwithstanding such a concealment and well within the appropriate time for commencing such actions." *838 F.2d at 1483*.

Given our precedent in Bohus, we agree with the Court **[**102]** of Appeals for the Sixth Circuit that the exercise of due diligence must be shown in the antitrust context. The steel companies, who have the burden of proof, see *Pinney Dock, 838 F.2d at 1465* (plaintiff has burden of proving fraudulent concealment elements), have identified areas of factual dispute concerning their ignorance of the railroads' sub rosa rate-setting activity and anti-competitive non-rate actions. But these assertions did not include evidence of due diligence. Given the scope of the steel companies' knowledge of publicized railroad rate-making decisions - the same rates charged for handling self unloaders as bulkers and the refusal to grant commodity line haul rates from private docks - we find that the steel companies have failed to satisfy the diligence component of the defense. What the steel companies did know about the railroads' rate-making should reasonably have made them aware of a basis for asserting the very claims now being raised. The district court properly granted summary judgment for B &LE on this issue.

B. Waiver - National Steel

Like the other steel company plaintiffs, National Steel sought recovery under federal **[**103]** and state antitrust laws for damages resulting from B &LE's participation in the conspiracy to delay the introduction of the self-unloader/private dock system. Setting National Steel apart from the other steel company plaintiffs is the fact that

National Steel owned and operated its own fleet of vessels for the transportation of iron ore. National Steel's established proprietary interest in vessels, in particular the self-unloader, the *Stinson*, gave rise to National Steel's additional claim for damages - that, absent the conspiracy, National Steel would have built the *Stinson* earlier and at a lower cost.

The liability jury found that the conspiracy caused injury to National Steel resulting from "foreclosure and or delay in the utilization of self-unloading vessels for the delivery of iron ore" and "the ability to fully use private docks to handle iron ore." App. at 1894. At the damages phase of the trial, National Steel's expert witness testified that National Steel would have purchased the *Stinson* in 1972 instead of 1974, which would have resulted in a significant cost savings.

B&LE moved for a directed verdict at the conclusion of the damages phase of the trial, **[**104]** alleging that National Steel failed to present evidence from which the jury could reasonably calculate damages, that its evidence rested on false assumptions and ignored significant contributing factors to its alleged injuries, and that B&LE's expert damages witnesses demonstrated the inadequacy and unreasonableness of National **[*1180]** Steel's allegation. App. at 2037-38. The district court denied B&LE's motion.

The damages jury determined that the cost savings to which National Steel was entitled amounted to $ 16,700,000, portions of which were trebled under federal law and doubled under Ohio state law, for a total award of $ 39,700,000.

In its judgment n.o.v. opinion, the district court determined that B&LE had properly preserved the issue concerning the amounts awarded to National and concluded that the jury's cost savings verdict was impermissible, reasoning that the cost savings damages reflected only the impact of inflation, an aspect of monetary damage not recoverable under the relevant antitrust laws. Granting B&LE's motion for judgment n.o.v., the court elaborated its rationale:

> National did eventually invest in self-unloader vessels. It claimed that the vessels cost more to **[**105]** build than would have been the case if they had been constructed earlier. The inescapable conclusion, however, is that the difference in costs reflects merely the impact of inflation, presumably offset by the time value of money, and not an actual loss to the plaintiff.

App. at 2108-09.

National Steel cross-appealed on two grounds. First, National Steel claims that by asserting only a general objection to the evidence of damages in its directed verdict motion, B&LE waived its right to argue that the award of cost savings damages was not cognizable under the antitrust laws. Second, even if the argument was properly preserved, National Steel argues that the additional amount paid for the *Stinson* was legally recoverable as actual damages resulting from B&LE's conduct and that the jury's verdict was rationally based on the expert testimony presented by National Steel.

We need not decide the merits issue because we conclude that B&LE has not preserved its argument in accordance with our decision in Bonjorno v. Kaiser Aluminum & Chemical Corp., *752 F.2d 802, 814-15 (3d Cir. 1984)*. In Bonjorno, the district court granted judgment n.o.v. in an **[**106]** antitrust action concluding that damages for diminution of "going concern" value were not recoverable. We reversed because the defendant only challenged damages generally and failed to raise that specific reason in its motion for a directed verdict. *752 F.2d at 814-15*. We explained that ***HN32***[] the "specific grounds for a JNOV must be asserted in the motion for a directed verdict," *752 F.2d at 814*, citing *Abraham v. Pekarski, 728 F.2d 167, 172 (3d Cir.)*, cert. denied, *467 U.S. 1242, 82 L. Ed. 2d 822, 104 S. Ct. 3513 (1984)*, and the lack of specificity on a particular issue will defeat a motion for judgment n.o.v. on that ground. Id. This requirement affords the non-moving party a chance to respond with additional evidence, and avoids infringement of the non-moving party's *Seventh Amendment* rights. Id., citing *Lowenstein v. Pepsi-Cola Bottling Co., 536 F.2d 9, 11 (3d Cir.)*, cert. denied, *429 U.S. 966, 50 L. Ed. 2d 334, 97 S. Ct. 396 (1976)*.

While B&LE contends that its directed verdict motion explicitly contested the inclusion of inflation as a component of damages, B&LE additionally **[**107]** argues that, by the content of the trial, National Steel was put on notice that there was a challenge to National Steel's recovery for cost savings resulting from the delayed construction of the *Stinson*.

We disagree with B&LE's assertions. First, the portion of the directed verdict mounting a challenge to the damages claims of all plaintiffs did not confront National Steel's cost savings damages claim with the required specificity such as would have alerted National Steel that B&LE was contesting damages attributed solely to inflation. National Steel argued that such notice would have prompted it to develop an alternative theory of recovery, and to introduce evidence that the timing of the construction of the self-unloader exposed National Steel to increased competition in the building of these vessels, and hence diminished its profit. We believe that the lack of opportunity to present additional evidence, followed by a grant of judgment n.o.v., is tantamount to the trial court deciding an issue already submitted to and deliberated on by the jury which compromises the non-moving parties' right to a fair trial. Bonjorno*, 752 F.2d at 814*.

[*1181] Second, **[**108]** we do not credit B&LE's assertion that, during the course of the trial, it was challenging National Steel's recovery as representing only inflation. We have reviewed the record references and do not find that the evidence cited would have put National Steel on guard that its proof of damages was inadequate. By our reading, the questioning at trial concerned whether National Steel's expert computed a deduction for the use of equity; that is, because National Steel did not invest in the self-unloader, it had additional cash to invest elsewhere. This other investment and its return, argued B&LE, should have been deducted from the figure representing the amount suffered because National Steel did not buy the self-unloading vessel earlier. This challenge to the evidence is not specific as to how inflation factored into the calculations nor does it even mention inflation as a disputed element.

We conclude that B&LE failed to preserve, in its motion for a directed verdict, the ground upon which the district court relied to grant judgment n.o.v. in B&LE's favor. The district court was, thus, without authority to decide the merits of the issue and the judgment abrogating the award of damages **[**109]** to National Steel will be reversed.

C. Prejudgment Interest - The Steel and Dock Companies

HN33[] Under Ohio law, the prevailing party may recover prejudgment interest if the losing party failed to make a good- faith effort to settle the case. *Ohio Rev. Code Ann. § 1343.03(C)* (Anderson 1979 and Supp. 1990). This includes consideration of whether a party rationally evaluated its risks and potential liability and whether a good faith monetary settlement offer or response to an offer by the other party occurred. *Kalain v. Smith, 25 Ohio St. 3d 157, 495 N.E.2d 572, 574 (Ohio 1986)*. If a party has a good faith, objectively reasonable belief that liability does not exist, the party does not need to offer a cash settlement in order to avoid prejudgment interest liability in the event it does not prevail. Id.

The district court refused to award prejudgment interest on the plaintiffs' Ohio Valentine Act judgments because it found that B&LE's refusal to settle the case was based on the reasonable belief that it was without liability to the plaintiffs.

The plaintiffs contend that B&LE's plea of nolo contendere in its criminal prosecution and the substantial settlements by co-conspirators **[**110]** evidence B&LE's lack of a good faith, objectively reasonable belief that it was not liable. In light of this, B&LE's repeated refusals to engage in settlement negotiations were in bad faith and thus subject B&LE to liability for prejudgment interest. The plaintiffs refer to several settlement overtures which they offered both pre-trial and after the liability verdict which B&LE declined to pursue. Although B&LE did make a settlement proposal during the second day of the damages trial deliberations, plaintiffs classified the offer as grossly inadequate because it was far exceeded by the then current toll of attorney's fees.

We review the district court's decision whether to grant prejudgment interest for abuse of discretion. Given the difficulty in resolving many of the legal issues presented here, we agree with the district court that B&LE had a reasonable expectation that it would not be liable to the plaintiffs. We thus conclude that the district court did not abuse its discretion in failing to award prejudgment interest under Ohio law. [30]

[111]** D. The *Seventh Amendment* Right to a Fair Trial - The Wills Affiliates

Despite a finding of antitrust liability in favor of the Wills affiliates, the damages jury awarded them only nominal damages. Wills asserts that this award results from the trial court's failure to confine the second trial to a calculation of the amount of damage sustained. Instead, complains Wills, B&LE was permitted to retry its liability defense. Because causation elements re-entered the damage phase of the trial, Wills contends that its *Seventh Amendment* right **[*1182]** to a fair trial was violated. ***HN34***[] We exercise plenary review when constitutional questions are presented on appeal.

Seventh Amendment problems are inherent when separate juries determine fact of damage and amount of damages. According to the Supreme Court, ***HN35***[] bifurcated trials are permitted only if the separate issues are so distinct that a trial of one without the other may be had without injustice. *Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500, 75 L. Ed. 1188, 51 S. Ct. 513 (1931)*. ***HN36***[] If "the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter **[**112]** without confusion and uncertainty, [this] would amount to a denial of a fair trial." Id.

Although we have not, in a majority opinion, discussed the *Seventh Amendment* dilemma posed by bifurcation of an antitrust case, the constitutional concerns have been recognized by our colleagues. See *Bonjorno v. Kaiser Aluminum, 752 F.2d at 816* ("Bifurcation of trial resulting in different juries determining liability and damages raises serious questions under the standard set forth by the Supreme Court in Gasoline Products . . . .") (Statement of Adams, J., sur denial of the petition for rehearing en banc.) Also, in *Link v. Mercedes-Benz, 550 F.2d 860, 875*, the dissenting judge rendered this prescient opinion:

> Admittedly, in an action under *§ 4* the task of defining which issues are so separate and distinct as to satisfy the test of Gasoline Products is complex. Since liability under *§ 4* necessarily includes proof of injury to business and property, bifurcation to separate juries of liability and damages in a *§ 4* case inevitability introduces the possibility that in the liability phase the first jury might find that there **[**113]** was such injury, while the second jury might on the same evidence of injury in the damage phase, find none.

Id. (Gibbons, J., dissenting).

This articulated possibility became reality here.

During the liability phase of the trial, Wills presented evidence to show that its attempts to purchase dock facilities to accommodate self-unloading vessels were continually thwarted by the railroad conspiracy. To demonstrate injury to its business, Wills contended that had it been able to acquire the necessary dock space, its companies would have handled the iron ore unloading and land transport needs of Armco Steel. This loss of Armco's business was the sole evidence of property injury to Wills. Thus, Wills' claims were tied to its ability to serve a specific customer and it was required to show, during the liability phase, that Armco would have used its dock and truck service. This basis of liability was vigorously challenged by B&LE who attempted to show that Armco would not have utilized Wills' services to the extent alleged, if at all.

The liability jury was instructed that to find for all plaintiffs here they must determine that:

> The particular plaintiff . . . was genuinely **[**114]** interested in doing it, it requested the transaction, and was financially able to carry it out . . . . You can't claim to have been damaged unless you were genuinely damaged,

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[30] B &LE also doubts that an award of prejudgment interest is permissible for damages awarded under Ohio's Valentine Act. Since we are denying the cross-appeal on other grounds, we need not reach this issue.

> and you can't be genuinely damaged unless if the [private docks] [31] had been willing and would have been in a position and would have carried through with the project.

App. at 4998.

After hearing the evidence and the instruction, the liability jury answered "yes" to the following questions concerning B&LE's antitrust liability to Wills:

> Was the agreement, combination or conspiracy a material **[**115]** cause of any injury to the business or property of Wills' Dock Company (Toledo World Terminals, Inc. and its predecessors, Consolidated Dock, Inc. and Consolidated Dock & Storage, Inc.)?

[*1183] Did the injury result from:

* * *

> acts in furtherance of the conspiracy, including the refusal to sell or lease dock properties or the refusal to lease or sell dock properties without restrictions, to prevent Wills from engaging in an iron ore business at Toledo, Ohio?
> Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wills Trucking, Inc. because it was unable to provide a trucking service in combination with Wills' dock service?

App. at 1900.

Since the jury found that Wills had suffered damage to its property by the conspiracy, in order not to violate the *Seventh Amendment*, the role of the second jury should have been limited to determining the amount of damages Wills incurred from acts taken in furtherance of the conspiracy. Nonetheless the *Seventh Amendment* prohibition against reexamination of the issue of fact of damage was compromised soon after the damages jury was empaneled. Upon seating the jury, the district court informed **[**116]** it that "the defendant will be entitled to defense on the ground that these damages have not been established or that any damages that they might have suffered stem from causes other than the antitrust conspiracy claim." App. at 5113-14 (emphasis added). This comment, although not starkly objectionable, set the tone for the overlap of causation questions which the damages jury was permitted to hear.

During the course of the damages trials, Wills offered evidence necessary to calculate damages under a lost profits theory. B&LE's key defense witness on damages was Dr. H. W. Pifer, who was also B&LE's primary witness during the liability phase. At the damages trial, Dr. Pifer began to discuss documents relevant to events dated in the mid-1950's, before any plaintiff's damage period began. The court denied an objection to the entry of this evidence. Dr. Pifer then cited to exhibits indicative of potential causes for the plaintiff's damage other than the antitrust conspiracy. At this point the plaintiffs were granted a continuing objection to the use of testimony and documents relevant to causation and fact of damage issues. When the objection was raised, the court responded, "I **[**117]** am not so sure it is limited to impact. Objection overruled. It conceivably might have something to do with the amount." App. at 6041.

After further testimony by Dr. Pifer, the plaintiffs moved for a mistrial or, in the alternative, to strike the testimony of Dr. Pifer because of its direct contradiction to what the prior jury had held. The court, in overruling the objection and denying the mistrial, stated that he would "straighten it out in the charge of the court." App. at 6078.

However, as the following excerpts reveal, the subsequent charge to the jury could not be construed as curative:

> In an antitrust conspiracy case, the law is that each member of the conspiracy is equally responsible for all the damages caused by the entire conspiracy. So that it is not necessary for the plaintiffs to have shown that the

[31] We have signified a change from the text which requires some explanation. In the transcript, the word "railroads" appeared where we have bracketed "private docks." We altered the quote because it is obvious from the full context, that the reference was to the dock companies and not the defendant. We are confident, too, that, in hearing the instruction as a whole, the jury understood the court to be discussing the burden of the dock companies.

> Bessemer & Lake Erie Railroad Company in and of itself caused each and every element of damage that is claimed. All that they had to show was that they were injured as a result of the antitrust conspiracy of which it has been established that the Bessemer & Lake Erie Railroad Company was an active participant.

App. 6355 (emphasis added). And later,

> Now, **[**118]** with respect to the claims of the dock company plaintiffs, the issue is relatively straightforward at least in theory. If they were deprived of the chance to handle iron ore at their private docks, they were deprived of the chance to get into the private dock business for handling iron ore, the question is: When would they have gotten into that business? How much tonnage would they have handled? And what would have been their profit on the tonnage they would have handled?

App. at 6367. Finally, as to nominal damages:

> Now, I mentioned in passing, but I will recapitulate, that the burden of proof is on the plaintiffs in any case which the plaintiffs **[*1184]** are seeking to recover damages. But once the plaintiffs have established that they did suffer an injury, it is not encumbent upon the plaintiffs to show their damages with mathematical certainty.
>
> In any case such as this where you are trying to reconstruct what would have happened in the absence of a conspiracy, it is obviously beyond human possibility to know for certain exactly what would have happened. What we are trying to do here is reconstruct in our minds a hypothetical world which would have existed in the absence of **[**119]** this suppression of competition.
>
> In that situation the law says the plaintiff who has shown injury is not to be faulted because of the inability to prove damages with mathematical precision or with any very great degree of certainty.
>
> What is required, and the burden is upon the plaintiffs, is to provide you with a reasonable estimate of their damages, what you regard as a reasonably reliable estimate. . . . If you conclude that the plaintiffs have not established a reasonably sound basis on which you can make a rational estimate that is satisfactory to you, you would have the right to say they haven't proven their damages. In that case you would award only nominal damages, a dollar.

App. at 6375-77.

The instructions given concerning the function of the jury at this juncture were confusing. Taken as a whole, and in combination with the court's opening statement and the liability-type evidence which was introduced during the damage phase, the jury could have easily understood that they were to consider causation. Of particular concern is the court's statement that "all that they had to show was that they were injured as a result of the antitrust conspiracy." Although the past **[**120]** tense utilized might indicate that the court was describing the necessary proof in the first trial, since that was not spelled out, the opposite interpretation is just as easily understood - that the plaintiffs were now required to show injury resulting from the antitrust conspiracy. We point also to the language of the court when it explained to the jury how it should determine dock company damages. The district court stated that if the plaintiffs were deprived of the chance to handle iron ore at their private docks, then the jury should proceed to answer further questions. Once again, causation considerations were put before the jury. [32]

[121]** Finally, the award of nominal damages to Wills can only be understood if the jury considered causation. The sole injury alleged by Wills was its inability to acquire a private dock and to truck ore for Armco Steel. For the liability jury to return a verdict in its favor can only mean that Wills proved that it was injured, to some extent, by the preclusion from handling Armco's business. The first jury heard both the plaintiffs' case and the defense's evidence concerning the prospects of Wills to serve Armco's transport needs and found in favor of Wills. It impliedly found that, by virtue of the conspiracy, Wills was precluded from making profits by handling at least some of Armco Steel's iron ore. ***HN37***[] Nominal damages are appropriate only when plaintiffs are unable to prove any amount of damages and are not properly awarded when a plaintiff, like Wills, has established a quantifiable loss of revenue.

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[32] The district court's clouding of the fact and the amount of damages is exemplified in a portion of its judgment n.o.v. opinion where it observed: "Throughout both phases of the trial, the defendant vehemently argued, and sought to prove, that any damages actually sustained by the plaintiffs were attributable to economic factors other than the alleged conspiracy . . . ." App. at 2129 (emphasis added).

While Wills' calculations as to the quantity of ore it would have handled and the amount of potential profit were certainly challengeable in the damage phase, an award of nominal damages was simply inappropriate.

We note a similarity to our decision in *Rea v. Ford Motor Co., 497 F.2d 577* ***[**122]*** *(3d Cir.)*, cert. denied, *419 U.S. 868, 42 L. Ed. 2d 106, 95 S. Ct. 126 (1974)*. In Rea, an antitrust defendant argued that the trial court erred when at a retrial for damages it refused to allow one defendant to introduce evidence that its acts were not the cause of the plaintiff's **[*1185]** injury. We rejected the defendant's contention that these elements of causation were really damages issues. "Causation is an element of liability. Our remand left open only the amount of damages, not the fact of damage." *Id. at 577*.

The admonition of Rea against retrial of causation issues in a damages trial was violated here. Even B&LE does not dispute that it put before the jury facts tending to disprove that its conspiratorial actions were the cause of Wills' injury. This is a clear violation of the *Seventh Amendment*.

We therefore reverse the order of the district court denying Wills' *Seventh Amendment* claim and order a retrial of Wills' damage phase case. Because we are reversing on legal grounds, we need not address the other issue raised by Wills - that a new trial is mandated by allegedly objectionable remarks concerning causation presented by defense counsel **[**123]** to the jury during the damages trial.

IV.

At the outset of this opinion, we stated our substantial affirmation of the order of the district court. We conclude here with grateful acknowledgment of the district court's careful analysis and profound scholarship in shepherding the parties and issues through the complexities of the lawsuit.

We will, therefore, affirm all but two aspects of the order of the district court. We will reverse the grant of judgment n.o.v. against National Steel and remand for entry of judgment in its favor. We will also reverse the denial of the Wills' post-trial motions and remand for a new trial limited to a calculation of damages.

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Information Exch. Sys. v. First Bank Nat'l Ass'n

United States Court of Appeals for the Eighth Circuit

May 10, 1993, Submitted ; May 28, 1993, Filed

No. 92-3132

Reporter

994 F.2d 478 *; 1993 U.S. App. LEXIS 12564 **; Copy. L. Rep. (CCH) P27,118; 1993-1 Trade Cas. (CCH) P70,258

Information Exchange Systems, Inc., and IXI Laboratories, Inc., Appellants, v. First Bank National Association, Appellee. Qwix Media Shops and Depots, Inc., Appellant, v. First Bank National Association, Appellee.

Subsequent History: [1]** Rehearing Denied August 5, 1993, Reported at: *1993 U.S. App. LEXIS 20153*.

Prior History: Appeal from the United States District Court for the District of Minnesota. District No. CIV 4-91-902. Diana E. Murhpy, U.S. District Judge.

Disposition: Affirmed

Core Terms

trial court, plaintiffs', banking, discovery, documents, intellectual property rights, trial court's dismissal, racketeering, diskettes, grant summary judgment, intellectual property, duplication, collateral, practices, summary judgment motion, fraudulent concealment, outstanding loan, antitrust claim, communications, antitrust, infringe, patents, security interest, summary judgment, circumstances, inducement, ownership, loans

LexisNexis® Headnotes

Contracts Law > Contract Interpretation > General Overview

HN1[] **Contracts Law, Contract Interpretation**

If the language is unambiguous, construction of the contract is a matter of law.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN2[] **Regulated Practices, Private Actions**

The limitations period for suits under the antitrust laws is four years. See *15 U.S.C.S. § 15b*.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] **Private Actions, Remedies**

A cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business. In the context of banking practices that restrict a plaintiff's options and thus increase its operating costs (so-called tying arrangements), the injury to competition occurs when the alleged tying arrangement is imposed.

Banking Law > ... > Criminal Offenses > Employee Fraud > General Overview

HN4[] **Criminal Offenses, Employee Fraud**

A cause of action under *12 U.S.C.S. § 1977 (1)* accrues when the bank commits the unlawful conduct.

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For FIRST BANK NATIONAL ASSOCIATION, Defendant - Appellee: Shannon Mary O'Toole, John C. Thomas, Jerome Alan Miranowski, 612-344-9300, Rebecca E. Bender, 612-344-9300, Mark Philip Wine, 612-344-9300, James Randall Benham, Jodeen A. Kozlak, 612-344-9300, OPPENHEIMER & WOLFF, 45 S. Seventh Street, Suite 3400, Plaza VII Building, Minneapolis, MN 55402, 612-344-9300.

Judges: Before BEAM, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

Opinion by: MORRIS SHEPPARD ARNOLD

Opinion

[*480] MORRIS SHEPPARD ARNOLD, Circuit Judge.

The events as recounted by the parties are difficult to reconstruct. Nonetheless, what follows is a factual summary that is as accurate as we can make it, given the state of the record submitted to us. Ronald Johnson originally owned three independent but related corporations -- Information Exchange Systems (IXI), IXI Laboratories (Labs), and Qwix Media (Qwix). IXI is a research company and holds various patents related to magnetic tape recording (it was previously a subsidiary of Memorex). Labs is a licensee of IXI and manufactures recording and tape duplication equipment (computer diskettes) using the patents owned by IXI. Qwix puts data onto computer diskettes **[*481]** using equipment acquired from Labs (essentially, as we understand it, Qwix is a publisher for software originated by others).

In 1984, Labs borrowed money from a predecessor bank of what is now First Bank. The loan was secured by an interest in the assets of Labs. That loan was also later guaranteed by Qwix; the guaranty **[**2]** was secured by an interest in the assets of Qwix. In 1985, Qwix itself borrowed money from a second predecessor bank of what is now

First Bank. Both of these predecessor banks were owned in part by a holding company bank that later merged the predecessor banks into what is now First Bank.

By late 1985 and early 1986, the holding company bank had placed both Labs and Qwix into "workout," which is evidently a state of control by the bank in which the operations of Labs and Qwix were directed, or at least closely supervised, by the bank. Eventually, the bank threatened to foreclose on the collateral for the loan to Labs. The bank gave February 6, 1987, as the deadline for Labs's repayment of the outstanding loan. On that day, however, instead of foreclosing on the collateral, the bank sold the loans of both Labs and Qwix, including the bank's security interests, to two individuals, Ronald Fletcher and Richard McNamara (for the sake of simplicity, F&M). The locks on the buildings holding IXI, Labs, and Qwix were changed on that day, and F&M evidently took physical possession of the buildings and their contents at that time. F&M eventually foreclosed on the collateral for the loans and **[**3]** formed other businesses with the assets of Labs and Qwix obtained through the foreclosure.

In 1991, through two lawsuits that were subsequently consolidated, IXI, Labs, and Qwix sued First Bank in federal court. They asserted federal claims relating to intellectual property (trademarks, copyrights, and patents), ***antitrust law***, racketeering, and unlawful banking practices. They also asserted claims under state statutes and common law. First Bank moved for summary judgment in April and May, 1992. In July, 1992, the trial court granted summary judgment to First Bank on all of the federal claims and declined to exercise jurisdiction over the state claims. The trial court therefore dismissed the federal claims with prejudice and dismissed the state claims without prejudice. The trial court subsequently denied a motion to reconsider. The plaintiffs appeal.

The plaintiffs contend, initially, that summary judgment was inappropriate while discovery was incomplete. The plaintiffs then assert, as to each of the federal claims, that even with the discovery accomplished at the time of the motions for summary judgment, enough evidence was presented to establish the existence of genuine issues of **[**4]** material fact. The plaintiffs apparently do not appeal the trial court's decision to decline jurisdiction over the state claims. We affirm the trial court [1] in all respects.

I.

In its opinion granting summary judgment to First Bank, the trial court noted that although the plaintiffs had argued "that the motions for summary judgment are premature" in view of discovery disputes that had only recently been resolved by a magistrate, the plaintiffs did not "detail what discovery is outstanding or how it relates to the current motions." The trial court declined, therefore, to postpone ruling on the summary judgment motions.

In its opinion denying reconsideration of the ruling on summary judgment, the trial court stated that the plaintiffs "*now* present detailed materials concerning [the] outstanding discovery … [but] have not shown why these materials were unavailable before" (emphasis added). The trial court further stated **[**5]** that the plaintiffs "have not shown that discovery subsequently produced or requested would be material to the outcome." The trial court therefore rejected the outstanding discovery as a basis for reconsideration of the ruling on summary judgment.

The plaintiffs' responses to the summary judgment motions were not submitted with the record, so we do not know exactly what the plaintiffs said in their briefs about the outstanding discovery. During the hearing **[*482]** on the summary judgment motions, the only details given to the trial court on that point were that the magistrate had just granted the plaintiffs "access specifically to communications between the bank and [F&M] that we have not *previously* been given" (emphasis added). (The magistrate's order grants access to communications between the bank or its counsel and F&M or their counsel "regarding any matter relating directly or indirectly" to Labs or Qwix, except for documents constituting work product or protected by attorney-client privilege.) Counsel for the plaintiffs then stated, "Clearly this is too early to be saying that this is all we know or all we can discover about these transactions."

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[1] The Honorable Diana E. Murphy, United States District Judge for the District of Minnesota.

Given the vagueness of the plaintiffs' **[**6]** statements to the trial court, and the trial court's own remarks that the briefs "relied heavily upon discovery undertaken in earlier state court actions," we affirm the trial court's refusal to delay ruling on the summary judgment motions. We turn, then, to the merits.

II.

The predicate for all of the plaintiffs' claims is that it was actually First Bank that took over the three businesses on February 6, 1987, and that F&M were only the bank's agents in that takeover, since they did not actually obtain ownership of the outstanding loans, and the concomitant security interests, until nearly two weeks later, when all of the requisite payments were made to the bank and F&M took physical possession of the documents relating to the outstanding loans. As to the intellectual property claims, then, the plaintiffs contend that use of the plaintiffs' trademarks, copyrights, and patents after February 6, 1987, was an infringement by the bank on the plaintiffs' intellectual property rights. The plaintiffs also claim that the bank induced others to infringe the plaintiffs' intellectual property rights. *See* *15 U.S.C. § 1114(1)* (trademarks), *17 U.S.C. § 504* **[**7]** *(a)* (copyrights), and *35 U.S.C. § 271(a)* (patents).

In its opinion granting summary judgment to First Bank on the intellectual property claims, the trial court held that First Bank had conveyed (apparently by assignment) its security interests in the plaintiffs' intellectual property rights to F&M as of February 6, 1987, and therefore that the plaintiffs had failed to establish any genuine issue of material fact relating to the use of those intellectual property rights by the bank itself, rather than by F&M. Construing an "agreement" between the bank and F&M, and finding the language of that document to be unambiguous, the trial court rejected the plaintiffs' argument that the actual transfer of rights occurred at any time except on February 6, 1987. With respect to inducement to infringe, the trial court stated that the plaintiffs had "pointed to no evidence that First Bank had the requisite intent, knowledge, or constructive knowledge" that F&M "would infringe plaintiffs' rights, assuming for present purposes that they did."

The plaintiffs argue on appeal that there was evidence of a request from Mr. Fletcher to the bank *after* February 6, **[**8]** 1987, for a release of all of the bank's "rights in Labs." The plaintiffs further contend that the "agreement" between the bank and F&M stated that no assignment of the notes would occur until final payment was received; that Mr. McNamara's payment was not received until February 13, 1987; and that the documents relating to the outstanding loans were not delivered to F&M until February 18, 1987. Finally, the plaintiffs contend, the evidence is that it was the bank, and not F&M, that ordered the changing of the locks at the buildings of the three businesses. All of these facts, the plaintiffs assert, allow the factual inference and the legal conclusion that the actual transfer of ownership to F&M took place sometime after February 6, 1987.

It seems to us that the critical evidence is the language in the contract between the bank and F&M. ***HN1***[] If the language is unambiguous, construction of the contract (and, therefore, determination of the effective date of transfer of ownership) is a matter of law. *See*, *e.g.*, 4 S. Williston, *A Treatise on the Law of Contracts* § 616 at 649, 651-52 (3d ed. 1961), and 3 A. Corbin, *A Comprehensive Treatise on the Rules of Contract Law* § 554 **[**9]** at 222-25 (1960).

[*483] The only "agreement" that we could find in the materials originally submitted to us substantiates the trial court's summary of the relevant language and the trial court's finding that the language is unambiguous. (The "agreement" does refer to another document, an "assignment," but that second document was not included with the materials submitted in the record. Upon request by the court at oral argument, counsel for the bank subsequently submitted a document of "assignment," dated February 6, 1987, that declares that the bank "hereby assigns" to F&M the notes in question. The plaintiffs object to the addition of that document to the record. We need not decide whether that document may be added to the record, for we find no inconsistency between the terms of the "agreement" that is undisputedly in the record and the terms of the document of "assignment" subsequently submitted to us.) We see no language in the "agreement" making the transfer of ownership conditional on any subsequent payments by F&M. We therefore affirm the trial court's dismissal of the direct infringement claims.

As to the inducement claim, the plaintiffs argue on appeal that the bank induced F&M **[**10]** to infringe the plaintiffs' intellectual property rights by representing to F&M that F&M could use the trademarks, copyrights, and patents that secured the outstanding loans (the plaintiffs evidently offer this argument regardless of whether F&M are considered to have been the bank's agents or to have acted on their own behalf). The plaintiffs contend that the security interests originally held by the bank did not include the right to *use* the intellectual property in question; that the bank knew it; that the bank nonetheless told F&M that the intellectual property could be used; that the bank should, therefore, have known that F&M would use that intellectual property; and that F&M did in fact use that intellectual property.

In its opinion granting summary judgment to First Bank, the trial court stated that the plaintiffs made these same assertions at the trial court level "without citation to record evidence." The plaintiffs make no citation to specific evidence in their opening appellate brief, either. The portions of the record cited in the plaintiffs' reply brief, moreover, are inscrutable, ambiguous, or not to the effect ascribed to them. Under these circumstances, we affirm **[**11]** the trial court's dismissal of the inducement claims relating to intellectual property rights.

III.

The gist of the plaintiffs' antitrust claims is that by taking over and then transferring the plaintiffs' businesses to F&M, First Bank reduced competition and restrained trade in, and attempted or conspired to monopolize, the marketplace for diskettes and their duplication. *See* *15 U.S.C. § 1*, *§ 2*, *§ 15(a)*, *§ 18*. Qwix also alleges that by requiring it to guarantee the loan to Labs, to secure that guarantee with Qwix's assets, and to submit to bank supervision through "workout," all as a condition of continued credit for Qwix itself, First Bank conspired to restrain trade (in the diskette duplication marketplace, evidently, by increasing Qwix's operating costs compared to those of other diskette duplication businesses; the effect on competition in the banking industry is addressed through Qwix's claim with respect to unlawful banking practices). *See* *15 U.S.C. § 1*, *§ 15(a)*.

In its opinion granting summary judgment to First Bank, the trial court stated that the plaintiffs had "not shown how competition was suppressed **[**12]** through the actions of First Bank. They fail to define the relevant market, the nature of competition in that market, or any share of the market which F&M may have had before February 6, 1987." The trial court further declared that the plaintiffs' allegations of "loss due to First Bank's assignment of its security interests in their property, and the assignees' subsequent foreclosure," state no antitrust claim. (This declaration implies, we believe, that while the plaintiffs may have been injured by the acts of First Bank, the injuries were not of a nature actionable under the antitrust laws. *See*, *e.g.*, *Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1056 (5th Cir. 1982)*, *cert. denied*, *459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983)*.) As far as we can tell, the trial court's opinion on summary judgment did not **[*484]** address the antitrust allegations, made only by Qwix, in relation to the requirements placed upon it by the bank as a condition of continued credit.

In their appellate brief, the plaintiffs state that competition was ultimately reduced in the marketplace for diskettes and their duplication, first, **[**13]** because of the takeover of the plaintiffs' businesses by F&M's diskette duplication businesses subsequent to First Bank's takeover of the plaintiffs' businesses, and, second, because of the eventual merger of the plaintiffs' businesses with "long-time competitor MST." Both of those arguments are foreclosed by the determination that F&M, and not the bank, owned the outstanding loans (and the securing collateral) on February 6, 1987. It is undisputed that F&M's own businesses were incorporated after that date. Any subsequent merger, therefore, by F&M of their businesses with the plaintiffs' businesses, and eventually with MST, would be an act by F&M, not the bank. We therefore affirm the trial court's dismissal of the antitrust claims related to the marketplace for diskettes and their duplication.

The trial court did not specifically address the antitrust allegations, made only by Qwix, in relation to the requirements placed upon it by the bank as a condition of continued credit. We hold, however, that those claims are barred by the statute of limitations. ***HN2***[] The limitations period for suits under the antitrust laws is four years. *See* *15 U.S.C. § 15b*. **[**14]** ***HN3***[] A cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business. *See*, *e.g.*, *Kaiser Aluminum, 677 F.2d at 1051*. In the context of banking practices that restrict a plaintiff's options and thus increase its operating costs (so-called tying arrangements), the injury to competition occurs when the alleged tying arrangement is imposed. *Id. at 1056*.

It is not clear when the arrangements complained of here occurred, but it has to have been before February, 1987, when the bank sold the loans, and their securing collateral, to F&M. Qwix sued the bank in July, 1991, more than four years after February, 1987. The antitrust claims based on the requirements placed on Qwix as a condition of continued credit, then, are barred unless the bank fraudulently concealed its activities from Qwix. *See*, *e.g.*, *Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 284 (8th Cir. 1962)*, *cert. denied*, *371 U.S. 912, 9 L. Ed. 2d 171, 83 S. Ct. 256 (1962), 373 U.S. 914, 83 S. Ct. 1297, 10 L. Ed. 2d 415 (1963)*.

We see no application of the fraudulent concealment **[**15]** doctrine in the context of the antitrust claims related to the requirements imposed on Qwix as a condition of continued credit. Certainly Qwix knew of those requirements at the time they were imposed. We do not find persuasive Qwix's argument (actually made in the context of its claim with respect to unlawful banking practices) that First Bank's refusal to release certain documents amounts to fraudulent concealment of the "'facts that are the basis of [Qwix's] cause of action,'" *Berkson v. Del Monte Corp., 743 F.2d 53, 55 (1st Cir. 1984)*, *cert. denied*, *470 U.S. 1056, 84 L. Ed. 2d 826, 105 S. Ct. 1765 (1985)*, quoting *Dayco Corp. v. Goodyear Tire and Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*. Those documents may have provided evidentiary proof of facts to be asserted by Qwix in court, but the actual facts themselves, related to the conditions imposed, were known by Qwix as of the time those requirements were placed upon it as a condition of continued credit. Since the statute of limitations was not tolled by fraudulent concealment, the limitations period expired at the latest in February, 1991, well before Qwix sued. We therefore **[**16]** affirm the trial court's dismissal of the antitrust claims related to the requirements imposed on Qwix as a condition of continued credit.

IV.

The essence of the plaintiffs' racketeering claims is threefold -- that First Bank made false representations by mail and by phone (mail fraud and wire fraud), first, between 1985 and 1987, to obtain control of Qwix and Labs and, second, as of February 6, 1987, to defraud Qwix and Labs by leading others to believe that the businesses operated by F&M after that date were the same as those operated before then by Ronald Johnson and **[*485]** his associates; and that between 1985 and the present, First Bank conspired with F&M to obtain control of and to defraud Qwix and Labs. *See* *18 U.S.C. § 1962(b)*, *§ 1962(c)*, *§ 1962(d)*.

In its opinion granting summary judgment to First Bank, the trial court concluded that "there is no indication in the record that the actions of First Bank prior to the various negotiations involving [F&M] were related as defined under RICO." Drawing on that conclusion, the trial court stated that the "relevant related conduct" began in December, 1986, and ended on February 6, 1987. The trial **[**17]** court stated further that the few acts "taken by First Bank after that date were ministerial in nature, transferring various documents and performing official tasks necessitated by the February 6 agreement." The trial court held, accordingly, that because "the alleged related acts occurred within a short period of time, … with no evidence of the threat of any future criminal activity by First Bank," the plaintiffs "are unable to sustain an essential element of their RICO claims" (the pattern requirement).

We construe the trial court's opinion as drawing three separate legal conclusions -- first, that the acts of First Bank prior to its involvement with F&M were not sufficiently "related" to be considered part of a racketeering scheme; second, that the acts of First Bank after February 6, 1987, neither amount to nor pose a threat of "continued criminal activity"; and, third, that any conspiracy between First Bank and F&M was of such short duration that it could not support the statutory requirement of a "pattern" of racketeering activity. *See*, *e.g.*, *H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 232, 239-43, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989)*. We agree with **[**18]** all of those conclusions.

On appeal, the plaintiffs argue that First Bank engaged in a scheme between 1985 and 1987 to take over the plaintiffs' businesses and furthered that scheme by mail and by phone. *See* *18 U.S.C. § 1962(b)*. They cite no specific evidence, however, of motive for such a scheme, particular communications, how those communications were fraudulent, or how those communications furthered the alleged scheme. Under these circumstances, the plaintiffs have failed to demonstrate both the requisite predicate acts and the requisite relatedness of those acts. *See*, *e.g.*, *Manion v. Freund, 967 F.2d 1183, 1186 (8th Cir. 1992)*. We therefore affirm the trial court's dismissal of the non-conspiracy racketeering claims involving the acts of First Bank between 1985 and 1987.

As to the acts of First Bank after February 6, 1987, the plaintiffs argue that the bank has continued to participate in conducting the business affairs of the plaintiffs' businesses. *See* 18 U.S.C. § 1962(c). The only specific evidence the plaintiffs offer, however, is that First Bank retains **[**19]** an interest in the proceeds from any eventual sale of the intellectual property rights at issue, and that First Bank has given F&M "further advice on how to use" the plaintiffs' businesses. The plaintiffs point to nothing that we can see that shows how a retained interest in the intellectual property rights amounts to participation in the conduct of the plaintiffs' businesses' affairs. Nor do they offer any examples of the alleged "further advice" given to F&M. Under these circumstances, we agree that no genuine issue of material fact exists on the question of threatened continued criminal activity by First Bank (separate from a conspiracy with F&M) after February 6, 1987. *See*, *e.g.*, *Lange v. Hocker, 940 F.2d 359, 362 (8th Cir. 1991)*. We therefore affirm the trial court's dismissal of the non-conspiracy racketeering claims involving the acts of First Bank after February 6, 1987.

Finally, it is apparently undisputed that communications between First Bank and F&M began no earlier than late 1986. Since even the plaintiffs acknowledge that by March, 1987, F&M had ownership of the loans, and their securing collateral, we agree that any alleged conspiracy, **[**20]** *see* 18 U.S.C. § 1962(d), could not have lasted longer than three or four months. Under these circumstances, the plaintiffs have failed to establish a conspiracy of sufficient duration to sustain a racketeering claim. *See*, *e.g.*, *Primary Care Investors, Seven, Inc. v. PHP Healthcare* **[*486]** *Corp., 986 F.2d 1208, 1215-16 (8th Cir. 1993)*; *see also* *Lange, 940 F.2d at 361*, and *Terry A. Lambert Plumbing, Inc. v. Western Security Bank, 934 F.2d 976, 981 (8th Cir. 1991)*. We therefore affirm the trial court's dismissal of the conspiracy-related racketeering claims.

V.

With respect to unlawful banking practices, Qwix is the only plaintiff that makes a claim. The import of that claim is that by requiring Qwix to guarantee the loan to Labs, to secure that guarantee with Qwix's assets, and to submit to bank supervision through "workout," all as a condition of continued credit to Qwix itself, First Bank committed acts prohibited by the federal banking statutes. *See* 12 U.S.C. § 1972(1), § 1975.

In its opinion granting summary **[**21]** judgment to First Bank, the trial court dismissed that claim as barred by the four-year statute of limitations, *see* 12 U.S.C. § 1977(1). The trial court rejected Qwix's argument that First Bank's refusal to release certain documents amounted to fraudulent concealment of facts related to that claim, finding instead that all of the fraudulent concealment alleged by Qwix was in relation to the bank's transactions with F&M and not to the conditions placed upon Qwix. On appeal, Qwix argues that documents related to the conditions placed upon it were withheld by First Bank and therefore that the bank did engage in fraudulent concealment related to the unlawful conduct. We disagree.

HN4[] A cause of action under the statute at issue accrues when the bank commits the unlawful conduct. *See*, *e.g.*, *Lancianese v. Bank of Mount Hope, 783 F.2d 467, 470 (4th Cir. 1986)*. All of the bank's acts in that regard had to have occurred before February 6, 1987, when the bank sold the loans, and their securing collateral, to F&M. Qwix did not file its complaint until July, 1991, more than four years later.

Even though First Bank may **[**22]** have withheld the relevant documents, we have no question that Qwix was aware of the requirements imposed on it at the time they were imposed. *See*, *e.g.*, *Jackson v. Union National Bank, 715 F. Supp. 892, 896 (C.D. Ill. 1989)*. Under these circumstances, we do not find persuasive Qwix's argument that the statute of limitations should be tolled in regard to the alleged unlawful banking practices. We therefore affirm the trial court's dismissal of the unlawful banking practices claims.

VI.

For the reasons stated, we affirm the judgment of the trial court.

End of Document

Ortho Diagnostic Sys. v. Abbott Lab., Inc.

United States District Court for the Southern District of New York

May 28, 1993, Decided

93 Civ. 2656 (LBS)

Reporter

822 F. Supp. 145 *; 1993 U.S. Dist. LEXIS 7101 **; 1993-1 Trade Cas. (CCH) P70,266

ORTHO DIAGNOSTIC SYSTEMS, INC, Plaintiff, v. ABBOTT LABORATORIES, INC., Defendant.

Core Terms

tests, pricing, monopoly power, merits, leveraging, purchasers, blood, preliminary injunction, monopolize, monopoly, argues, percent, technology, centers, package, buy, customer, alleges, switch, irreparable harm, Sherman Act, markets, serious question, negotiate, irreparable injury, software, buyer, competitive advantage, tied product, anti-competitive

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Criminal Law & Procedure > Trials > Bench Trials

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

Findings of fact and conclusions of law made by a court at the preliminary injunction stage of a case are not binding at trial on the merits.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Grounds for Injunctions**

A preliminary injunction is appropriate on a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the party requesting the preliminary relief.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] Remedies, Damages

In this the U.S. Court of Appeals for the Second Circuit, an applicant for a preliminary injunction must show that it is likely to suffer irreparable harm if equitable relief is denied. The Second Circuit consistently holds that perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. An antitrust plaintiff must make the same showing of irreparable harm as any other plaintiff. The Clayton Act requires a showing that the danger of irreparable loss or damage is immediate.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Monetary Damages

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] Injunctions, Grounds for Injunctions

It is well settled in the U.S. Court of Appeals for the Second Circuit that irreparable injury means injury for which a monetary award cannot be adequate compensation, and that where money damages is adequate compensation a preliminary injunction will not issue.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN5[] Injunctions, Grounds for Injunctions

If the element of irreparable harm is prerequisite for relief where the plaintiff must show probable success on the merits, then a fortiori where the plaintiff establishes something less than probable success on the merits, need for proof of the threat of irreparable damage is even more pronounced.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] Monopolies & Monopolization, Attempts to Monopolize

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] **Monopolies & Monopolization, Actual Monopolization**

Each of the activities which *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, seeks to proscribe has its own elements. Unlawful monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Attempted monopolization has three elements: (1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN8[] **Regulated Practices, Monopolies & Monopolization**

Courts routinely find monopoly power where the market share is greater than 70 percent.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN9[] **Regulated Practices, Monopolies & Monopolization**

The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN10[] **Antitrust & Trade Law, Sherman Act**

Courts tolerate the existence of monopoly power only insofar as necessary to preserve competitive incentives and to be fair to the firm that has attained its position innocently. There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable. Accordingly, the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of *§ 2* of the

Sherman Act, even if there is no attempt to monopolize the second market. It is the use of economic power that creates the liability.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

A Sherman Act claim is stated both where a company leverages power in one market to create monopoly in another, and where a company uses monopoly power in one market to impede competition in another, whether or not it attempts to monopolize the second market, with resulting tangible harm to competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Where a package deal is offered but the customer is also able to purchase the components of the package separately at greater cost, and where the package price is not below cost, there is no antitrust violation.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN14[] **Antitrust & Trade Law, Clayton Act**

Section 3 of the Clayton Act provides that it shall be unlawful for any person engaged in commerce, in the course of such commerce, to make a sale or contract for sale of goods for use, consumption or resale within the United States or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in the goods of a competitor or competitors of the seller, where the effect of such sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN15[] **Antitrust & Trade Law, Sherman Act**

It is well established that *§ 1* of the Sherman Act does not render illegal every contract that in any way restrains trade, but rather only those contracts which effect an unreasonable restraint of trade. The courts have formulated two analytical approaches to determining when a restraint on trade is unreasonable: the per se test, and the "rule of reason" test. The basic difference between the two approaches lies in the extent to which a court must examine the actual effect on competition which an allegedly anti-competitive business practice has. Under the rule of reason test, the court must determine the competitive impact of a particular practice in the context of a relevant market. Under the per se rule, a court does not conduct this extensive inquiry, because the practice in question has been held to be manifestly anti-competitive.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

Under certain conditions, tie-ins are per se unreasonable restraints of trade under the antitrust laws. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits for the tied item is restrained and the Sherman Act is violated.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN17[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The packaging or tying of different products is only condemned when the firm possesses enough market power in the tying product to force the purchaser to buy the tied product. Furthermore, where the purchaser is free to buy the items separately, no tie-in exists. The elements of an illegal tie-in arrangement have been consistently stated by the United States Court of Appeals for the Second Circuit as the following: (1) a tying and a tied product; (2) evidence of actual coercion by the seller forcing the buyer to accept the tied product; (3) sufficient economic power in the tying market to coerce purchaser acceptance of the tied product; (4) anticompetitive effects in the market for the tied product; and (5) the involvement of a "not insubstantial" amount of interstate commerce in the tied product.

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Judges: Sand

Opinion by: LEONARD B. SAND

Opinion

[*147] OPINION

SAND, J.

By Order dated May 26, 1993, this Court denied a preliminary injunction and briefly deferred the filing of this Opinion to enable the parties to examine the Opinion for the sole purpose of advising the Court if any material contained herein is regarded as being confidential. In this Opinion we have set forth our reasons for the denial of preliminary injunctive relief.

This case is before the Court on a motion by plaintiff, Ortho Diagnostic Systems, Inc. ("Ortho") for a preliminary injunction, seeking to enjoin implementation of a contract entered into between defendant Abbott Laboratories, Inc. ("Abbott") and the Council of Community Blood Centers ("CCBC") on the **[**2]** ground that the contract violates various provisions of the antitrust laws. Because we find that plaintiff has not demonstrated a likelihood that it will suffer irreparable harm if the contract is not enjoined, we must deny the preliminary injunction. However, in recognition of the significant interests at stake, both private and public, we have set a date for trial on the merits of November 15, 1993.

Procedural Background

Plaintiff filed its complaint on April 22, 1993. On April 23, 1993, this Court signed an order to show cause in which plaintiff requested expedited discovery and a hearing on the preliminary injunction. The Court heard argument on the order to show cause on April 27, 1993, and granted the motion, providing for certain limited expedited discovery. At that argument, the Court scheduled a hearing on the preliminary injunction for May 20 and 21, 1993. On April 30, 1993, the Court heard argument on a motion by defendant to transfer the case to the Northern District of Illinois. That motion was denied. On May 21, 1993 the Court heard oral argument regarding the issuance of a preliminary injunction. We have taken all care to resolve the issue before the effective **[**3]** date of the contract, which is June 1, 1993, and our decision follows.

Factual Background

HN1[] Findings of fact and conclusions of law made by the Court at the preliminary injunction stage of a case are not binding at trial on the merits. *University of Texas v. Camenisch, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981)*. The following facts are those which we find have been demonstrated by the submissions of the parties and during the hearing for the purpose of determining the propriety of a preliminary injunction only.

Plaintiff Ortho is a New Jersey corporation having its principal place of business in New Jersey and is a wholly owned subsidiary of Johnson & Johnson. Defendant Abbott is an Illinois corporation having its principal place of business in Illinois and licensed to do business in New York.

Both Ortho and Abbott sell blood screening tests used by blood donor centers ("BDCs") and plasma centers [1] to ensure the purity of blood collected across the country. [2] There are five tests which are used by BDCs to screen

[1] Ortho is also involved in the "diagnostic" market, which is composed of hospitals, commercial laboratories and other facilities which test blood to diagnose disease. The diagnostic market is not implicated in this lawsuit, but Ortho's role in that market is a factor which increases the improbability of Ortho exiting the blood-screening market as a result of the CCBC contract.

each unit of blood donated for transfusion: (1) HBsAg tests for hepatitis B surface antigens; (2) HIV 1/2 tests for two strains of the HIV AIDS virus; **[**4]** (3) Anti-core is a further test for hepatitis B; (4) HTLV tests for a form of leukemia; and (5) HCV tests for hepatitis C. These tests are not interchangeable; each must be performed on every unit of blood collected. Plasma centers usually provide blood components, rather than whole blood, to hospitals and industry. **[*148]** Plasma centers use three of these five tests, specifically the HCV, HBsAg, and HIV 1/2 tests. Abbott and Ortho use different technologies to perform the test which are incompatible with each other; Abbott uses a "bead" technology, and Ortho uses a "micro-plate" technology.

[5]** In addition to the tests, many BDCs use a computer software data management system to record and correlate the results of the thousands of individual units of blood tested daily. Abbott's proprietary data management system, upon which many BDCs depend, is known as "DMS". The American Red Cross ("ARC") owns the DMS system outright. Other BDCs which use DMS must obtain it from Abbott. Some large BDCs have developed their own data management systems, and therefore do not use DMS at all. Abbott estimates that 23.7 percent of the screening tests performed each year by BDCs and plasma centers are processed by Abbott-owned DMS systems. (Bryant Decl. at P 17). Ortho is in the process of developing a comparable computer software system, "LOMS", which is currently undergoing field testing.

Four companies sell the blood screening tests in the United States. Only Abbott sells all five of the blood screening tests. Ortho sells HCV, HBsAg and Anti-core. Ortho also offers an HTLV test, but it has not gained acceptance in the market. Ortho currently has applications pending for FDA approval of both an improved HTLV test, and an HIV 1/2 test. Ortho's internal estimates indicate that the **[**6]** HTLV test could gain approval by as early as June of this year (Michels Dep. at 35) and the HIV 1/2 test could gain approval by the second half of 1993 (Michels Dep. at 33). Abbott's and Ortho's only other competitors have a negligible share of the market and therefore do not play a part in this lawsuit.

BDCs and plasma centers together collect approximately 25 million units of blood annually. BDCs collect blood from volunteer donors and screen approximately 13 million units of blood annually. The BDC customer group includes the American Red Cross, which tests approximately 50 percent of these 13 million units; the CCBC, an association of approximately 55 BDCs which together accounts for approximately 35 to 40 percent, or approximately 5 million units, of the blood collected and tested; and unaffiliated BDCs which account for the balance of the blood collected.

Abbott and Ortho differ on whether the relevant customer market is the BDCs alone or the BDCs and the plasma centers taken together. However, it is clear that Abbott holds a predominant share of the market, defined either way, in four out of five of the tests. For example, Abbott's unit and dollar market shares of sales **[**7]** to BDCs in 1992 were approximately as follows:

Product	**Units**	**Dollars**
HTLV	91%	90%
HIV	86%	87%
HBsAg	75%	73%
Anti-core	70%	69%
HCV	21%	20%

[2] Both companies also compete in the international market, but there is no dispute that the relevant geographic market for purposes of this lawsuit is the United States. We note the participation in the international market because it casts doubt on Ortho's claim that it will greatly reduce its expenditures for research and development if the contract at issue here takes effect.

This market power is reinforced by high barriers to entry into the market for blood screening tests, including the high costs of research and development, and the expense of acquiring patents, maintaining a large sales and technical support staff and obtaining FDA approvals.

The Contract

At the core of this action is a contract which Abbott signed in April, 1993 with the CCBC. This group purchasing agreement is intended to govern the prices of Abbott's blood screening assays for the next three years, and goes into effect on June 1, 1993. The individual BDCs have the choice of whether to sign on to the master contract, or to negotiate individual deals. According to Abbott's U.S. Marketing Manager, not all of the CCBC's members participate in group purchasing agreements. Only about 30 out of the 55 or so CCBC members, or about 60 percent, participated in the prior group agreement with Abbott which expires on May 31, 1993 (Bryant Decl. at P 4). The CCBC collects a 1.5 percent commission on all sales **[**8]** under its master agreements, the proceeds of which it uses to run programs and provide services for its members.

[*149] In the fall of 1992, the CCBC formed a negotiating team for the purpose of negotiating a new long-term group purchasing agreement. The CCBC negotiators met separately with both Abbott and Ortho in the fall of 1992, and then submitted a "request for proposal" ("RFP") to both companies. The RFP asked both companies to submit bids that included prices for various combinations of the tests, including a five-assay package, as well as prices for each test individually. The RFP also requested prices which included data management software, and prices for the software separately.

Although the Court was presented with a great deal of deposition testimony on the bidding process, it is sufficient to note that both companies competed for the CCBC contract, providing pricing for all five tests and software and for various other combinations. [3] After lengthy negotiations and submission of supplemental proposals, the negotiating team forwarded its recommendation of the Abbott proposal to the CCBC Group Purchasing Subcommittee, which ultimately decided to recommend the proposal to **[**9]** the CCBC members.

Ortho alleges that Abbott's contract with the CCBC is designed to foreclose Ortho from competing with Abbott for the next three years. Abbott has accomplished this, Ortho alleges, by devising a pricing scheme which would in effect force any rational buyer to purchase all five tests from Abbott, even though the buyer might rather purchase one or more tests from Ortho or one of the other competing companies.

The pricing structure which would go into effect according to the CCBC contract is as follows:

CCBC members who agree to purchase all five tests exclusively from Abbott pay the following:

Test	Price
HBsAg	0.66
Anti-core	0.85
HTLV	1.03
HIV-1/2	1.93
HCV	2.90
Total	7.37

[10]**

Also included in this package is the DMS system.

CCBC members who agree to purchase four tests from Abbott must pay:

Test	Price w/DMS	Price w/o DMS
HBsAg	0.81	0.72

[3] In its five-assay package, Ortho offered its own HTLV test, which is not generally accepted on the market, and an HIV 1/2 test manufactured by Genetic Systems (one of the two smaller competitors). Ortho also offered its LOMS computer software system, although Ortho alleges that the CCBC understood that the system was not yet ready to be implemented.

Test	Price w/DMS	Price w/o DMS
Anti-core	1.14	1.05
HTLV	1.18	1.09
HIV-1/2	2.08	1.99
HCV	2.90	2.90
Total	8.11	7.75

CCBC members who agree to buy three or less tests from Abbott pay according to the following schedule, and DMS is not included with purchase of three of fewer assays:

Test	Price
HBsAg	1.20
Anti-core	1.25
HTLV	1.57
HIV-1/2	2.47
HCV	3.53
Total	10.02

Plaintiff provides a number of examples of how the pricing structure allegedly will exclude Ortho from selling to CCBC members. Plaintiff alleges that Abbott has exploited the fact that the great majority of purchasers buy the Abbott HTLV and HIV-1/2 tests, and has used price penalties to force purchasers to buy the other three tests from Abbott as well. A few of the examples are set out in the footnote. [4]

[11] [*150]** In addition to this pricing structure, the CCBC contract contains what plaintiff has referred to as a "bridge" clause. This clause provides that if a competing company develops a new test, a customer may switch over from Abbott only until that time when Abbott develops a comparable test approved by the FDA. This provision was included as a response to the BDCs' concerns that if a new or improved test were to be developed in the micro-plate technology, the centers might be locked in to the Abbott contract and not be able to use the new test, or might be charged a prohibitive price by the company offering the new test. The provision allows a BDC to switch to the other technology with Abbott picking up the cost of the switch and any increased cost of the new test, as long as the customer agrees to switch back when Abbott has developed a comparable new or improved test in the bead technology. Ortho alleges that this provision improperly limits Abbott's competitors to short-term profits from technological gains and would therefore have an adverse effect on research and development.

The third feature of the master contract with which Ortho takes issue is the alleged tie-in of the DMS **[**12]** system to the tests. Ortho argues, in essence, that by refusing to quote a price on DMS for BDCs who wish to purchase less than four assays from Abbott, Abbott has effectively made it impossible for many BDCs to purchase tests from Ortho because the BDCs are dependent on the DMS system. In response, Abbott argues that it will negotiate individual deals with BDCs who enter contracts for three assays or less with a high enough volume to warrant inclusion of DMS in the deal.

Finally, Ortho has alleged that Abbott intends to enter into a contract with the American Red Cross during the next few months, which will impose similar arrangements on another 50 percent of the BDC market. If this happens, Ortho alleges, Abbott will have effectively forced Ortho out of the market for blood screening tests entirely. Abbott argues that there is no evidence that Abbott will be able to enter into a similar contract with the ARC when that

[4] If a customer wishes to buy Abbott's HTLV and HIV-1/2 together with its HCV, the price for the three would cost 7.57, while its price for all five of the tests would be 7.37, including the DMS system which is not available with the three assay package. Therefore, in order to sell the remaining two tests at a competitive price, Ortho alleges it would have to give the two tests away, plus give the customer a .20 cent rebate and a free data management software system, which it does not have at this time.

While perhaps not as dramatic as that example, other combinations of tests produce similar pricing effects. For example, if a customer were to buy all the tests except the HBsAg test from Abbott, the price for the Abbott tests would be $ 7.30. Therefore, to meet the price of the Abbott five-test package, $ 7.37, Ortho alleges it would have to offer the HBsAg test for 0.7 cents.

contract expires at the end of this year. First of all, Abbott argues that by that time, Ortho will likely have FDA approval of the HIV and enhanced HTLV tests, and will therefore be in a better position to offer a more competitive five-assay deal to the ARC. **[**13]** Secondly, Abbott argues that any alleged leveraging of the DMS system cannot be part of a deal with the ARC, since the ARC already owns the DMS system.

Discussion

HN2[] A preliminary injunction is appropriate on "'a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the party requesting the preliminary relief.'" *Savage v. Gorski, 850 F.2d 64, 67 (2d Cir. 1988)* *(quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979))*.

A. *Irreparable Injury:*

HN3[] In this Circuit, an applicant for a preliminary injunction must show that "it is likely to suffer irreparable harm if equitable relief is denied." *JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990)*. The Second Circuit has consistently held that "perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable **[**14]** harm before a decision on the merits can be rendered." *Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 45 (2d Cir. 1983)*. An antitrust plaintiff must make the same showing of irreparable harm as any other plaintiff. *See Jack Kahn Music Co. v. Baldwin Piano & Organ, 604 F.2d 755, 759* (Clayton Act "requires 'a showing that the danger of irreparable loss or damage is immediate.'").

We find that plaintiff has not satisfied its burden of demonstrating that it is likely to suffer irreparable injury if this Court does **[*151]** not enjoin the CCBC contract. We have reached this conclusion based on a number of factors, which we will discuss in turn.

Abbott argues that even if plaintiff proves its antitrust claims, its only damages will be the loss of customers, an injury which can be fully compensated by monetary relief. ***HN4***[] It is well settled in this Circuit that "irreparable injury means injury for which a monetary award cannot be adequate compensation, and that where money damages is adequate compensation a preliminary injunction will not issue." *Jackson Dairy, Inc. v. H.P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979)*. **[**15]**

We agree with Abbott's characterization. Assuming Ortho can prove liability, it appears to this Court that Ortho's losses, if any, can be compensated by money damages. Plaintiff will be able to demonstrate which customers switched from Ortho to Abbott, and the amount of revenues foregone from that loss of business. Ortho argues that it will not be able to prove lost opportunity; i.e. those customers which it might have been able to sign had Abbott's illegal pricing scheme not been in effect. However, while such damages may be difficult to prove, that difficulty is not insurmountable. Furthermore, the availability of treble damages under the antitrust laws might well counteract this perceived problem.

Abbott further argues that because Ortho is a very successful corporation, which sells many other products aside from the blood-screening tests, and moreover is a subsidiary of Johnson & Johnson, it can sustain any loss of business which might occur. Abbott thereby distinguishes the cases cited by Ortho in its papers, which involve the destruction of "mom and pop" businesses. *Roso-Lino Beverage Dist., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125-26 (2d Cir. 1984)*; **[**16]** *Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970)*.

Again, we find Abbott's position persuasive. Ortho has not presented credible evidence that it will be forced out of the U.S. blood screening business if the CCBC contract is not enjoined. This is a highly volatile market, and too many variables are in flux to make it likely that Ortho would suddenly drop out of the running. We believe that much of Ortho's argument was premised on the misconception that it could be many years before a trial on the merits. [5] However, we have set a date of November 15, 1993 for trial, and therefore the relevant question is whether plaintiff will suffer irreparable injury between today and November 15, 1993, six months from now.

[17]** Most importantly in this regard, a large portion of Ortho's existing business with CCBC is secured by long-term contracts which do not expire until July, 1994 at the earliest (Michels Dep., Exh. 13). These sales will continue regardless of the new master agreement, and well beyond the date set for trial on the merits. The continuation of this business makes it quite unlikely that Ortho will drastically cut its sales staff, research and development, or support services in the coming months. As noted above, Ortho's participation in the diagnostic market, which uses some of these same blood-screening tests as well as others which Ortho manufactures, also leads us to the conclusion that Ortho will not disappear from this market overnight.

Additionally, in order to prevail on the irreparable injury prong of the test, Ortho would have had to convince the Court that the difficulty and costs of switching between the two technologies was so burdensome, that once the BDCs switched to the Abbott technology on June 1, 1993 they would be lost to Ortho. Plaintiff however failed to provide any estimate of the time or cost involved in switching between the two technologies. Although some deponents **[**18]** testified that switching would be disruptive, Mr. MacPherson, the Executive Director of the CCBC, testified that many centers told him that "they didn't see it as a big deal to go to **[*152]** make two technology switches if you were going back to a system that you were already comfortable with." (MacPherson Dep. at 120) Therefore, the mere fact that some centers will have switched to the bead technology as of June 1, 1993 does not mean that Ortho necessarily will lose the customer base if the preliminary injunction does not issue.

Various other factors also make it unlikely that Ortho will suffer irreparable harm during this time frame. Ortho's allegation that Abbott will sign a similar master agreement with the ARC in the near future, closing Ortho out of 50 percent of the BDC market, is not supported by the evidence thus far. The ARC contract does not expire until the end of 1993; again, this is after the date set for trial on the merits. Furthermore, by the end of 1993, Ortho may very well have FDA approval for the HIV and enhanced HTLV tests, placing Ortho in a different position to compete with Abbott by its ability to offer a five-assay package. As noted above, the "leverage" which **[**19]** Abbott allegedly enjoys by virtue of DMS has no impact on the ARC, which already owns the program.

Ortho's proximity to developing a comparable data management system, LOMS, is another factor which weighs against a finding of irreparable injury. If Ortho is successful in this regard, it will be able to compete for much of the business which Abbott allegedly controls because of the BDCs' dependence on DMS. It is implausible that Ortho would cease its efforts in this market when it is possibly so close to achieving true competitive status.

For all the foregoing reasons, we find that plaintiff has not met its burden of demonstrating that it is likely to suffer irreparable harm if this Court does not enjoin the CCBC contract. Ortho's reliance on the Seventh Circuit's decision in *General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 591 (7th Cir. 1984)* is misplaced. That circuit does not require a showing of irreparable harm, but instead engages in an analysis of the relative harms that each side would suffer from the grant or denial of an injunction. It is by no means clear that Ortho would prevail even upon that analysis, but in any **[**20]** event, it is inapplicable.

Because Ortho has not met the threshold burden of proving irreparable injury, the first prong of the test for a preliminary injunction, we do not need to address the second prong of the test, namely whether Ortho has demonstrated likelihood of success on the merits or sufficiently serious questions going to the merits to warrant litigation and a balance of the hardships tipping in its favor. However, because courts have considered the interrelationship between the two prongs, we note briefly our views on the question of likelihood of success on the merits. *See Kahn, 604 F.2d at 759*:

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[5] See transcript, proceedings, May 21, 1993 at 49 where plaintiff's counsel argued on the basis of a three year interval before trial on the merits could be held. Plaintiff's counsel later agreed that if an injunction were denied plaintiff could be ready for trial on the merits in October. Transcript at 67. Defendant's counsel asserted that one year would be required to complete pre-trial discovery. We believe that no good reason exists why this case could not be ready for trial on the merits by November 15, 1993. Transcript at 66.

> *HN5*[] "If the element of irreparable harm is prerequisite for relief where the plaintiff must show probable success on the merits, then *a fortiori* where the plaintiff establishes something less than probable success on the merits, need for proof of the threat of irreparable damage is even more pronounced." (quoting *Triebwasser & Katz v. American Telephone & Telegraph Co., 535 F.2d 1356, 1359 (2d Cir. 1976)*.

B. *Likelihood of Success on the Merits/ Serious Questions Going to the Merits:*

Ortho's claims fall **[**21]** into two categories: (1) claims that Abbott is abusing its monopoly power or attempting to monopolize through monopoly leveraging, in violation of *Section 2* of the Sherman Act; and (2) claims that Abbott's price structure and/or use of DMS are effectively illegal tying arrangements in violation of *Section 1* of the Sherman Act and Section 3 of the Clayton Act, and *New York General Business Law § 340*. We find that on the state of the record thus far, plaintiff has demonstrated serious questions going to merits on both categories of claims, but has not shown likelihood of success.

(1) *Monopoly Leveraging:*

Section 2 of the Sherman Act makes it unlawful to *HN6*[] "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . ." *15 U.S.C. § 2*.

[*153] *HN7*[] Each of the activities which *Section 2* seeks to proscribe has its own elements. Unlawful monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development **[**22]** as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. Attempted monopolization has three elements: "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-891 (1993)*.

Although monopolization and attempted monopolization are separate offenses under the ***antitrust law***, and Ortho alleges that Abbott has committed both, the allegations can be reduced to essentially one theory. Ortho alleges that Abbott has leveraged its lawfully gained monopoly power in the HTLV and HIV markets to unlawfully monopolize or attempt to monopolize the markets in the other three tests through an anti-competitive pricing scheme which forces purchasers to buy all five tests from Abbott. In the same vein, Ortho alleges that Abbott is leveraging its monopoly power in DMS by refusing to offer DMS to purchasers who wish to buy three or fewer tests.

Turning briefly to the DMS question **[**23]** first, there are a number of facts which have not been established but which may make plaintiff's case difficult to prove. First of all, because the ARC owns DMS outright, it is probably inappropriate to include the ARC in an estimate of Abbott's market power in DMS. Therefore, it is unclear whether Abbott actually possesses the requisite market power to sustain a leveraging claim. Secondly, the parties dispute whether Abbott has actually refused to offer DMS to customers purchasing fewer than four tests. However, Abbott's bundling of the DMS program with its four and five assay packages does raise a serious question going to the merits of the claim to make it a fair ground for litigation.

The heart of plaintiff's leveraging claims revolves around Abbott's pricing structure. It is clear that Abbott satisfies the first element of a monopolization claim, monopoly power, because Abbott has 90 percent of the market share in HTLV, and 87 percent of the market share in HIV. It is a closer call whether Abbott enjoys monopoly power in the HBsAg and Anti-core markets, where Abbott's market share is approximately 70 percent. [6] *HN8*[] Courts routinely

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[6] For the purposes of this motion, we have concluded that it is inappropriate to exclude the ARC from the calculation of market share, as Abbott would have the Court do. The only reason offered for such exclusion is that the ARC contract will be expiring at the end of the year. By that logic, we should include an estimate of the new market share which Abbott will enjoy by virtue of the new CCBC master contract. Rather than engage in such speculation, we prefer to assess market share as it exists at this point in time.

find monopoly power where the market share **[**24]** is greater than 70 percent. *See* *Grinnell, 384 U.S. at 571* (87 percent of the market constituted monopoly); *Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 974 & n.6 (8th Cir. 1968)*, *cert. denied, 395 U.S. 961, 23 L. Ed. 2d 748, 89 S. Ct. 2096 (1969)* (surveying cases and noting that percentages greater than 70 percent generally are found to constitute monopoly power.)

The critical question therefore becomes whether Abbott has abused its **[**25]** monopoly power in HTLV and HIV either to maintain monopoly power in those markets and the Anti-core and HBsAg tests or to attempt to attain monopoly power in those tests, and, in the case of attempted monopolization, whether there is a dangerous probability of success.

Ortho alleges that the type of anti-competitive behavior in which Abbott is engaging is monopoly leveraging. Monopoly leveraging is where a party uses its monopoly power in one market to distort or affect competition in another market. The Supreme Court has explained that ***HN9***[] "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States v. Griffith, 334 U.S. 100, 107,* ***[*154]*** *92 L. Ed. 1236, 68 S. Ct. 941 (1947)*. In this case, Ortho alleges that by bundling together the tests which consumers prefer to buy from Abbott, the HIV and the HTLV, with the other three tests which consumers may wish to purchase from another manufacturer, at a price which cannot be matched by Ortho without drastically cutting its prices or giving the tests away free, Abbott effectively closes out all competition.

Ortho relies principally on two **[**26]** cases in support of its monopoly leveraging claim: *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056* (3d Cir.), *cert. denied, 439 U.S. 838, 58 L. Ed. 2d 134, 99 S. Ct. 123 (1978)*, and *Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*, *cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*.

In *SmithKline,* the Third Circuit was faced with a factual scenario which appears to be similar at this stage of the record to the one confronting this Court. The parties in *SmithKline* were pharmaceutical manufacturers, which had each developed certain antibiotics. The defendant, Eli Lilly, had a lawful monopoly in two of the drugs, Keflin and Keflex, by virtue of patents. In a third, Kefzol, Eli Lilly did not have a patent and faced competition on that drug from SmithKline, which marketed an equivalent called Ancef. The lawsuit arose when Eli Lilly adopted a new pricing structure which effectively bundled Keflin and Keflex together with Kefzol, at a price which would have forced SmithKline to offer Ancef rebates of between 16 and 33 percent in order to compete. We say "effectively bundled" because **[**27]** purchasers were still free to buy the drugs separately, thus avoiding liability on a tying claim, but the pricing structure made that choice economically irrational.

The Third Circuit found that Eli Lilly's pricing plan violated *Section 2* of the Sherman Act. The court first defined the relevant product market as that composed of all of the various types of cephalosporin antibiotics, and affirmed the district court's finding that Eli Lilly possessed monopoly power in that market. The court then went on to find that Eli Lilly's monopoly power was being unlawfully maintained by the pricing structure. The court's language is instructive:

> In sum, the act of willful acquisition and maintenance of monopoly power was brought about by linking products on which Lilly faced no competition--Keflin and Keflex--with a competitive product, Kefzol. The result was to sell all three products on a non- competitive basis in what would have otherwise been a competitive market for Ancef and Kefzol. The effect of the [new pricing plan] was to force SmithKline to pay rebates on one product, Ancef, equal to rebates paid by Lilly based on volume sales of three products . . . The goal of the plan **[**28]** was to associate Lilly's legal monopolistic practices with an illegal activity that directly affected the price, supply, and demand of Kefzol and Ancef. Were it not for Lilly's [new pricing plan], the price, supply and demand of Kefsol and Ancef would have been determined by the economic laws of a competitive market. The [new pricing plan] blatantly revised those economic laws and made Lilly a transgressor under *§ 2* of the Sherman Act.

575 F.2d at 1065.

Abbott argues that *SmithKline* is not authority for a leveraging claim, because, among other reasons, the court found that there was only one market at issue, that of cephalosporin drugs, and the Second Circuit requires two markets for a leveraging claim. While that is true, the reasoning of *SmithKline* is still persuasive, and has even greater force where a similar pricing scheme is employed where there are two or more markets.

Ortho has demonstrated that there are sufficiently serious questions regarding whether Abbott's new pricing scheme has similar anti-competitive qualities. The linking of the HTLV and HIV tests, in which Abbott has a lawful monopoly, with the other three tests in which **[**29]** it faces competition at prices which would allegedly force Ortho to give rebates of over 100% in certain combinations, more likely than not will foreclose competition for these customers. The situation is especially severe where, as here, the contract is for an extended period of time.

[*155] Ortho relies on the *Berkey* decision for the proposition that a violation of *Section 2* based on a claim of monopoly leveraging does not have to entail an actual monopolization of the leveraged market. Rather, it is sufficient if competition in the leveraged market, here the three tests over which Abbott does not already have monopoly power, is distorted. Defendant argues that the *Berkey* decision was wrongly decided, and cites to cases in other circuits which hold that merely gaining a competitive advantage in a second market by means of monopoly power in a primary market is not a violation of the ***antitrust law***. Abbott also maintains that it has not contravened *Berkey,* because that case does not prohibit actions taken in pursuit of "a valid business policy." *603 F.2d at 284*.

There are certain difficulties with defendant's argument. First, Abbott downplays the **[**30]** fact that *Berkey* remains the law of this Circuit. *Berkey* involved a challenge to Kodak's use of its monopoly in the camera, film and color paper markets to affect the photofinishing market, in which it faced competition from Berkey. The court found that Kodak was never close to attaining monopoly power in the photofinishing market, and therefore could not be held liable for "attempted monopolization" because the third element, dangerous probability of success, had not been met. However, the court explained that a firm still violates *Section 2* where, although not attempting to monopolize the second market, the firm uses its monopoly power in the first market to distort competition or to gain a competitive advantage in the second. The court stated:

> This conclusion appears to be an inexorable interpretation of the antitrust laws. ***HN10***[] We tolerate the existence of monopoly power . . . only insofar as necessary to preserve competitive incentives and to be fair to the firm that has attained its position innocently. There is no reason to allow the exercise of such power to the detriment of competition, in either the controlled market or any other. That the competition in the **[**31]** leveraged market may not be destroyed but merely distorted does not make it more palatable.
>
> *603 F.2d at 275*.
> * * *
>
> Accordingly, the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of *§ 2*, even if there is no attempt to monopolize the second market. It is the use of economic power that creates the liability.
>
> *Id. at 276*.

The *Berkey* analysis has been recently reaffirmed by this Court in *Viacom Int'l Inc. v. Time Inc., 785 F. Supp. 371, 378 (S.D.N.Y. 1992)*, where the court held that ***HN11***[] a Sherman Act claim "is stated both where a company leverages power in one market to create monopoly in another, *see* *United States v. Griffith, 334 U.S. 100, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*, and where a company uses monopoly power in one market to impede competition in another, whether or not it attempts to monopolize the second market, *Berkey, 603 F.2d at 275*, with resulting 'tangible harm to competition' *Twin Labs, Inc. v. Weider Health & Fitness, 900 F.2d 566, 571 (2d Cir. 1990)*".

Plaintiff **[**32]** has demonstrated to the Court's satisfaction that Abbott's new pricing structure may, at the least, impede competition in the markets for the three tests in which Abbott does not have monopoly power.

Another difficulty with Abbott's argument is that certain of the cases Abbott cites in opposition to the monopoly leveraging claim are cases from other circuits which, although in conflict with *Berkey,* simply do not control in this Circuit. For example, defendant relies on *Fineman v. Armstrong World Industries, Inc., 980 F.2d 171 (3d Cir. 1992) cert. denied, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993)*, which involved a challenge to defendant's alleged use of monopoly power in the resilient floor covering market to gain a competitive advantage in the market for video magazines sold to distributors of floor coverings. The *Fineman* court held that in order to state a claim under *Section 2* for monopoly leveraging, it is insufficient to show that the firm has used its monopoly power in one market to gain a competitive advantage in a second market; rather, it is necessary to demonstrate threatened or actual monopoly in the leveraged market. **[**33]** Although **[*156]** *Fineman* flatly rejects the *Berkey* holding that proof of use of monopoly power in a primary market in order to gain a competitive advantage in the leveraged market is sufficient, *Fineman* simply does not control our decision. The same holds true for the Ninth Circuit's rejection of *Berkey* in *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 541-549 (9th Cir. 1991)*, *cert. denied, 118 L. Ed. 2d 316, 112 S. Ct. 1603 (1992)*.

Abbott however does present arguments which give the Court pause. Abbott contends that its pricing structure arises from its ability to provide all five tests, which is an advantage it possesses legitimately due to its size. Abbott explains that its bundling is merely a package discount, *i.e.* a lower per-test price when more tests are purchased. At oral argument, Abbott drew the analogy to a car rental agency, which can offer lower prices when renting a fleet of cars than when renting one car separately.

In support of this argument, Abbott relies on *Chillicothe Sand & Gravel Co. v. Martin Marietta, 615 F.2d 427 (7th Cir. 1980)*. In *Chillicothe,* **[**34]** the court explained that one must look to the complained of conduct's effect on competition, and not on specific competitors. Furthermore, the court ruled that ***HN12***[] where a package deal is offered but the customer is also able to purchase the components of the package separately at greater cost, and where the package price is not below cost, there is no antitrust violation. *See* also *Southern Pacific Commun. Co. v. AT&T, 556 F. Supp. 825, 947 (D.D.C. 1983)*, *aff'd, 238 U.S. App. D.C. 309, 740 F.2d 980 (D.C. Cir. 1984)*, *cert. denied, 470 U.S. 1005, 84 L. Ed. 2d 380, 105 S. Ct. 1359 (1985)*.

Abbott argues that the CCBC itself recognized that a package deal including all five assays would result in greater volume of sales and could save its members considerable sums of money, and that is why it specifically requested the bundling in the RFP. Ortho argues in response that this is not a true volume discount, because a BDC which purchases all five tests from Abbott obtains lower prices per test under the master agreement than a BDC which purchases four or three tests from Abbott even if the latter does a far greater volume of testing overall.

Because Ortho **[**35]** has not met its burden of demonstrating that it would suffer irreparable harm if an injunction does not issue, we do not need to determine who has the better argument on the monopoly leveraging claim. It suffices to say that plaintiff has not proven that it is likely to succeed on the merits, but it has shown that there are sufficiently serious questions on the merits to warrant litigation. We will address the question of the balance of the hardships below.

(2) *Illegal Tying Claims:*

Plaintiff's claims regarding illegal tying may be more difficult to prove, but again it appears that there are sufficiently serious questions going to the merits of these claims to warrant preliminary injunctive relief if Ortho had demonstrated both that the balance of the equities is in its favor and that it would suffer irreparable injury. Although the law of tying is well-developed, the facts of this case, specifically that the tests are available for separate purchase and are therefore not explicitly tied, make the law more difficult to apply. With regard to plaintiff's second tying argument, that DMS is the tying product used to force purchasers to buy either four or five tests, we noted **[**36]** above that it is unclear whether DMS is separately available or not.

Ortho's tying claims come under *Section 1* of the Sherman Act and Section 3 of the Clayton Act. *Section 1* of the Sherman Act provides:

> ***HN13***[] 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 . . .

Section 3 of the Clayton Act provides:

> ***HN14***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods . . . for use, consumption or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the . . . purchaser thereof shall not **[*157]** use or deal in the goods of a competitor or competitors of the . . . seller, where the effect of such . . . sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

HN15[] It is well established that *Section 1* of the Sherman Act does not render illegal every **[**37]** contract that in any way restrains trade, but rather only those contracts which effect an unreasonable restraint of trade. *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. The courts have formulated two analytical approaches to determining when a restraint on trade is unreasonable: the *per se* test, and the "rule of reason" test. The basic difference between the two approaches lies in the extent to which a court must examine the actual effect on competition which an allegedly anti-competitive business practice has. Under the rule of reason test, the court must determine the competitive impact of a particular practice in the context of a relevant market. Under the *per se* rule, a court does not conduct this extensive inquiry, because the practice in question has been held to be manifestly anti-competitive.

The Supreme Court has held that ***HN16***[] under certain conditions, tie-ins are *per se* unreasonable restraints of trade under the antitrust laws. In *Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*, the Supreme Court explained that

> the essential characteristic of an invalid tying arrangement **[**38]** lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits for the tied item is restrained and the Sherman Act is violated.

Ortho argues that Abbott's pricing structure constitutes a *per se* illegal tie-in because Abbott is exploiting its control over the HIV and HTLV markets to force the buyer into purchasing the other three tests, some or all of which the buyer might rather purchase from Ortho. The DMS tying claim is essentially the same. ***HN17***[] The packaging or tying of different products is only condemned when the firm possesses enough market power in the tying product to force the purchaser to buy the tied product. Furthermore, where the purchaser is free to buy the items separately, no tie-in exists. *Northern Pacific Railroad Corp. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*.

The elements of an illegal tie-in arrangement have been consistently stated by the Second Circuit as the following:

> (1) a tying and a tied **[**39]** product; (2) evidence of actual coercion by the seller forcing the buyer to accept the tied product; (3) sufficient economic power in the tying market to coerce purchaser acceptance of the tied product; (4) anticompetitive effects in the market for the tied product; and (5) the involvement of a "not insubstantial" amount of interstate commerce in the tied product.

Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992).

Ortho concedes, as it must, that there is nothing in the CCBC contract which explicitly conditions the purchase of the HIV and HTLV tests on purchase of any of the other three tests. Therefore, Ortho is constrained to argue that although purchasers appear to have the choice to buy the tests separately, in fact, that choice is illusory because the prices have been set to ensure that any rational purchaser will be coerced to buy all five tests. With regard to

DMS, Ortho argues that there is an explicit tie by virtue of Abbott's refusal to offer DMS to purchasers of three tests or less; Abbott responds that in fact, it is willing to negotiate individual deals for DMS to purchasers of sufficient volume, and in any event, **[**40]** it does not possess market power in DMS.

There is some case law to support the position that a tie does not have to be explicit but can instead be inferred from the pricing structure of two products and the market power which the party has. *See* for example, *United States v. Loew's, Inc., 371 U.S. 38, 54, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)* (remedy **[*158]** for antitrust violation included provision that company could not use an unjustified price differential between goods sold separately and those sold as a package which would have the effect of creating a tie); *Virtual Maintenance, Inc. v. Prime Computer, Inc., 957 F.2d 1318, 1323* (6th Cir.) *vacated and remanded on other grounds, 121 L. Ed. 2d 235, 113 S. Ct. 314 (1992)* ("A tying arrangement clearly exists here because the large price differential between the software support alone and the software/hardware maintenance package induces all rational buyers of Prime's software support to accept its hardware maintenance").

Absent an explicit condition in the contract, there is a question of fact for the fact-finder regarding the existence of the tie, and we are unable on this state of the record **[**41]** to determine if plaintiff is likely to prevail on the merits of the tying claims. What is evident however is that there are sufficiently serious questions going to the merits of the tying claims to make them a fair ground for litigation.

(3) Balance of the Hardships:

We cannot find on this state of the record that the balance of the hardships tip decidedly towards Ortho. If this Court enjoins the CCBC contract, Abbott will most likely negotiate a new contract that will result in higher prices charged to the BDCs. The centers will then pass this higher cost on to the ultimate consumers, which are the hospitals and patients who need blood for transfusions. If it turns out that the injunction was improvidently granted, that cost to the public cannot be recouped. On the other hand, if the contract goes into effect on June 1, 1993, and the Court later finds in favor of Ortho, all that has been lost are profits which Ortho should have realized, and which the Court can award. Thus, the balance of the equities does not tip decidedly towards Ortho in this case.

Finally, we wish to acknowledge the brief we received from the CCBC as amicus curiae. We appreciate the various concerns which **[**42]** the CCBC expressed regarding the possible consequences which a preliminary injunction could have on the BDC market. However, we want to stress that the CCBC's concern regarding "confusion" which the BDCs may experience if an injunction were to issue is not resolved by our denial of the preliminary relief. A preliminary injunction is just that: a decision made at a preliminary stage of the proceedings to address the immediate circumstances. Our denial of the preliminary injunction should not leave the impression that the Court has addressed the merits of Ortho's claims in any but the most preliminary way. Six months from now, after trial on the merits, the application of the law to the facts may appear very differently, and a permanent injunction may be manifestly appropriate. Any uncertainty this state of affairs may cause the CCBC and its members is an unfortunate but inevitable consequence of pending litigation.

Conclusion

For the reasons stated above, we deny Ortho's motion for a preliminary injunction. We set the case down for trial on November 15, 1993. We ask that Magistrate-Judge Grubin continue her pretrial supervision of discovery in this case.

Dated: New **[**43]** York, New York

May 28, 1993

Leonard B. Sand

U.S.D.J.

Williamson v. Sacred Heart Hosp.

United States District Court for the Northern District of Florida, Pensacola Division

May 28, 1993, Decided ; May 28, 1993, FILED; June 2, 1993, ENTERED

CASE NO. 89-30084-RV

Reporter
1993 U.S. Dist. LEXIS 20853 *; 1993 WL 543002

ANGEL YUH WILLIAMSON, M.D., and PENSACOLA DIAGNOSTIC CENTER & BREAST CLINIC, P.A., Plaintiffs, v. SACRED HEART HOSPITAL OF PENSACOLA; BAPTIST HOSPITAL, INC.; PENSACOLA RADIOLOGY CONSULTANTS, P.A.; ALBERT A. POST, M.D.; KEITH T. SHEARLOCK, M.D.; and HEALTH FIRST NETWORK, INC., Defendants.

Core Terms

privileges, patients, radiology, referrals, conspiracy, clinic, bylaws, exclusive contract, Diagnostic, antitrust, membership, Pathologists, radiologist, negotiations, internal medicine, specimen, needle, staff, recommendation, accommodate, specialty, breast, no evidence, competitors, practicing, undisputed, placement, courtesy, defendants', termination

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[ ] **Discovery, Methods of Discovery**

A motion for summary judgment should be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. An issue of fact is "material" if it might affect the outcome of the case under the governing law. It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Burdens of Proof, Movant Persuasion & Proof**

The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof. However, summary judgment is improper if a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN3[] **Summary Judgment, Burdens of Proof**

On summary judgment motion, the record and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. Furthermore, the court must consider the entire record in the case, not just those pieces of evidence that have been singled out for attention by the parties.

Antitrust & Trade Law > Regulated Industries > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN4[] **Antitrust & Trade Law, Regulated Industries**

The Health Care Quality Improvement Act (HCQIA), *42 U.S.C.S. § 11101 et seq.*, creates antitrust immunity for a professional review body in connection with a professional review action. *42 U.S.C.S. § 11111(a)*. The decisions of professional review bodies regarding privileges and membership qualify on their face as professional review actions. However, for immunity to attach under the HCQIA, the review action must have been taken in the reasonable belief that the action was in the furtherance of quality care, and in the reasonable belief that the action was warranted by the facts known after a reasonable effort to obtain the facts and after providing notice and hearing procedures. *42 U.S.C.S. § 11112(a)*. The statute creates a rebuttable presumption that these requirements have been met.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

International Trade Law > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

15 U.S.C.S. § 1 of the Sherman Act provides: 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. The threshold requirement of a conspiracy claim under this statute is existence of an agreement between two or more persons demonstrating a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN6[] **Conspiracy, Elements**

It is the rare case in which plaintiff can establish the existence of a conspiracy by showing an explicit agreement. Therefore, most conspiracies are inferred from the behavior of the alleged conspirators. However, the range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy is limited.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN7[] **Summary Judgment, Evidentiary Considerations**

To make out a conspiracy, and thus avoid summary judgment, the circumstantial evidence upon which plaintiff relies must establish a non-legitimate motive for entering into such a conspiracy. In other words, plaintiff must show that collective behavior is economically reasonable in that it accomplishes a goal that would economically inure to defendants' benefit, and therefore reasonably exclude the possibility that defendants acted independently. To make this showing, plaintiff must adduce evidence that tends to exclude the possibility that the alleged co-conspirators acted independently and in a manner consistent with rational business objectives. This means that conduct that is as consistent with permissible, unilateral activity as with an illegal conspiracy does not, standing alone, permit the inference of an antitrust conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN8[] **Conspiracy to Monopolize, Sherman Act**

Plaintiff need not show a specific intent to restrain trade or to build a monopoly. So long as the purported conspiracy has an anticompetitive effect, plaintiff has made out a case under *15 U.S.C.S. § 1*. Therefore, in determining whether a conspiracy exists, if an economic motive is evident, plaintiff need only show (1) a conscious commitment on the part of the alleged conspirators to adhere to an agreement that is (2) designed to achieve an objective prohibited by the statute.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN9[] **Conspiracy, Elements**

Once plaintiff makes out a conspiracy, the court must decide whether the agreement had an adverse impact on competition. Certain conspiracies are deemed to have such a pernicious effect on competition, that they are said to be illegal per se. That is, the conduct involved always or almost always tends to restrict competition and decrease output without any countervailing procompetitive benefits. The per se label should be applied infrequently and with caution. Therefore, the presumption in *15 U.S.C.S. § 1* cases is that the rule of reason standard applies.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason asks whether, in the circumstances of a particular case, a restrictive practice imposes an unreasonable restraint on competition. A restraint is unreasonable if it has an adverse impact on competition and cannot be justified as a procompetitive measure. Thus, the rule of reason standard hinges the ultimate legality of a restraint on whether plaintiff has demonstrated an anticompetitive effect that is not offset by a need to achieve a procompetitive benefit or justification.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order to show an injury to competition using the rule of reason analysis, plaintiff first must establish a particularized or relevant market in which defendant's actions unreasonably restrain trade. The relevant market is defined generally as the area of effective competition. The market must contain both a product dimension and a geographic dimension. The product dimension is determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output. The geographic dimension is the area in which the product or its reasonably interchangeable substitutes are traded.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN12[] Antitrust Actions, Physicians

Once plaintiff has established the relevant market, the rule of reason analysis focuses on defendants' power within the market. The meaning of market power in rule of reason cases has not been clearly explained or defined by the United States Supreme Court. However, the court agrees with the description of market power as the power to raise price above the competitive level without losing so many sales that the price increase would be unprofitable.

Evidence > Privileges > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN13[] Evidence, Privileges

The denial or revocation of hospital privileges are presumed to be economically motivated, and are, therefore, evidence of an economic conspiracy between defendant hospital and its staff. In such a case, plaintiff need only show a conscious commitment to the agreement and that the agreement was designed to achieve an anticompetitive effect.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

HN14[] Sherman Act, Claims

Exclusive contracts are completely consistent with rational economic objectives by preserving the efficiency of a department's operation and thus its ability to compete in the market place.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN15[] **Antitrust Actions, Physicians**

The use of unfair means in substituting one competitor for another without more does not violate the antitrust laws.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN16[] **Antitrust Actions, Physicians**

Evidence of pretext only serves to rebut an assertion of independent action on the part of defendant.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN17[] **Antitrust Actions, Physicians**

As with all tort-like causes of action, the failure to show causation is fatal to a *15 U.S.C.S. § 1* claim.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN18[] **Antitrust Actions, Physicians**

Reciprocal dealing is conceptually similar to tying. In a tying arrangement, a seller uses its power in the market for product A to coerce the buyer of product A to purchase product B. However, a reciprocal dealing arrangement exists when the two parties face each other as both buyer and seller. The buyer of product A offers to buy from the other party, but only if that second party will buy product B from the first party. The two cases are similar in that, in each case, one side of a transaction has special power in the market place in reciprocal dealings, a buyer with economic power forces a seller to buy something from it.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN19[] **Exclusive & Reciprocal Dealing, Reciprocal Dealing**

The difference between a tying arrangement and a reciprocal dealing arrangement is that the strict standard of coercion applied to tying cases is not applicable to reciprocal dealing cases. If the coercion necessary for per se treatment is not present, the court may analyze the case under the rule of reason. Therefore, where plaintiff shows that one party has sufficient market power to unduly influence a second party to treat the first more favorably than the free market would otherwise dictate, and the second party acts in conformity with the reciprocal arrangement, plaintiff has proved the existence of an arrangement that unreasonably restrains trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Reciprocal Dealing

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN20[] **Exclusive & Reciprocal Dealing, Reciprocal Dealing**

A coercive reciprocal agreement, like a tying agreement, is unreasonable per se whenever one party has sufficient economic leverage in one market to gain an unfair advantage in another market.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN21[] **Market Definition, Relevant Market**

In order to prevail in the absence of per se liability, plaintiff must show that defendant's conduct unreasonably restrained competition. In the absence of evidence of actual detrimental effects, the rule of reason dictates that plaintiff define the relevant market (both its product and geographical boundaries), as well as demonstrate defendant's market power.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN22[] **Conspiracy, Elements**

Even if defendant's reliance on the privileges requirement was pretextual, such pretext would constitute unilateral action by defendant. Therefore, it is not evidence of a conspiracy between defendant and a separate codefendant.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN23[] **Antitrust Actions, Physicians**

Evidence of conscious parallelism does not permit an inference of conspiracy unless plaintiff establishes that each defendant engaging in the parallel action acted contrary to its economic self-interest. Thus, plaintiff must establish that each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN24[] **Antitrust Actions, Physicians**

The mere opportunity to conspire among antitrust defendants is insufficient to permit the inference of conspiracy.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Managed Healthcare > General Overview

HN25[] **Antitrust Actions, Facilities**

Competition between Health Maintenance Organizations creates something of a paradox. On one level, their restrictive practices promote competition. On another level, they have an obvious anticompetitive effect. Thus, the question becomes whether the procompetitive benefits offset the anticompetitive effect in the relevant product and geographic markets (the rule of reason).

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN26[] **Intentional Interference, Elements**

Tortious interference with business relationships and tortious interference with contractual relations are basically the same cause of action under Florida law. The only material difference appears to be that in one there is a contract and in the other there is only a business relationship. In order to prove a tortious interference claim, plaintiff must demonstrate: (1) the existence of a business or contractual relationship under which plaintiff had legal rights; (2) an intentional and unjustified interference with the relationship; and (3) damage to plaintiff as a result of the tortious interference with that relationship. The relationship involved can be based on a business expectancy arising even from an unenforceable agreement that would have been completed had defendant not intervened. In order to be actionable, the interference must be direct; conduct that has only indirect consequences on plaintiff will not support a claim for tortious interference.

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN27[] **Business Torts, Unfair Business Practices**

In Florida, no liability for tortious interference exists where defendant acted to protect its own legitimate economic interests. So long as improper means are not employed, activities taken to safeguard or promote one's own financial and contractual interests are entirely non-actionable.

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN28[] **Business Torts, Unfair Business Practices**

Competitors have a right to attract patronage by lobbying potential customers for their business. That is the essence of competition. Such conduct becomes actionable only when the competitor uses improper means.

Counsel: **[*1]** Steve L. Brannock, LEVIN, WARFIELD, et al, Pensacola, FL, Atty: Plaintiffs. Charles P. Pillans, III, Jacksonville, FL, Atty: Plaintiffs. Lewis Rosenbloom, HOLLAND & KNIGHT, Tampa, FL, Atty: Plaintiffs.

Edward Moore, MOORE, HILL & WESTMORELAND, Pensacola, FL, Atty: Defendants. William H. Clark, CLARK, PARTINGTON, et al, Pensacola, FL, Atty: Defendants. Patrick G. Emmanuel, EMMANUEL, SHEPPARD, Pensacola, FL, Atty: Defendants.

Judges: ROGER VINSON, United States District Judge

Opinion by: ROBERT VINSON

Opinion

ORDER

Defendants Sacred Heart Hospital of Pensacola ("Sacred Heart"), Baptist Hospital, Inc. ("Baptist"), Health First Network, Inc., and Keith T. Shearlock, M.D. all have moved for reconsideration of this court's order of December 27, 1991, denying their several motions for summary judgment. (doc. 332). Upon consideration of the motions and the memoranda of the parties, the evidence in the record, and the argument of counsel at the hearing held in this matter, I have concluded that further amplification of the factual record is necessary, and that, in turn, requires a number of revisions in the legal analysis set out in my earlier order. Accordingly, these motions are GRANTED and my order of December 27, 1991, is vacated and set aside, and this order is substituted therefor. Except as noted, the material facts are not in dispute.

I. BACKGROUND

A. DR. WILLIAMSON AND PENSACOLA DIAGNOSTIC CENTER & BREAST CLINIC

Plaintiff Angel Yuh Williamson, M.D. **[*2]** is a board certified radiologist. In May 1984, Dr. Williamson formed, and has been the sole owner of, plaintiff Pensacola Diagnostic Center & Breast Clinic, P.A. ("Pensacola Diagnostic"). Pensacola Diagnostic is an outpatient radiology clinic located in Pensacola, Florida. While it provides general radiological services, it specializes in the area of comprehensive breast care. [1] In particular, Pensacola Diagnostic places special emphasis on the detection and diagnosis of breast cancer.

In 1984, Pensacola Diagnostic was unique. In the traditional approach to breast care, a patient would see a primary care physician such as a family practitioner or an obstetrician/gynecologist. The primary care physician then would refer the patient to a radiologist for a mammogram. The patient would go to the hospital with which the **[*3]** radiologist was affiliated, and a radiology technician would perform the mammogram. The radiologist would read and interpret the mammogram and send a written report to the primary care physician for consultation regarding any further action.

In contrast, Dr. Williamson, through her clinic, does not utilize the hospital radiology departments and emphasizes patient consultation and education. Normally, Dr. Williamson's patients are referred to her by their primary care physician. [2] Dr. Williamson then consults with the patient, performs the mammogram or other diagnostic procedures at her clinic, interprets the results there, and discusses them with the patient. She then makes a written report to the primary care physician.

When the results of a particular diagnostic test reveal the need for further treatment or hospitalization, it is still the referring primary care physician or a surgeon who provides the treatment or admits the patient to the hospital. Thus, even though Dr. Williamson was on the staff of the University Hospital in Pensacola from shortly after arriving here in 1983, she never admitted a patient to that hospital. It is now closed. Similarly, between the time she obtained courtesy privileges at defendant Baptist Hospital in 1988, and the taking of her deposition in October 1989, Dr. Williamson visited only three patients there. During these visits, she consulted with the patients and their families by giving them medical advice, but did not prescribe treatments or make entries on their hospital charts. [3]

Since it began operations in 1984, Pensacola Diagnostic has enjoyed continuous growth. Dr. Williamson opened Pensacola Diagnostic by herself with three employees. As of October 1989, there were nine full-time employees. As of early 1991, Pensacola Diagnostic maintained approximately 10,000 to 11,000 patient files. **[*4]** The work load at her clinic is such that, for the last several years, Dr. Williamson has been exploring the possibility of adding another radiologist to her practice.

Dr. Williamson and Pensacola Diagnostic have also enjoyed a steady increase in income. Clinic revenue has increased every year, growing from $ 187,881.00 in the fiscal year ending April 30, 1985, to $ 670,996.27 for the first eleven months of the fiscal year ending April 30, 1990. During the same period, Williamson's annual salary and benefits package increased in value from $ 45,139.00 to over $ 250,000.00.

B. DR. WILLIAMSON'S ATTEMPTS TO GAIN PRIVILEGES AT SACRED HEART AND BAPTIST.

1. *The 1984 Applications*

(a) Sacred Heart, Pensacola Radiology Associates and Albert A. Post, M.D.

In November 1984, shortly after opening Pensacola Diagnostic, Dr. Williamson sought staff privileges in the Departments of Radiology at defendant Sacred Heart Hospital of Pensacola ("Sacred Heart") and at defendant Baptist Hospital, Inc. ("Baptist"). Defendant Sacred Heart is a non-profit corporation engaged in the business of

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[1] Since Dr. Williamson is the sole owner of Pensacola Diagnostic, I will frequently refer to both as "the plaintiff" for brevity purposes. As a practical matter, their interests are identical.

[2] Defendants claim that plaintiff's patient logs show that, from 1984 and 1989, only 7% to 15% of Pensacola Diagnostic's business consisted of "self-referrals", i.e. patients who come directly to plaintiff for breast care. In such case, plaintiff would perform diagnostic functions, and then would refer the patient to a physician or surgeon if further care was necessary. Plaintiff claims that self-referrals accounted for approximately half of her business.

[3] At least one of these patients was a "self-referral" for whom Dr. Williamson was acting as the "primary care" physician. Accordingly, she referred the patient to a surgeon who then admitted the patient to Baptist. Since receiving her privileges at Baptist, Dr. Williamson has not attempted to admit any patients there. Nor has she ever admitted any patient to any hospital where she has privileges.

providing full service health care in the Pensacola, Florida, area. [4] At the time Dr. **[*5]** Williamson submitted her application, Sacred Heart had an exclusive contract with defendant Pensacola Radiology Consultants, P.A. ("PRC") for the provision of radiological services at the hospital. [5] Defendant Albert A. Post, M.D. is PRC's founder and president, and is also the chairman of Sacred Heart's Department of Radiology.

Section 7.1 of Sacred Heart's "Credentialling Procedures Manual of the Bylaws, Rules and Regulations of the Medical and Dental Staff" sets out an "exclusivity **[*6]** policy" that specifically provides for this type of contract. According to the bylaws, certain hospital facilities and services, including radiology, are designated to be used on an exclusive basis in accordance with contracts between the hospital and qualified practitioners. Applications for initial appointment or for clinical privileges related to those hospital facilities and services under exclusive contract cannot be accepted for processing unless they are submitted in accordance with an existing or proposed contract with the hospital.

Upon receiving Dr. Williamson's application, Sacred Heart's medical director, John Whitcomb, M.D., consulted with Dr. Post. During their discussion, Dr. Post stated that, in his view, the exclusive contract with PRC prohibited Dr. Williamson from practicing radiology at Sacred Heart. Therefore, he questioned whether the hospital could grant the requested privileges. [6] There was some further discussion as to what services Dr. Williamson sought to render, and Dr. Post noted that the hospital routinely granted courtesy rights to non-staff physicians who merely wanted to view films or to visit and consult with their patients.

[*7] What exactly happened to Dr. Williamson's application at this point is unclear. Dr. Whitcomb admits having made no immediate effort to process it through regular channels. [7] At the same time, S. Randall Hobgood, M.D., another of PRC's partners, admits having questioned the propriety of granting Dr. Williamson's request for privileges in the face of the exclusive contract with PRC. In addition, there also is evidence that, during a conversation with David Allen Cross, M.D., a local surgeon, Dr. Post questioned the quality of Dr. Williamson's equipment, as well as her competency as a radiologist.

It is undisputed that Dr. Williamson frequently telephoned Dr. Whitcomb's office concerning her application. In particular, on February 8, 1985, Dr. Whitcomb's administrative secretary, Carol Beem, telephoned Dr. Williamson's office and told her secretary that Dr. Whitcomb and Dr. Post had discussed **[*8]** her application, and had concluded that she would not need privileges.

Dr. Williamson claims to have understood Ms. Beem's remarks to mean that Drs. Whitcomb and Post had decided that she did not need privileges "in order to properly care for her patients," and therefore, that her application was no longer being considered for approval. Dr. Williamson felt that such patient care decisions were hers alone to make. [8] **[*9]** Of course, Sacred Heart contends that Ms. Beem merely explained Dr. Post's conclusion that,

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[4] Pensacola and the bordering communities of Cantonment, Gulf Breeze and Milton account for 82% of Sacred Heart's patients.

[5] Defendant Albert A. Post, M.D. is a radiologist and a shareholder in PRC. He also is chairman of Sacred Heart's radiology department. Dr. Post's partners in PRC, S. Randall Hobgood, M.D., William R. Balchunas, M.D., and Anthony J. DeRaimo, M.D., all were originally named as defendants in plaintiff's complaint. They all have been dismissed with prejudice by stipulation of the plaintiffs. (Doc. 284).

[6] S. Randall Hobgood, M.D., another of PRC's physician partners, expressed similar concerns to Dr. Whitcomb.

[7] Indeed, given the wording of the bylaws, it is doubtful whether Dr. Whitcomb had authority to process the application.

[8] PRC and Dr. Post correctly point out that Dr. Williamson's description of her conversation with Ms. Beem is inadmissible hearsay as to them. However, PRC and Dr. Post have based their motion in part on the deposition testimony of Dr. Whitcomb in which he admits both that his office was in contact with Dr. Williamson during this time period, and that Ms. Beem did have a conversation with Dr. Williamson, the substance of which was substantially as alleged by plaintiffs. Thus, I reiterate that the fact of the phone call and the essentials of its content are not in dispute as to either Sacred Heart or PRC and Dr. Post. The only dispute over the conversation relates to interpretation of Ms. Beem's statement that Dr. Williamson "did not need privileges".

because of the standard courtesies extended to non-staff physicians, Dr. Williamson would not need privileges "to visit patients or to view the results of tests." [9]

On February 12, 1985, Dr. Whitcomb followed up this phone conversation with a letter in which he advised Dr. Williamson that the Executive Committee had discussed "what kind of privileges could be offered to [her] since we do have a closed contract situation for radiology." He then informed her that the Committee had concluded that she would not need privileges to visit her patients or to see the results of their tests. Dr. Whitcomb also offered to continue processing Dr. Williamson's application, stating that, if accepted, she would be afforded staff membership rights without radiology procedure or interpretation privileges.

Dr. Whitcomb's letter is the only evidence that the Executive Committee actually met and discussed Dr. Williamson's application. [10] In any event, on February 13, 1985, Dr. Williamson requested that Sacred Heart continue processing her application for staff **[*10]** membership. Subsequently, Dr. Williamson received several requests from Carol Beem for additional information regarding her education and references.

On April 4, 1985, Dr. Whitcomb again wrote Dr. Williamson and stated that he had begun the procedure of verifying her license and other qualifications, but that, contrary to his letter of February 12, he could not process her application for staff membership only. He explained that the Credentialling Procedures Manual required that each application for appointment to the medical staff contain a request for specific clinical privileges. Since the exclusive contract with PRC prevented Sacred Heart from granting privileges in the Department of Radiology, it could not process Dr. Williamson's associated request for appointment to the medical staff.

On April **[*11]** 15, 1985, Dr. Williamson wrote back to Dr. Whitcomb and explained that she did not wish to work in the radiology department, and that she only wanted to be able to admit her clinic patients and attend to their general care. [11] This letter also alludes to several telephone conversations with Dr. Whitcomb's office during which Dr. Williamson allegedly explained the precise nature of the services she wanted to perform at the hospital.

On April 17, 1985, Dr. Williamson met with the Credentials **[*12]** Committee to discuss her unique request. Once again, she stated that she did not want to practice diagnostic radiology, but only wanted to be able to provide continuing care to her clinic patients. She explained that the provision of such care required that she have the privilege of admitting patients as the attending physician, that she be able both to consult with them during their stay, and to order clinical tests and patient care.

The Credentials Committee considered her request, but determined that the exclusive contract with PRC prevented them from recommending approval of her application for membership in the Department of Radiology as a radiologist. [12] Instead, the Committee, along with Dr. Whitcomb, suggested that Dr. Williamson apply for staff

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Oddly, Dr. Williamson has submitted an excerpt of Ms. Beem's deposition testimony, in which she confirms Sacred Heart's interpretation of the conversation, i.e. Ms. Beem told Dr. Williamson she would not need privileges because the radiology department would extend her the courtesy of visiting her patients and viewing their films.

[9] In the original order, I determined that this conversation was hearsay. However, upon further reflection, it appears to be an adopted admission under *Federal Rule of Evidence 801(d)(2)(B)*, and if so, not hearsay.

[10] Though Sacred Heart has attached to its motion for summary judgment the minutes of other Executive Committee meetings in which plaintiff's application was discussed, the minutes of this meeting are absent.

[11] Dr. Williamson claims that, at this time, independent radiologist Thomas Brown, M.D. had privileges at Sacred Heart even though he was not then a member of PRC. Sacred Heart points out, however, that, at one time, Dr. Brown was associated with PRC. After he severed this relationship, Dr. Brown did remain a member of the Sacred Heart staff, but was not permitted to furnish radiology services or exercise clinical privileges. Dr. Brown resigned from the staff in December 1985, and has not had staff privileges since then.

[12] Only the Board of Directors can grant staff membership and privileges. Under the normal procedure, an application for medical staff privileges is reviewed first by the Credentials Committee. After examining the applicants qualifications and receiving input from the relevant medical department, the Credentials Committee makes findings as to the applicant's qualifications and

membership and Level I privileges in either the Department of Family Practice or the Department of Internal Medicine. Dr. Williamson agreed to amend her application, and the committee provided her with a copy of the Bylaws, Rules and Regulations of the Medical and Dental Staff setting out the staff membership and privilege eligibility requirements for all the medical departments at the hospital. They also provided her with copies **[*13]** of proposed amendments to the Rules and Regulations of the Departments of Medicine and Family Practice then under consideration by the hospital. Because Dr. Williamson later withdrew her application for privileges in the Department of Family Practice, it is not at issue in this case. Therefore, I will refer only to her application for privileges in the Department of Internal Medicine.

[*14] The bylaws in effect at the time Dr. Williamson submitted her original application provided for four categories of privileges in the Department of Internal Medicine. Category I privileges allowed the physician to "render emergency care and care of the most preliminary nature. Further management must then be provided by an appropriately qualified physician." To be eligible for such privileges, the physician had to have completed one year of postgraduate clinical training.

In the fall of 1984, shortly before Dr. Williamson submitted her application, the Department of Internal Medicine began the process of amending its departmental Rules and Regulations. [13] **[*15]** The proposed rule changes would create a three-tiered system of privileges wherein "Level I" privileges would require the least amount of medical expertise, and "Level III" privileges would require the most expertise. [14]

From as early as October 23, 1984, the proposed rules defined "Level I" privileges to permit the physician "to treat mild, uncomplicated illnesses or disorders. Should the patient's medical condition progress to an acute or unstable phase, consultation by a member of the Department with Level III privileges is required." The proposed eligibility requirements for "Level I" privileges added the words "in a medically **[*16]** oriented specialty" to the existing requirements. Thus, as proposed, the rules included the phrase: "To be eligible for Level I privileges, the physician must provide evidence of satisfactorily completing one year of approved postgraduate clinical training *in a medically oriented specialty."* [15]

On March 11, 1985, the Bylaws Committee approved the Department of Internal Medicine's proposed rule changes and passed them on to the Medical Executive Committee. On March 26, 1985, several weeks before Dr. Williamson's April 17 meeting with the Credentials Committee, the Medical Executive Committee approved these amendments without change. In the version of the proposed rule that the general staff considered at its regular meeting of May 28, 1985, the words "primary care" appeared before the words "medically oriented specialty. " Thus, the **[*17]** proposed rule then read:

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recommends either approval or denial. It then passes the application on to the Executive Committee of the Medical and Dental Staff for review. After making its own recommendation, the Executive Committee passes the application on to the Board of Directors of Sacred Heart Hospital for final action.

[13] In addition to matters of general concern, the Bylaws of the Medical and Dental Staff of Sacred Heart Hospital contain the Rules and Regulations for each medical department within the hospital. The delineation of privileges for a particular department is listed within the "Rules and Regulations" pertaining to that department. Subject to the approval of the Bylaws Committee, the Executive Committee, the General Staff and the Board of Directors, each department has the power to adopt its own Rules and Regulations.

[14] Amending the bylaws to incorporate the rules changes was a four-step process. First, the department changing its rules drafts a proposed rule. The Bylaws Committee then reviews the proposed rule and makes any changes it deems appropriate. Next the proposed rule goes before the Executive Committee for input from the administration. If the Executive Committee makes any changes, the proposed rule goes back to the department for review, and the process starts over. Once the Executive Committee approves the rule, the general staff votes on it. Finally, if the general staff approves the change, it is submitted to the Board of Directors for final approval and incorporation into the bylaws.

[15] Both definitions appeared in the minutes of an October 23, 1984, Department of Internal Medicine monthly meeting and remained unchanged throughout the amendment process.

> To be eligible for Level I privileges, the physician must provide evidence of satisfactorily completing one year of approved post-graduate clinical training in a *primary care* medically oriented specialty. (emphasis added)

This addition is not reflected in the minutes of any committee meeting. [16] Nevertheless, the general staff approved the amendment as presented and passed it on to the Board of Directors for their approval.

The change is significant insofar as it concerns Dr. Williamson's pending application. After finishing medical **[*18]** school, Dr. Williamson completed a one year residency in nuclear medicine. It is undisputed that nuclear medicine has been recognized by the AMA since 1971 as a "medically oriented" specialty. However, it is not a "*primary care* medically oriented" specialty. [17]

[*19] At the Board of Directors meeting on July 19, 1985, Dr. Whitcomb presented the revised Rules and Regulations for the Department of Internal Medicine and, in the words of the Board's minutes, "highlighted the levels of privileges, eligibility requirements, and supervision requirements." The Board then adopted the proposed rules without change.

On July 17, 1985, two days before Board approval of the revised eligibility requirements, Dr. Whitcomb sent a memo to the Credentials Committee in which he stated that Dr. Webb, the Chairman of the Department of Internal Medicine, had reviewed Dr. Williamson's credentials and concluded that she failed to meet the minimum requirements for the granting of Level I privileges within his department. Accordingly, Dr. Webb recommended that Dr. Williamson's applications for medical staff membership and privileges be denied. In accordance with Dr. Webb's evaluation of her medical qualifications, the Credentials Committee concluded at its July 17 meeting that Dr. Williamson did not qualify for privileges in the Department of Internal Medicine.

In lieu of recommending the outright rejection of her application, the Credentials Committee voted to request **[*20]** the Department of Radiology to consider accepting Dr. Williamson in the Department of Radiology "Courtesy Staff, with consultant privileges." The committee defined consultant privileges as "being available for consultation [with] other physicians or patients, to permit patient interaction within the hospital, but without the privilege to give official readings of x-rays or radiological procedures and without the privilege to write orders."

This recommendation notwithstanding, the Executive Committee of the Medical and Dental Staff determined at its July 23, 1985, meeting that the exclusive contract with PRC precluded the hospital from offering any type of privileges in the Department of Radiology. The Executive Committee also determined that Dr. Williamson's lack of clinical experience precluded granting privileges in the Department of Internal Medicine. Accordingly, the committee voted to recommend to the Board of Directors that it deny Dr. Williamson's applications.

As the Chairman of the Department of Radiology, Dr. Post did serve on the Executive Committee, and was present at this meeting. However, Dr. Post claims to have abstained from making any comments about Dr. Williamson, **[*21]** and there is no evidence to the contrary. Neither Dr. Post nor any other physician associated with PRC otherwise played any role in the processing of Dr. Williamson's application. [18] One member of the Executive Committee did vote against a negative recommendation, but this physician is not identified.

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[16] This wording does appear in a copy of the bylaws plaintiff has submitted in support of her opposition to defendants' original motions for summary judgment. *(See* App. III to plaintiff's opposition at p. 213-14). This copy is dated March 1985. Another copy of the bylaws bearing the same date, and also submitted by the plaintiff, does not include the words "primary care" before "medically oriented specialty". *(See Id.* at 158-59).

[17] Dr. Williamson also had completed a three year residency in diagnostic radiology. During that residency, she rotated through the different sections of diagnostic radiology including angiography and interventional radiology. During these rotations, Dr. Williamson visited patients prior to performing the necessary procedures, and discussed with them the procedures and the associated risks. She issued premedication orders and post procedure orders on these patients including antiocoagulant or other medications required for the procedures. Most of the patients with whom Dr. Williamson dealt during her residency were referred to radiology for specific procedures by the admitting physician. However, in those cases where patients were admitted to the hospital by the radiology staff, the residents participated in taking medical histories and administering physical exams.

[18] None of the radiologists sits on the Credentials Committee.

Under the "Fair Hearing Plan" of the Medical Staff By-laws, a physician who receives an adverse recommendation from the Executive Committee is entitled to an opportunity to show, by clear and convincing evidence, that the adverse recommendation was arbitrary, capricious, or unreasonable. On July 30, 1985, Dr. Williamson requested a hearing on the Executive Committee's adverse recommendation. A hearing was set for September 17, 1985, but was postponed at Dr. Williamson's request. The Executive Committee then rescheduled the hearing for November 5, 1985, but Dr. Williamson again requested that it be postponed. On November 25, 1985, Dr. Whitcomb wrote **[*22]** Dr. Williamson to ask that she submit a tentative date for rescheduling the hearing. Dr. Williamson did not respond, and there was no further discussion of her application for approximately two and one-half years. Thus, the application was considered to be abandoned.

(b) Baptist Hospital

Defendant Baptist Hospital, Inc. ("Baptist") also is a nonprofit corporation engaged in the business of providing full service health care in the Pensacola, Florida, area. [19] Dr. Williamson's concurrent attempt to attain privileges at Baptist is similar to her efforts at Sacred Heart.

Pursuant to an oral agreement, Radiology Associates of Pensacola ("Radiology Associates") had been providing radiology services at Baptist from the time the hospital opened in 1951. The specifics of this agreement were very vague. At the time Dr. Williamson submitted her application, some of the physicians practicing **[*23]** with Radiology Associates did not even realize that the contract was exclusive. Similarly, over the years several exceptions had been made, most notably for perinatologists performing fetal ultrasound, and neurologists performing CT scans. [20]

In the summer of 1984 - - - well before plaintiff submitted her application for privileges - - - Baptist's Board of Directors directed the hospital administration to reduce the Radiology Associates contract to writing. Discussions regarding the written contract continued through the winter, and the contract was executed on June 28, 1985.

In the meantime, Dr. Williamson contacted Baptist in November 1984, and requested an application for medical staff membership and privileges in the Department of Radiology. On December 7, 1984, John N. Robbins, Baptist's **[*24]** administrator, responded with a letter explaining that the hospital was then negotiating a written contract with Radiology Associates for the provision of radiology services. Robbins informed Dr. Williamson that, in view of these negotiations, Baptist would be unable to consider an application for privileges in radiology from a physician who was not affiliated with Radiology Associates.

In April, Dr. Williamson contacted Baptist and, as with Sacred Heart, explained that she did not wish to practice diagnostic radiology. She informed Baptist that she only desired privileges sufficient to allow her to admit patients, and to provide continuing care to those patients she had treated at her clinic, but who had been admitted to Baptist by other physicians. In a letter to Thomas B. Williams, M.D., the president of Baptist's medical staff, dated May 6, 1985, Dr. Williamson reiterated her desire and stated that she had discussed the matter with Radiology Associates and had made it quite clear to them that she had no intention of practicing radiology at Baptist. [21] Subsequently, on May 13, 1985, Baptist forwarded an application and a copy of the hospital bylaws and rules and regulations to **[*25]** Dr. Williamson.

Dr. Williamson submitted her application on or about May 28, 1985. On June 4, 1985, the Executive Committee met, and although there is no evidence that Radiology Consultants objected to Dr. Williamson's application, it concluded that, although she was qualified for privileges in diagnostic radiology, the exclusive contract then being

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[19] Pensacola and the bordering communities of Cantonment, Gulf Breeze, and Milton account for 88.88% of Baptist's patients.

[20] As described more fully below, at one time radiologists performed fetal ultrasound. Gradually, responsibility for performing the procedure shifted to obstetricians and perinatologists This is now the standard practice.

[21] In their depositions, Wiley Howard Cooper, M.D. and William R. Bender, M.D., both of whom are principals in Radiology Associates, stated that the P.A. had no objection to Dr. Williamson obtaining staff membership at Baptist as long as she did not practice diagnostic radiology at the hospital. According to Drs. Cooper and Bender, both John Robbins, Baptist's chief administrator, and Spencer Mitchum, the hospital's attorney, told the physicians of Radiology Associates that the hospital considered the issue of medical staff membership separate from the issue of privileges.

negotiated would preclude her from practicing her specialty at Baptist. The minutes of the **[*26]** Committee's meeting reveal that it recognized that Dr. Williamson did not want to practice radiology. However, after much discussion, it was agreed "that the Medical Staff Bylaws do not appear to provide for granting privileges such as she is requesting, since it appears that with her training she would be eligible only for privileges in radiology and the Executive Committee does not perceive a need to amend the bylaws to change this."

Nevertheless, hospital policy required the Committee to consider the issue of privileges separately from the issue of the exclusive contract. [22] In other words, the exclusive contract with Radiology Associates would not prevent Dr. Williamson from obtaining privileges at Baptist merely because she was a radiologist. If she could show that she otherwise qualified *under the bylaws* for privileges in an area not covered by the exclusive contract, the Committee would recommend approval of her application. Accordingly, by letter dated July 8, 1985, Dr. Williams explained the Executive Committee's dilemma

> From information submitted, it would appear that under our bylaws your qualifications if acceptable would be only in the specialty of Diagnostic **[*27]** Radiology. Further, as you have been advised, you will not be able to practice Diagnostic Radiology in Baptist Hospital because of the exclusive contract the hospital has with Radiology Associates of Pensacola.
> * * *
>
> With these constraints, there is almost nothing that you can do at Baptist Hospital with your present qualifications. Therefore, it appears to us that membership on our Medical staff would be of no benefit to you. *If you disagree with this conclusion, please advise us specifically and in detail what it is that you wish to do at Baptist Hospital that is allowed under the Rules and Regulations applicable to Diagnostic Radiology and not precluded by the exclusive contract which we have with Radiology Associates of Pensacola. We will hold your application pending our receiving your reply to this correspondence. If it can be determined that there is any meaningful practice in Diagnostic Radiology open to you at Baptist Hospital, we will be happy to proceed with processing your application.*

[*28] Dr. Williamson claims that, because she felt that she already had provided the requested information, she interpreted Dr. Williams' letter as a denial of her application. At this point, Dr. Williamson also abandoned her application to Baptist for approximately two and one-half years.

2. *Dr. Williamson's First Application For Membership in Health First*

While her applications were being processed at Sacred Heart and Baptist in 1984 and 1985, Dr. Williamson also was seeking membership in defendant Health First Network, Inc. ("Health First"). Health First is an "independent physician's association", and it is the sole authorized provider of health care for members of a health maintenance organization ("HMO") known as Health Options of Pensacola ("HOP"). HOP is jointly and equally owned by Health First; Blue Cross/Blue Shield of Florida; Gulf Coast Diversified, Inc., an affiliate of defendant Sacred Heart; and BCI Enterprises, Inc., an affiliate of defendant Baptist.

As originally drafted, Health First's bylaws provided that, at a minimum, a physician applying for membership

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[22] In her memorandum, plaintiff consistently mischaracterizes the nature of this policy, relying on a statement by counsel for Baptist at the deposition of Wiley Howard Cooper, M.D. to the effect that the Board of Directors had adopted a policy of keeping the issue of privileges separate from the issue of exclusive contracts. Plaintiff argues that Baptist had a policy that would have allowed the Executive Committee to grant limited privileges in the Department of Radiology so long as she promised not to practice diagnostic radiology at the hospital.

The plain language of plaintiff's own evidence belies this interpretation. First, the Medical Staff Bylaws make no provisions for such partial privileges. Second, the minutes of the June 4 Executive Committee meeting clearly show that it was willing to grant Dr. Williamson privileges in a manner that was consistent with both the Bylaws and the exclusive contract. As discussed in the text, it subsequently wrote her a letter inviting her to explain her qualifications in an area not covered by the exclusive contract.

> (2) shall have been granted permanent admitting or clinical privileges or other major privileges, **[*29]** without supervision, by at least one Participating Hospital, and shall not have had any such privileges suspended, revoked, or otherwise terminated at any hospital anywhere. [23]

The bylaws defined "Participating Hospital" as a "participating provider that is a hospital." At the time the bylaws were drafted in early 1985, the only participating hospitals were Sacred Heart and Baptist. Later, Gulf Breeze Hospital became a participating hospital.

[*30] Shortly after HOP became operational on August 1, 1985, it decided to expand its operation to areas outside Pensacola. Accordingly, in late 1985, HOP added several outlying hospitals to the organization. At the same time, it requested that Health First correspondingly admit physician providers from these areas. To encourage physician participation outside of the Pensacola area, Health First waived the requirement that all members buy an $ 8500.00 share of stock in the Health First corporation.

Health First also amended its credentialling criteria to permit physicians who practiced primarily in the outlying areas to qualify for membership in Health First, and hence HOP, by obtaining privileges at an outlying participating hospital. At the same time, Health First retained the requirement that physicians practicing primarily in Pensacola obtain privileges at a hospital affiliated by ownership or control with the hospital owners of HOP. At the time, the only such hospitals were Baptist, Sacred Heart, Gulf Breeze Hospital and Jay Hospital. [24]

[*31] Dr. Williamson initially inquired into membership in Health First by telephone on May 20, 1985. At that time she spoke to Health First's president, defendant Keith T. Shearlock, M.D. [25] Dr. Shearlock explained that, in order

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[23] The remaining included minimum credentialling criteria required that applicants:

> (1) shall at all times be licensed to practice allopathic or osteopathic medicine within the State of Florida;
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> * * *
>
> (3) shall not have been denied membership in the American Medical Association or any state or county medical association or society;
>
> (4) shall at all times be and have been in compliance with the Current Opinions of the Judicial Council of the American Medical Association;
>
> (5) shall have made no act or omission which tends to disrupt the operation of the business of [Health First] or any Physician Provider;
>
> (6) shall at all times maintain professional malpractice liability insurance satisfactory to the Board; and,
>
> (7) shall be in compliance with all provisions of these Medical Staff Bylaws, the Bylaws of [Health First], any applicable Physician Provider Agreement, and any other rules, regulations, policies and procedures of the Staff or [Health First].

[24] The new credentialling criteria provided that an applicant

> (2) shall have been granted or shall be actively seeking or making progress toward obtaining, permanent admitting or clinical privileges or other major privileges, without supervision, by at least one Participating Hospital *(which must be an affiliated hospital if the Applicant practices primarily within the central portion of the service area),* and shall not have had any such privileges suspended, revoked, or otherwise terminated at any hospital anywhere . . .

A "Participating hospital" still was defined as a "Participating Provider that is a hospital," and included the newly recruited hospitals. However, "Affiliated Hospital" means

> Sacred Heart Hospital or Baptist Hospital of Pensacola, Florida, or any other Participating Hospital . . . directly or indirectly associated by ownership or control with Gulf Coast Diversified, Inc. or Mobile Diagnostics, Inc., which are the two hospital related Florida corporations that are stockholders in Health Options of Pensacola, Inc.

"Central portion of the service area" is not defined in the bylaws, but it is undisputed that the term refers to the greater Pensacola area, including Escambia, Santa Rosa, Okaloosa Counties, along with parts of Walton County, Florida.

[25] Defendant Keith Shearlock, M.D. is a nephrologist (a kidney specialist). It is undisputed that Dr. Shearlock does not compete with Dr. Williamson, and that, as a nephrologist, he would not refer patients to a radiologist such as Dr. Williamson.

to become a member of Health First, its bylaws required that physicians practicing in the greater Pensacola, Florida, area first obtain staff membership and associated privileges without supervision at Sacred Heart or Baptist. Since Dr. Williamson did not have privileges at either hospital, Dr. Shearlock told her that she would not be eligible for membership.

In response, Dr. Williamson wrote to Health First's Medical Director, Paul T. Baroco, M.D., requesting a waiver of the privileges requirement. In her letter, which was dated September **[*32]** 30, 1985, Dr. Williamson set out her qualifications, and explained that because of the exclusive contracts at Baptist and Sacred Heart, she was not eligible for radiology privileges. She also offered to discount her fees in exchange for a waiver.

Dr. Baroco passed this letter on to Dr. Shearlock, who responded by letter on February 9, 1986. In this letter, Dr. Shearlock simply stated that "one must have major staff privileges at either Baptist or Sacred Heart Hospital to be eligible as a physician provider. It is my understanding that you have not achieved that status and therefore there is no opportunity to offer you a contract as a physician provider."

Dr. Shearlock rejected Dr. Williamson's inquiry without supplying her with an application or discussing her request with the Health First Board of Directors (which also functions as the credentialling committee). Dr. Shearlock stated that, as Health First's president and only administrative employee, he felt it was within his purview to screen applications in order to determine whether the applicant met the threshold requirements for membership. Since it was clear that Dr. Williamson did not have the appropriate privileges, Dr. Shearlock **[*33]** stated that he felt it unnecessary and wasteful to continue processing her application.

3. *Dr. Williamson's Negotiations With PRC*

While her various applications were pending, and even after they had been rejected, Dr. Williamson was attempting to negotiate an employment contract with PRC. At this same time, Sacred Heart was laying the groundwork for the creation of its own women's health care clinic. During the preliminary planning stages, and in conjunction with the Williamson/PRC negotiations, there was some discussion of Sacred Heart buying Dr. Williamson's equipment and making her the radiologist for the proposed clinic.

In the context of the parties' negotiations, it is clear that Dr. Williamson viewed joining PRC and operating the proposed Sacred Heart clinic as akin to a corporate merger. Consistent with this view, Dr. Williamson envisioned joining PRC as a shareholder and combining her assets, i.e. her clinical expertise, equipment and substantial client files, with those of PRC to form a single entity.

In contrast, PRC wanted Dr. Williamson to join the group as an employee, with the possibility of shareholder status in two years. In mid-August 1986, PRC in fact offered **[*34]** Dr. Williamson such a proposed contract in writing. However, by her own admission, Dr. Williamson was not interested in doing "hospital radiology." In particular, she did not want to be on call" at night or on weekends. Apparently, PRC was willing to accommodate Dr. Williamson's scheduling request in exchange for a 25% decrease in salary, but Dr. Williamson rejected this arrangement.

The proposed contract also contained a non-compete clause forbidding her to practice medicine in Escambia and Santa Rosa Counties for two years if she should separate from the group. Finally, it contained a termination clause that would have allowed PRC to terminate Dr. Williamson without cause upon 90-days' notice. Dr. Williamson had severe misgivings about the inclusion of these clauses. PRC, however, refused to change them, as they are commonly utilized. As a result, negotiations broke down, and on October 3, 1986, PRC withdrew its offer. [26]

[*35] The withdrawal of PRC's offer also eliminated the possibility of Dr. Williamson playing a part in the operation of Sacred Heart's proposed women's center. After discussions with PRC, the Ad Hoc Committee on the Women's

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[26] Plaintiff's clinic operated on a regular "9 to 5" type business schedule, and Dr. Williamson did not work nights or weekends. In addition, plaintiff's own figures show that association with PRC would have resulted in a decrease in her income.

Center had determined as early as January of 1986 that the creation of its own women's center and a formal relationship with Pensacola Diagnostic were mutually exclusive alternatives. [27]

After the negotiations between PRC and Dr. Williamson ended, Sacred Heart completed its plans for a free-standing women's center on the Sacred Heart grounds. In March of 1987, the Ann L. Baroco Center for Women's Health ("Ann Baroco Center") opened its doors. Located adjacent to Sacred Heart, the Center offers a broad range of services, including mammography, fetal ultrasound, and localization of breast lesions through the use of a Kopan's needle and wire. From the beginning, its planners had envisioned the **[*36]** Center as a self-supporting addition to the network of clinic based health care facilities that Sacred Heart was developing through its affiliate, Gulf Coast Diversified, Inc. It also was anticipated that the Center would be both the source and the beneficiary of referrals to and from Sacred Heart physicians and programs. In short, Sacred Heart was now in direct competition with Dr. Williamson and Pensacola Diagnostic.

4. *Dr. Williamson's Second Application to Health First*

On May 18, 1987, approximately two months after the Ann Baroco Center opened, Dr. Williamson contacted Dr. Baroco's office and renewed her request for a Health First membership. At that time, it was again explained to her that she did not have the requisite privileges. Nevertheless, Health First sent her an application. Dr. Williamson returned the completed application on June 5, 1987.

Although it was clear that Dr. Williamson did not meet the hospital privileges requirement, several Health First members (most notably Dr. Irvin) spoke to Dr. Shearlock and Dr. Baroco on her behalf. These recommendations notwithstanding, Health First denied Dr. Williamson's application. Although Health First's Board of Directors **[*37]** did not meet to consider the application until June 16, 1987, Dr. Shearlock wrote Dr. Williamson on June 11, and once again told her that, without privileges at either Baptist or Sacred Heart, she was not eligible for membership. Health First's Board of Directors later confirmed Dr. Shearlock's actions by rejecting Dr. Williamson's application.

Between August and September 1987, Dr. Williamson obtained privileges at two of HOP's outlying participating hospitals (Abernathy Hospital in Flomaton, Alabama, and at Greenlawn Hospital in Atmore, Alabama). When Dr. Williamson notified Dr. Shearlock of her newly acquired privileges, she may have assumed that she would then be eligible for Health First membership. However, it is undisputed that Dr. Williamson practices primarily within HOP's central" service area, i.e. within the greater Pensacola area. Her privileges at these "outlying" hospitals notwithstanding, the bylaws still required her to obtain privileges at either Sacred Heart or Baptist. Since Dr. Williamson still had not obtained these privileges, Dr. Shearlock again rejected her request for membership.

5. *Dr. Williamson's 1987 Applications for Privileges*

(a) Sacred **[*38]** Heart.

In December 1987, several months after she had been denied membership in Health First, Dr. Williamson contacted both Sacred Heart and Baptist and requested that they reconsider her applications for privileges. Because of the time lapse, Sacred Heart requested that Dr. Williamson update her application. Accordingly, on January 22, 1988, Dr. Williamson submitted an application requesting privileges in the Department of Family Practice. Subsequently, On March 8, 1988, she requested that she also be considered for privileges in the Department of Internal Medicine.

On March 11, 1988, Dr. Williamson met with the Credentials Committee and the Chairman of the Department of Internal Medicine. She explained her qualifications for Level I privileges, and, after describing her education and residency in nuclear medicine, she argued that her unique specialty qualified as a "primary care, medically oriented specialty" within the meaning of the Department of Internal Medicine Rules and Regulations provisions describing the eligibility criteria for Level I privileges.

[27] Obviously, if Sacred Heart had pursued both options, it would have ended up competing with itself.

She also argued that her eight years' experience in the primary care of breast cancer patients was at least the functional **[*39]** equivalent of "one year of approved post graduate clinical training in a primary care medically oriented specialty." Finally, Dr. Williamson pointed out that she satisfied the "experienced physician" exception to the requirements for Level II privileges.

Dr. Williamson again stated that she did not wish to practice radiology at Sacred Heart. She explained that many of her patients were frustrated by the fact that when surgery was indicated, she could not admit them to Sacred Heart, but instead had to turn them over to the care of another physician. She only desired to be able to admit those patients as the attending physician, consult with the appropriate surgeon, introduce her patients to the consultants, explain the procedures, write orders, and supervise the overall care of her patients.

The Credentials Committee concluded that Dr. Williamson had not completed the required one-year residency in a "primary care medically oriented" specialty as required by the bylaws. At its meeting on March 22, 1988, the Executive Committee accepted the Credentials Committee's recommendation that Dr. Williamson's application be denied.

At Dr. Williamson's request, a hearing committee convened **[*40]** on April 27, 1988, to determine whether the rejection was arbitrary, capricious, or unreasonable. Present at the hearing were the committee members, counsel for Sacred Heart, Dr. Williamson and her counsel, representatives from the Departments of Radiology, Family Practice, Internal Medicine, and Obstetrics/Gynecology. As the Department of Radiology's representative, Dr. Hobgood of PRC attended the hearing as an observer. There is no evidence that he otherwise participated in the proceedings.

At the beginning of the hearing, Dr. Williamson voluntarily withdrew her application for membership and privileges in the Department of Family Practice. She then admitted that she had not completed a year of post-graduate clinical training in a "*primary care* medically oriented specialty" as required by the Rules and Regulations of the Department of Internal Medicine. However, she was prepared to present evidence showing that she was uniquely qualified by experience in a heretofore unrecognized sub-specialty of internal medicine that she described as comprehensive breast care.

Although the credentialling criteria for the Department of Internal Medicine does not allow for waiver of their requirements **[*41]** by a showing of practical expertise, Dr. Williamson took the position that Section 4.6 of the Sacred Heart Bylaws allowed the Board of Directors of the hospital to waive eligibility requirements where such waiver would serve the best interests of patient care. [28] Thus, she sought to create a record establishing her unique qualifications in the area of breast care.

The Hearing Committee determined that the only issue was whether her rejection had been arbitrary, capricious, or unreasonable, which narrowed down to whether Dr. Williamson satisfied the requirements for Level I privileges as set out in the Rules and Regulations of the Department of Internal Medicine, i.e. whether she had completed one year of post-graduate clinical training. Therefore, **[*42]** the parties concluded that it was unnecessary, if not improper, for Dr. Williamson to present evidence unrelated to this narrow issue. In short, having admitted that she did not meet the literal requirements for Level I privileges, the Hearing Committee determined that its job was at an end.

Subsequently, Dr. Williamson wrote to Jay Hardman, the Hospital Administrator and representative of the Board of Directors, asking that the Board take up the issue of her request for a Section 4.6 exemption. At the same time, Dr. Williamson exercised her right under the Fair Hearing Plan to request appellate review of the Hearing Committee's adverse decision.

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[28] Section 4.6 of Bylaws, Rules and Regulations of the Medical and Dental Staff of Sacred Heart Hospital provide: "The Board [of Directors] may waive any qualification when in its discretion such waiver will serve the best interests of patient care in the hospital."

At the Appellate Review Committee hearing on August 24, 1988, Dr. Williamson argued that the Hearing Committee erroneously had excluded evidence that her experience in the care and treatment of breast disease patients qualified her for privileges in the Department of Internal Medicine. Dr. Williamson further argued that the bylaws are primarily concerned with maintaining the quality of patient care, and therefore, that they should be interpreted broadly to allow her to show that her qualifications are at least equivalent to those she would **[*43]** have obtained in a one-year primary care residency.

The Appellate Review Committee nevertheless determined that the Hearing Committee properly had excluded the evidence of Dr. Williamson's equivalent training in her subspecialty. The Committee pointed out that the bylaws do not recognize breast care as a subspecialty within the Department of Internal Medicine, and concluded that neither it, nor the Hearing Committee, were authorized to amend the by-laws to create a new subspecialty or to waive the one-year residency requirement for Level I privileges in the Department of Internal Medicine. According to the Appellate Committee, these issue were solely within the purview of the Board of Directors. The Committee then affirmed the adverse recommendations of both the Hearing Committee and the Executive Committee, and recommended that Dr. Williamson's application for staff membership and privileges in the Department of Internal Medicine be denied.

On September 23, 1988, the Board of Directors reviewed the Appellate Review Committee's decision and recommendation, and adopted a resolution finding that the exclusion of the evidence relating to Dr. Williamson's medical expertise in the area **[*44]** of breast care was proper. The Board then denied her application for staff membership and privileges in the Department of Internal Medicine.

In another resolution adopted at the same time, the Board denied Dr. Williamson's request for a Section 4.6 waiver. The Board specifically concluded that there was no compelling reason to waive the eligibility requirements established by the Department of Internal Medicine, and that such a waiver would not serve the best interests of patient care.

(b) Baptist Hospital.

Dr. Williamson's second attempt to obtain privileges at Baptist proved much more fruitful than her attempts at Sacred Heart. In December 1987, Dr. Williamson wrote to Administrator John Robbins requesting that he reconsider her application. At this time, Dr. Williamson also requested information regarding privileges in the Department of Internal Medicine and the Department of Family Practice.

Robbins responded by letter dated January 12, 1988, in which he advised Dr. Williamson that, in order to qualify for privileges in the Department of Radiology, the Baptist Bylaws required the physician to spend at least 30 percent of her diagnostic radiology time in the Baptist **[*45]** Radiological Department. Inasmuch as the exclusive contract with Radiology Associates precluded her from practicing radiology at Baptist, it would be impossible for Dr. Williamson to meet this requirement. Nevertheless, Robbins again invited Dr. Williamson to detail what she wished to accomplish through membership on the Baptist medical staff.

By letter dated February 25, 1988, Dr. Williamson again explained that she had no desire to use her staff privileges to practice radiology, and that she only wished to admit patients and to provide follow-up care to patients she already had treated at her clinic. Dr. Williamson also discussed her qualifications in the fields of internal medicine and family practice. Finally, Dr. Williamson argued that, under the Baptist Bylaws, her medical staff privileges at University Hospital made her eligible for courtesy staff privileges at Baptist. Accordingly, she requested that Baptist also consider her application as one for courtesy staff privileges.

Baptist continued to process Dr. Williamson's application, and sometime in May 1988, the radiology department met and determined that she satisfied the minimum standards for privileges in diagnostic radiology **[*46]** at Baptist Hospital. Several telephone conversations then ensued between Dr. Williamson and Michael Fry, M.D., the Chief of Baptist's Department of Internal Medicine, during which the two physicians discussed Dr. Williamson's application for privileges in the Departments of Family Practice and Internal Medicine. The parties were able to work out an accommodation, and, in a letter dated July 27, 1988, Dr. Williamson agreed to withdraw her applications for privileges in those departments if Baptist would grant her application for courtesy privileges in the Department of Radiology.

On August 2, 1988, both the Credentials and Executive Committees recommended approval of Dr. Williamson's application for appointment to the courtesy medical staff with major privileges under supervision in diagnostic radiology. Subsequently, on August 23, 1988, the Board of Directors of Baptist Hospital approved her appointment.

As Baptist made clear during the processing of her application, Dr. Williamson's ability to practice radiology at Baptist would be circumscribed by its exclusive contract with Radiology Associates. However, plaintiff does not contend that the privileges granted to her were insufficient **[*47]** for her purposes. Further, Dr. Williamson expressed no objection to the bylaws requirement that her privileges be "under supervision" for the first two years of her membership on the Baptist medical staff.

As of the filing of her complaint in this case, Dr. Williamson had not attempted to admit any patients to Baptist. She has visited with patients on three separate occasions. According to Dr. Williamson, she did not review their medical records or make any entries on their charts. However, she did "consult" with these patients and their families on matters concerning the continuing care and treatment of their respective breast diseases.

6. *Dr. Williamson's Renewed Attempt to Gain Membership in Health First*

On August 10, 1988, Dr. Williamson informed Health First that she had obtained courtesy staff privileges under supervision at Baptist, and requested that her application for membership be processed. In again denying her application, Dr. Shearlock pointed out that the credentialling criteria of the Health First Bylaws require *unsupervised* privileges at either Baptist or Sacred Heart.

7. *Dr. Williamson's Request For A Change In Privileges*

Initially, Dr. Williamson **[*48]** expressed no outward signs of dissatisfaction with her privileges at Baptist. However, after she was rejected for membership in Health First, Dr. Williamson wrote to Al Stubblefield (Robbins' replacement as administrator) on January 9, 1989, requesting that her privileges be changed from "under supervision" to "unsupervised".

In her letter, Dr. Williamson emphasizes that her request was prompted by Health First's rejection. Furthermore, Dr. Williamson stated in her deposition that her current privileges were sufficient to meet the needs of her patients, and that she sought reclassification only to gain entrance into Health First.

Stubblefield responded on January 26, 1989, by pointing out that the bylaws, which Dr. Williamson had signed upon accepting her privileges, required that all initial appointments to both the associate and courtesy medical staff be provisional, i.e. "under supervision", for a period of two years before regular membership is granted. In addition, he reminded Dr. Williamson that the bylaws also required her to spend at least 30% of her practice in diagnostic radiology at Baptist before being eligible for regular privileges. Dr. Williamson met neither requirement. **[*49]** Hence, Stubblefield informed the plaintiff that Baptist could not change her privileges.

In a letter dated February 15, 1989, Dr. Williamson questioned Stubblefield's interpretation of the bylaws. Under Dr. Williamson's view, the thirty percent requirement would come into play if she sought promotion from the courtesy staff to the active staff, but would not bar her promotion from "provisional" (i.e. under supervision) courtesy staff to "regular" courtesy staff (i.e. not under supervision). Dr. Williamson reasoned that, because courtesy staff members are, by definition, physicians who "only occasionally attend patients" at Baptist Hospital, the imposition of the 30% practice requirement would defeat the purpose of having a courtesy staff.

Baptist rejected plaintiff's interpretation of its bylaws, and on March 16, 1989, Stubblefield wrote Dr. Williamson to inform her that both requirements applied to promotions from provisional courtesy to regular courtesy staff privileges. He also reminded Dr. Williamson that the hospital had warned her when she applied for privileges that the exclusive contract would make it impossible for her to meet the 30% practice requirement.

B. THREATS [*50] TO "BLACKBALL" DR. WILLIAMSON

Before Dr. Williamson opened her clinic, she contends that she met with Sacred Heart administrator Jay Hardman. Over the course of the meeting, Dr. Williamson says that she explained the organization of the clinic as well as her goal in creating it. At the conclusion of the meeting, Dr. Williamson alleges that Hardman told her that if she opened her clinic, Sacred Heart would close her one way or another, and threatened to "blackball" her. It is plaintiff's contention that Sacred Heart attempted to make good on this threat in three ways. First, Sacred Heart attacked her referral base. Second, it pressured Pensacola Pathologists into firing her husband, Michael Williamson M.D. Finally, it refused to accept her "needle placement" patients. Sacred Heart strongly denies making any threats against Dr. Williamson and disputes her three alleged theories of implementation.

1. *Attacks on Dr. Williamson's Referral Base*

It is undisputed that referrals from other physicians are vital to the success of Dr. Williamson's practice. According to Dr. Williamson, both Sacred Heart and PRC attacked this referral base in two ways. First, they threatened or **[*51]** otherwise pressured several physicians into reducing the number of patients they referred to her. Second, plaintiff alleges that between 1986 and 1988 Sacred Heart entered into contractual arrangements of one kind or another with several physicians in her referral base. Dr. Williamson alleges that Sacred Heart used its contractual leverage to coerce these physicians into referring patients back to Sacred Heart.

Dr. Murphy: According to plaintiff, the most important physicians in her referral base were B.L. Stalnaker, M.D. and Eugene Murphy, M.D. Drs. Stalnaker and Murphy practiced together as Obstetrician/gynecologists On October 14, 1986, Dr. Murphy gave an interview to the FTC in which he stated that Sacred Heart was not happy that he referred patients to Dr. Williamson. He stated that in several meetings with Sacred Heart administrators, Jay Hardman and defendant Dr. Post tried to convince him to divert referrals to Sacred Heart. According to Murphy, Sacred Heart focused on loyalty to the hospital, rather than on quality of care. Murphy allegedly rebuffed Sacred Heart's entreaties, and stated that because he had an established practice that could be taken elsewhere, he had **[*52]** enough leverage to "resist that, the gentle arm twisting." [29]

Dr. Stalnaker: Similarly, Williamson states that in 1985, and again in 1986 or 1987, Dr. Murphy's partner, Dr. Stalnaker, told her that Hardman threatened to pull his group's perinatal care contract unless he stopped referring patients to Dr. Williamson. Dr. Stalnaker also allegedly told Williamson that Hardman offered him kickbacks worth $ 300,000.00, as **[*53]** well as a reduction in his medical malpractice coverage requirement worth another $ 300,000.00, if he would refer his patients back to Sacred Heart. Finally, Dr. Williamson claims that Dr. Stalnaker told her that Hardman had threatened to call in the loans the hospital had made to various other practices if they continued to refer patients to Williamson.

Of course, all of Dr. Williamson's testimony concerning Dr. Stalnaker's statements to her is inadmissible hearsay. This leaves Dr. Stalnaker's own deposition testimony as the only credible evidence in the record regarding his dealings with Sacred Heart. Dr. Stalnaker flatly denies ever having told Dr. Williamson that Sacred Heart pressured him to divert referrals away from her clinic. He also denies having been offered kickbacks. In fact, Dr. Stalnaker stated that, unless a patient had a specific request, or was an in-patient at a hospital, he referred all his patients to Dr. Williamson.

The evidence on this point is hotly disputed, although it does not appear to be material. Defendants claim that, in 1985, Drs. Stalnaker and Murphy accounted for 354.5 referrals to Dr. Williamson. In 1986, the number of referrals from these two doctors **[*54]** increased to 409.5. [30]. Dr. Williamson counters that defendants' figures fail to

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[29] Defendants argue that Dr. Murphy's statements before the FTC are inadmissible hearsay. Actually, Dr. Murphy's statements may include hearsay within hearsay: The FTC testimony involves not only Dr. Murphy's own statements, but also Hardman's statements to Dr. Murphy. In the case of double hearsay, both levels of hearsay must fall within exception to the hearsay rule, or the entire statement is inadmissible. Dr. Murphy is now deceased. Plaintiff seems to be contending that these statements are within one of the exceptions to the hearsay rule, but that cannot be determined at this point.

[30] These figures were complied by Sacred Heart from Dr. Williamson's patient logs. Instances where two physicians names were listed as referral sources have been counted as half referrals to each doctor.

distinguish between new referrals and repeat visits from old referrals. Taking this factor into account, Dr. Williamson claims that new referrals from Drs. Stalnaker and Murphy dropped from approximately 450 in 1985, to 375 in 1986, and to fewer than 50 per year after 1987.

In viewing these statistics, however, it must be remembered that Dr. Murphy became gravely ill in 1986 and died in December of that year. Subsequently, Dr. Stalnaker sold his practice to Drs. Horan and Turner, and took a position as Director of Sacred Heart's obstetrics/gynecology residency program. As a result, he reduced his private practice to two and one-half days a week in 1986, and to one and one-half days a week beginning in 1989. In 1987 Dr. Stalnaker **[*55]** referred 55 new patients to Dr. Williamson, and in the years 1988-1990 he referred 16, 13, and 17 new patients respectively. In short, the decrease in referrals seems to be fully explained by the circumstances.

Dr. Horan and Dr. Turner: In 1985 Drs. Murphy and Stalnaker took in Charles A. Horan, M.D. as an associate. Subsequently, in 1986, they hired David Turner, M.D. After Dr. Murphy's death at the end of 1986, and pending his appointment as Director of Sacred Heart's OB/GYN residency program, Dr. Stalnaker agreed to sell his practice to Drs. Horan and Turner. Because they were young and had little or no collateral, Drs. Horan and Turner did not believe that they could get a bank loan for the purchase.

Consequently, Sacred Heart agreed to lend them the money. The loan agreement called for interest only payments during the first year, interest and principal payments in the second and third years, and a balloon payment in the third year with an option to renew. In addition, Sacred Heart did not require that the loan be fully collateralized. Both physicians stated that these terms were very advantageous.

According to the agreement, Sacred Heart made the loan as an inducement **[*56]** to Drs. Horan and Turner to maintain their practice in the Sacred Heart service area and to provide professional services to their patients at Sacred Heart. In addition, paragraph 3(b) of the agreement, under "covenants", also provides:

> In consideration for the aforesaid inducements from Hospital to Corporation, Corporation agrees that its physician shareholders and employees shall utilize the in-patient and out-patient facilities operated by Hospital and its affiliated corporations for their patients, to the extent feasible, and unless patient choice dictates otherwise.

Drs. Horan and Turner stated that maintaining the viability of their practice was important to Sacred Heart since it stood to lose approximately 30% of its OB-GYN service if their practice collapsed.

According to Dr. Williamson, Drs. Horan and Turner told her that Sacred Heart threatened not to renew their note unless they referred their radiology patients to Sacred Heart. Once again, Dr. Williamson's statements concerning Drs. Horan and Turner are hearsay and do not appear to fall within any exception to the hearsay rule. Therefore, the only credible evidence in the record concerning the relationship **[*57]** between Sacred Heart and Drs. Horan and Turner are the statements of the doctors themselves. Both physicians deny that the referral covenant created a quid pro quo requiring them to refer patients to the hospital's radiology department, or that they were under any pressure to make such referrals. Dr. Horan also denies having made any statements to the contrary to Dr. Williamson.

According to Dr. Horan, he and Dr. Turner were free to refer their patients as they saw fit. In this regard, defendants have submitted statistics which show that during the years 1986, 1987, 1988, and 1989, these two doctors accounted for 81, 80, 106.5, and 187.5 breast referrals to Dr. Williamson. Plaintiff does not agree with these statistics. Furthermore, Dr. Turner states that they chose not to renew the note in 1989 when the balloon payment came due, and had no further agreement after 1989.

Dr. Antonelli: In August 1987, Sacred Heart loaned Emilio Antonelli, M.D. and Stricker Mays, M.D. $ 300,479.00 to buy the OB/GYN practice of Eddie M. Frazier, M.D. This agreement is very similar to that of Drs. Horan and Turner, except that the "utilization" clause reads:

> In consideration of the aforesaid **[*58]** inducements from Hospital to Corporation, Antonelli and Mays agree that they shall utilize the inpatient and outpatient facilities operated by Hospital and its affiliated corporations for

> their patients, to the extent feasible, and in accordance with acceptable medical practice, and unless patient choice dictates otherwise.

According to Dr. Antonelli, Sacred Heart wanted to insert a more restrictive clause, but backed down after he refused.

In his deposition, Dr. Antonelli praised Dr. Williamson, and stated that, unless a patient requested otherwise, he always referred his patients to Dr. Williamson. There is absolutely no evidence that his relationship with Sacred Heart affected his referral patterns.

Drs. Fowler and Willis: Sacred Heart also loaned Louis B. Fowler, M.D. and Wayne Willis, M.D., partners in a family care practice, $ 50,000.00 to build a small pharmacy building on their office property. Drs. Fowler and Willis then leased the building back to Sacred Heart, which operated it as a pharmacy. During initial negotiations, Sacred Heart evidently asked them to refer their patients to the hospital. According to Drs. Fowler and Willis, they told Sacred Heart that **[*59]** they wouldn't have anything to do with such an arrangement, after which Sacred Heart "immediately" backed down. Subsequently, neither physician has received any pressure from Sacred Heart to refer patients to the hospital. Nor is there any evidence that their referral pattern vis-a-vis Dr. Williamson changed after they entered into the agreement with Sacred Heart.

In fact, Drs. Fowler and Willis subsequently entered into an arrangement whereby Dr. Williamson agreed to overread their x-rays on an "as needed" basis. Drs. Fowler and Willis previously had approached PRC at Sacred Heart with the same proposal. When Dr. Post of PRC insisted not only that his group read all films generated by the Fowler/Willis clinic, but also that PRC have supervisory control over their clinic's radiology department and employees, Drs. Fowler and Willis discontinued negotiations with PRC and reached the agreement with Dr. Williamson.

Shortly after this agreement was consummated, Sacred Heart's lease on the pharmacy expired, and they chose not to renew it. Plaintiff attempts to link her agreement with Drs. Fowler and Willis with Sacred Heart's abandonment of the pharmacy. However, Sacred Heart's representative **[*60]** in charge of the pharmacy, Richard Zeiler, as well as Drs. Fowler and Willis, denied any such linkage and stated in their depositions that the pharmacy was closed because it was not financially successful. Though it turned a small profit, the parties anticipated that sales would continue to fall off when a national drug store chain completed construction of a nearby store.

Dr. McMahon: Dr. Williamson further alleges that Dr. McMahon - - - who is the Medical Director of the Sacred Heart Surgery Center, and the Chairman of the Department of Surgery - - - told her that, because he had to support the hospital, he could not work with her. As with Dr. Stalnaker, Dr. McMahon denies ever having made such a comment to plaintiff.

Drs. Belk and Irvin: Dr. Williamson also claims that William W. Belk, M.D. and E. Coy Irvin, Jr., M.D. - - - partners in a family care practice - - - told her that Sacred Heart told them not to talk to her. According to Dr. Williamson, Drs. Belk and Irvin succumbed to the pressure from Sacred Heart, and stopped sending patients to her in 1987. In support of her argument, she points out that in 1986 and 1987 Drs. Belk and Irvin accounted for over 200 new referrals **[*61]** per year. However, after August 1987, when they entered into what Dr. Belk described as a "joint venture" with Sacred Heart to open a satellite office in Pace, Florida, their referrals decreased to 108 for 1988, and to 70 and 25 in 1989 and 1990, respectively. The precise nature of this "joint venture" is unclear, but it is undisputed that Sacred Heart rented the office and subleased it to Drs. Belk and Irvin. It is also undisputed that the contract contained no provisions relating to referrals.

Again, Dr. Williamson's statements are hearsay and are not admissible to prove the truth of what Drs. Belk and Irvin told her. And, once again, Drs. Belk and Irvin, like Drs. Horan and Turner, deny being under any pressure to disassociate themselves from Dr. Williamson. Instead, they mention a number of factors that lead to a decrease in referrals to Dr. Williamson.

Prior to 1987, Drs. Belk and Irvin were located next door to Dr. Williamson, making her services very convenient. Sometime in 1987, they acquired x-ray equipment for their Pensacola office and started to do much of their own x-ray work. In addition, they moved their Pensacola office to a new Gulf Coast Medical Arts Center several **[*62]** miles away from Dr. Williamson's clinic. [31] This move placed Dr. Williamson's facilities and Sacred Heart's facilities equally distant from their offices. At the same time, Sacred Heart opened its own women's clinic, the Ann Baroco Center. Dr. Belk stated that as the Ann Baroco center became more established, patients began asking to go there. Finding no difference in the quality of care between Dr. Williamson and the Ann Baroco Center, Drs. Belk and Irvin respected these requests. [32]

Despite the fact that, after 1987, they performed their own simple x-ray procedures, defendants claim that referrals to Dr. Williamson from Drs. Belk and Irvin actually increased. They claim that plaintiff's records show that in **[*63]** 1987, Drs. Belk and Irvin accounted for 136.5 referrals to her clinic. [33] This number decreased in 1988 to 132 referrals, but increased again in 1989 to 157 referrals.

Dr. Howard: On December 13, 1984, Joseph D. Howard, M.D. entered into an agreement with Gulf Coast Diversified ("Gulf Coast"), an affiliate of Sacred Heart and co-owner of HOP, to operate a family care clinic. According to the agreement, Gulf Coast would provide the administrative support and Dr. Howard would provide the physician services. The agreement states that Dr. Howard is an independent contractor. The agreement also states that "[Gulf Coast] shall be notified of any referral of patients . . . for medical services to any entity other than Sacred Heart Hospital of Pensacola." Finally, the agreement states that "[Dr. Howard] agrees to utilize specialty physicians who are members of the medical staff of Sacred **[*64]** Heart Hospital of Pensacola wherever practical to ensure continuity of patient care."

There is no indication that Dr. Williamson ever had a referral relationship with Dr. Howard. Instead, she alleges that Dr. Howard's referrals to Thomas Brown, M.D., another independent radiologist for whom Dr. Williamson worked when she first came to Pensacola, virtually ceased after Dr. Howard entered into the agreement with Sacred Heart.

In her affidavit, Mary Ellen Neal, Dr. Howard's head nurse at the time, stated that, when Sacred Heart established its relationship with Dr. Howard, she became an employee of Sacred Heart. She was supervised by a head nurse who came to the clinic from Sacred Heart Hospital, and who, in turn, reported to the Sacred Heart administration.

Ms. Neal states that prior to Dr. Howard's relationship with Sacred Heart, the majority of his referrals for out-patient radiological services went to Dr. Brown. Immediately after the relationship began, the supervising nurse told Ms. Neal that the clinic staff was to send all out-patient radiological referrals to Sacred Heart. She was told not to ask the patient where they wanted to go, but instead, to simply schedule the patient **[*65]** for Sacred Heart. Only if the patient objected were the staff to consider referring the patient to another facility. As a result, referrals to Dr. Brown virtually ceased. Of course, as previously noted, Dr. Brown is not a party to this case, and there is no evidence of any relationship between plaintiff and Dr. Howard that is relevant to this issue.

Dr. Mixon: On April 10, 1989, shortly after Dr. Williamson filed her complaint in this case, Fred S. Mixon, M.D. entered into an agreement to operate a family care clinic similar to that between Gulf Coast and Dr. Howard. As with Dr. Howard, Gulf Coast supplied administrative support, while Dr. Mixon provided physician services. Also like Dr. Howard, Dr. Mixon is an independent contractor. In addition, Dr. Mixon's agreement contains the same requirement that he utilize specialty physicians from Sacred Heart "wherever practical to ensure continuity of patient care." However, Dr. Mixon's agreement contains an additional restriction specifically requiring him to utilize radiology services provided by Sacred Heart unless Sacred Heart instructs him to use an outside radiologist. According to Dr. Brown, referrals from Dr. Mixon ceased after **[*66]** he entered into this agreement. As with Dr. Howard, the record reflects no relationship between Dr. Mixon and the plaintiff that is relevant to this issue.

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[31] Gulf Coast Medical Arts Center is a group of several practices that pooled their resources to build an office complex. Sacred Heart is not associated with Gulf Coast Medical Arts Center.

[32] Drs Belk and Irvin do not contend that there was any problem with Dr. Williamson's quality of care.

[33] As discussed above, defendants' numbers do not differentiate between new referrals and repeat visits by old referrals.

Dr. Cross: Dr. Williamson has alleged that David Alan Cross, M.D., a local surgeon, intimated to her that he and others with whom he was familiar were under pressure from Sacred Heart to route their radiology referrals back to Sacred Heart. As with the other physicians alleged to have been under such pressure, Dr. Cross stated under oath that he was under no pressure, had not been threatened by Sacred Heart, knew of no other physicians subject to pressure or threats, knew of no direct attempts to interrupt Dr. Williamson's referral patterns and that he never communicated any information to the contrary to Dr. Williamson. Dr. Williamson's testimony again appears to be inadmissible hearsay.

Dr. Westafer: Remarkably, Dr. Williamson next points to the contract between Anita S. Westafer, M.D. and Baptist Hospital. As with the contracts between Drs. Mixon and Howard and Sacred Heart, Baptist agreed to help equip and staff Dr. Westafer's office, in return for which Dr. Westafer agreed to provide the specified physician services. **[*67]** Dr. Williamson argues that after Dr. Westafer signed this contract in April of 1988, her referrals to Dr. Williamson decreased from approximately 70 new referrals on 1987 to 30 and 40 referrals in 1988 and 1989.

What plaintiff fails to mention is that Dr. Westafer's new referrals to Dr. Williamson had been dropping off steadily since 1985. In that year Dr. Westafer referred approximately 130 new patients. New referrals dropped to just under 100 in 1986, and to approximately 70 in 1987. In 1988, the year Dr. Westafer signed the contract with Baptist, her new referrals dropped to a low of approximately 30, but began to rise again to 40 in 1989, and to over 50 in 1990.

Moreover, Dr. Westafer's contract specifically states that she is not required to refer patients to Baptist. Quite to the contrary, the agreement provides:

> *Admittance of Patients*
>
> [Dr. Westafer] hereby acknowledges that the choice of services and the choice of service of suppliers that [Dr. Westafer] makes on behalf of its patients must be, and will be, made only with regard to the best interest of the patients themselves. Physician hereby specifically acknowledges, that the compensation that [Dr. Westafer] **[*68]** is to receive hereunder in no way requires, and is in no way contingent upon, the admission, recommendation, referral or any other form of arrangement by [Dr. Westafer] for utilization by patients or others of any item or service offered by the Hospital.

Drs. French and Montgomery: In October 1988, Baptist advanced Barbara French, M.D. and Paula Montgomery, M.D. working capital in the amount of $ 40,000.00 to open up their family care practice in Escambia County. Their loan agreement contained a clause identical to that quoted above from Dr. Westafer's contract. Plaintiff does not argue that Drs. French and Montgomery ever referred significant numbers of patients to her. Instead, she advances the novel theory that, but for their contractual relationship with Baptist, their referrals to her would have grown significantly.

In support of her contention, plaintiff compares the referral patter of Drs. French and Montgomery to that of Dr. Epps. Not a party to a contract with any hospital, Dr. Epps increased his new referrals to Dr. Williamson from 34 in 1987 to 325 in 1990.

Dr. Williamson also claims that members of the Sacred Heart Staff made disparaging remarks to others concerning **[*69]** the quality of her medical care and that of her clinic. Again, the only evidence supporting this allegation is the testimony of Dr. Williamson, which is inadmissible hearsay. And again, every physician that plaintiffs deposed denied ever having heard or made any of the disparaging remarks as claimed by the plaintiff, so the only material evidence of record fails to support plaintiff's claims.

2. *Alleged Threats to Michael Williamson*

When the Williamsons moved to Pensacola, Dr. Williamson's husband, Michael Williamson, M.D., a pathologist, became a professional employee of Pensacola Pathologists. In 1985, after two years employment, Dr. Michael Williamson became a shareholder and director of the professional association. Throughout his employment with Pensacola Pathologists, the corporation held an exclusive contract with Sacred Heart for the provision of pathology services. Eighty percent of the corporation's income came from this contract.

Shortly after Dr. Angel Williamson began advertising her clinic in 1984, Jerrard H. Hilbert, M.D., Pensacola Pathologists' founder, called a meeting of the group. According to Dr. Michael Williamson, Dr. Hilbert told him in front of the other **[*70]** physicians that Sacred Heart was upset with the Pensacola Diagnostic's advertising. He also allegedly stated that the advertising could mean trouble for the group and that trouble for the group would mean trouble for Michael Williamson. Dr. Hilbert then allegedly requested Dr. Michael Williamson to ask his wife to tone down her advertising.

David P. Nicholson, M.D., another shareholder in Pensacola Pathologists, stated that, around the time Dr. Angel Williamson began advertising her clinic, he had conversations with Dr. Hilbert in which Dr. Hilbert expressed concern over the fact that plaintiff's advertising might have a negative impact on Pensacola Pathologists' relationship with Sacred Heart. However, Dr. Nicholson stated that Dr. Michael Williamson was not present during these conversations, and that he had no knowledge of anyone from the group discussing the matter with Sacred Heart.

Dr. Michael Williamson further stated that, around the same time he commented on Pensacola Diagnostic's advertising, Dr. Hilbert told him that Sister Mary Carroll, a Sacred Heart administrator, had questioned him (Dr. Hilbert) about the quality of his (Dr. Michael Williamson's) work. Dr. Michael **[*71]** Williamson stated that such questioning by the Sisters was very unusual, and that he took it to be a threatening gesture.

Dr. Hilbert denies ever having made any of these statements. In addition, as discussed more fully below, these statements attributed to Dr. Hilbert are hearsay to the extent they are offered to show that Sacred Heart, in fact, threatened or pressured Pensacola Pathologists.

Dr. Angel Williamson also has testified to a number of conversations she allegedly had with Pensacola Pathologists shareholders concerning the effect of her practice on her husband's job. She states that Dr. Hilbert and Dr. Nicholson, along with Everett S. Harvard, M.D. and Fenner McConnell, M.D. (the two remaining Pensacola Pathologists shareholders), told her that Sacred Heart was very angry about her advertising, that this meant trouble for Pensacola Pathologists, which meant trouble for Dr. Michael Williamson.

Dr. Angel Williamson also states that, during the time when she was negotiating with PRC and Sacred Heart for the purchase of her practice, Dr. McConnell told the Williamsons at dinner one night that Jay Hardman had tried very hard to make the corporation fire Dr. Michael Williamson. **[*72]** He allegedly went on to state that things would be better for everyone if she reached an agreement with Sacred Heart. Once again, all of the Williamsons' statements concerning what Dr. McConnell and other members of Pensacola Pathologists said are inadmissible hearsay.

According to Dr. McConnell, the Williamsons invited him and his wife to dinner at a local restaurant, where Dr. Angel Williamson told him that she was negotiating with Sacred Heart and PRC to join the radiology group. Dr. McConnell states that he responded that he was happy because it would make his job easier. He admitted that the controversy between Sacred Heart and Dr. Angel Williamson made him uncomfortable in the negotiation of his own contract with Sacred Heart. He denied that any threats, of any type, were made by Sacred Heart.

When Dr. McMahon and Jay Hardman visited Dr. Angel Williamson in December 1985 to tell her that Sacred Heart no longer would accept her needle placement patients, Hardman allegedly asked her how she would feel if her husband's group lost its contract. Dr. Angel Williamson claims that she understood this to mean that if she fought the decision to ban her patients, Sacred Heart would have **[*73]** her husband fired.

Pensacola Pathologists' contract with Sacred Heart expired on December 31, 1988. Although negotiations to renew the contract began as early as September 1988, the parties did not reach an agreement on a new contract until June 1989. Until that time, Pensacola Pathologists continued to work without a contract. According to Dr. Angel Williamson, Drs. Hilbert and McConnell told her husband that this delay was occasioned by Sacred Heart's displeasure over her competition with them. These statements are also inadmissible hearsay.

Dr. McConnell expressed his concern over this delay in a conversation with Dr. David Cross. According to Dr. McConnell, he told Dr. Cross that he felt that, in general, Sacred Heart was putting undue pressure on hospital based physicians to accept increasingly more restrictive contract terms. In particular, Dr. McConnell commented on the fact that Sacred Heart was pressuring his own group into accepting a 90-day termination clause that he felt was unfair to the physicians. It also appears that Sacred Heart would not agree to an increase in the reimbursement rates for certain services. Although Dr. McConnell denies that any of this pressure **[*74]** was connected to Sacred Heart's ongoing controversy with Dr. Angel Williamson, he did indicate that the group had decided to terminate its relationship with Dr. Michael Williamson.

Dr. Cross tells a different story. According to Dr. Cross, sometime in May 1989, he had gone to the pathology department to speak with Dr. McConnell. Their conversation turned to the subject of Pensacola Pathologists' negotiations to renew their contract. At this point, Dr. McConnell allegedly told Dr. Cross that his group had acquiesced to pressure from Sacred Heart to get rid of Dr. Michael Williamson, and that, as a result, they would be able to renew their contract.

Several weeks later, on June 14, 1989, Pensacola Pathologists and Sacred Heart completed negotiations on the pathology contract. On the same day, Drs. Hilbert and Harvard informed Dr. Michael Williamson that Pensacola Pathologists would terminate his employment as of November 30, 1989. On June 15, 1989, Sacred Heart signed the pathology contract. On June 22, 1989, the Board of Directors of Pensacola Pathologists formally voted to terminate Dr. Michael Williamson, as their professional agreement allowed. As a result, he lost his privileges **[*75]** to practice at Sacred Heart, and was forced to sell his shares in the corporation.

Drs. Hilbert, Harvard and McConnell have denied that there was any connection between the renewal of the pathology contract and the termination of Dr. Michael Williamson. In addition, they point out that, at the same time Sacred Heart and Pensacola Pathologists completed their negotiations, Pensacola Pathologists also decided not to renew its contract with Roche Laboratories. During his time with the group, Dr. Michael Williamson had spent at least 50 percent of his time at Roche on behalf of the group. Thus, Pensacola Pathologists maintains that it simply had no further need for Dr. Michael Williamson's services.

Drs. Hilbert, Harvard, and McConnell also have stated that Sacred Heart never expressed any concern or complaints over Dr. Angel Williamson's advertising, and that the hospital never exerted any pressure on the group to fire Dr. Michael Williamson. In addition, each has stated that he never told Dr. Angel Williamson that the group was in danger of losing its contract because of its association with her husband. To the contrary, when the pathologists approached Sacred Heart with their concern **[*76]** that Dr. Michael Williamson's association with the group might influence the upcoming contract negotiations, Jay Hardman is alleged to have told Dr. McConnell that Dr. Michael Williamson would have to be judged on his own merits.

3. *The Needle Placement Controversy*

Occasionally, Dr. Williamson's examination will reveal a lesion in the patient's breast which must be removed for analysis. Often these lesions are nonpalpable, and too small to be found easily by the surgeon. The accepted procedure in these circumstances is to insert a Kopan's needle containing a very thin hook-wire into the breast at the point of the suspected lesion. After properly positioning the needle so that it isolates the lesion, the radiologist removes the needle, leaving the hook-wire attached to, or very near, the lesion. The surgeon need only follow the wire to find the suspected lesion.

Once the suspected lesion is removed, the specimen is then transported to the radiologist and a pathologist for examination and testing. The pathologist dissects the specimen, after which the radiologist performs an x-ray on the dissection. The radiologist then compares this film to the original x-ray to ensure that the **[*77]** proper tissue has been removed. The specimen is then sent to a pathologist who determines whether the lesion is cancerous.

When a Sacred Heart radiologist initiates the needle placement procedure, each subsequent step is performed on the Hospital premises. The radiologist performs the mammogram, places the needle, and then escorts the patient to the Sacred Heart surgi-center. A Sacred Heart surgeon removes the specimen, which is then transported back to the radiology department. There, a pathologist dissects the specimen and examines it along with the radiologist. The radiologist then re-mammograms the specimen. The pathologist then takes the specimen back to the pathology department for further testing. In the meantime, the patient remains in the surgery area in case further specimens are needed.

In the fall of 1985, shortly after Sacred Heart denied her first request for privileges, Dr. Williamson met with Drs. Hilbert, McConnell, Havard, and Nicholson of the Sacred Heart Pathology Department. They discussed the feasibility of Dr. Williamson performing the needle placement procedure at her clinic and then sending the patient to Sacred Heart for specimen removal and pathological **[*78]** examination. Dr. Williamson would identify the lesion, position the needle and localize the wire. A technician would then walk with the patient across the Sacred Heart parking lot to the Sacred Heart surgi-center, where a surgeon would remove the specimen. [34]

Once removed, the specimen would be returned to Dr. Williamson's clinic for dissection and another x-ray. After determining that the proper tissue had been removed, Dr. Williamson would send the specimen to the Sacred Heart pathology department for further testing. While Dr. Williamson performed these procedures, the patient would remain on the operating table at the surgi-center.

The pathologists agreed that an arrangement could probably be worked out, and Dr. Williamson was permitted to follow this procedure with several patients. No quality of care problems ever **[*79]** arose on these occasions. Nevertheless, shortly after Dr. Williamson implemented this protocol, technicians at the surgi-center contacted the pathologists and questioned whether it was appropriate to send specimens off the Sacred Heart grounds.

At the same time, William R. Bell, M.D., a member of the pathology group not present at the meeting with Dr. Williamson, expressed a number of concerns related to quality assurance and legal liability. First, Dr. Williamson's procedure did not allow for joint review of the biopsy specimen by the radiologist and the pathologist. Second, the procedure involved dissection of the specimen by Dr. Williamson, who, as a radiologist, is not specifically trained in such procedures. Third, the transportation of the specimen to Dr. Williamson's clinic would involve loss of control over the integrity of the specimen. Fourth, delays in processing the specimen might lead to deterioration. Finally, because she did not have staff privileges, Dr. Williamson was outside the Sacred Heart quality assurance mechanism.

Dr. Bell discussed his concerns with Dr. Hilbert, Dr. McMahon (the Medical Director of the Sacred Heart Surgical Center and the Chairman of the **[*80]** Department of Surgery), and Sacred Heart administrator Edward Lohmiller. As a result, the administration called a meeting of the Medical Advisory Board. The Board met on December 4, 1985. After much discussion, it concluded that the breaks in the quality control chain not only threatened the integrity of the needle placement procedure, but also unnecessarily exposed the hospital to civil liability. Although no one could demonstrate that Dr. Williamson's protocol resulted in a decrease or decline in the quality of care, and despite the fact that several of the physicians present apparently felt that there was no serious problem, the Advisory Board recommended both that the hospital not allow specimens removed at Sacred Heart to be transported outside the Sacred Heart complex, and that Sacred Heart not accept needle placement patients whose lesions had been localized in a physician's office outside the hospital.

Several days later, Jay Hardman, Sacred Heart's administrator, and Dr. McMahon visited Dr. Williamson at her office and told her of the Advisory Board's decision. However, it was not until April 1, 1987, that the Surgical Center issued a written policy statement directing that **[*81]** all specimens removed from a patient's body be submitted directly to the pathology department. This statement did not address the needle localization, and it was not until October 17, 1989, that Dr. Whitcomb wrote Dr. Williamson and made it clear that Sacred Heart would no longer accept patients with needle localizations for breast biopsy unless they were under the care of a Sacred Heart staff radiologist.

Despite its stated concern over the removal of specimens from the Sacred Heart campus, it is undisputed that the pathology department received thousands of samples, including breast biopsies, from places other than the Sacred Heart Surgical Center. In addition, it is undisputed that the pathology department routinely sends specimens to outside laboratories. [35] Other doctors utilize couriers to send samples to Sacred Heart's pathologists. Dr.

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[34] Dr. Williamson's clinic is adjacent to the Sacred Heart Hospital grounds, and is no farther from the surgi-center, which is free-standing, than the Sacred Heart radiology department.

Williamson argues that Sacred Heart's professed quality control concerns were illusory, and that her needle placement procedure posed no greater quality assurance concerns than Sacred Heart's procedure. Specifically, she contends that board certified radiologists are qualified to dissect breast biopsy specimens, and that the removal of the **[*82]** specimen to her clinic poses no greater risk than the use of any outside laboratory.

PLAINTIFFS' CLAIMS

Dr. Williamson and her clinic filed the complaint in this case on March 29, 1989. Count I of the complaint alleges a conspiracy among Sacred Heart, PRC, and Dr. Post to restrain trade in violation of *Section 1* of the Sherman Act [*15 U.S.C. § 1*] by making it impossible for independent radiologists to compete against them in the provision of radiology services. Count II alleges a similar conspiracy between Baptist and Radiology Associates. Count III alleges a conspiracy among all the defendants to restrain trade in violation of *Section 1* of the Sherman Act by excluding **[*83]** Dr. Angel Williamson from Health First, and thus from HOP and its patient base. Count IV alleges a pendent state law claim against Sacred Heart, PRC, and Dr. Post for tortious interference with present and prospective business relationships.

Defendants counter that there is no evidence of an antitrust conspiracy and that plaintiff Williamson has failed to show an antitrust injury. In addition, Sacred Heart, Baptist and Health First argue that their actions in denying Dr. Williamson's requests for privileges and staff membership are immune from antitrust liability under the Health Care Quality Improvement Act, Title *42, United States Code, Sections 11101, et seq.* Finally, Sacred Heart, PRC and Dr. Post argue that there is no evidence that they improperly interfered with plaintiff's business relationships.

II. ANALYSIS

A. *Defendants' Joint Motion to Strike Expert Witnesses' Affidavits*

Before taking up the substance of defendants' several motions for summary judgment, I first must address their joint motion to strike certain expert witnesses' affidavits submitted by plaintiff Williamson in support of her opposition to defendants' motions. (doc. 317). For the reasons **[*84]** set out below, that motion is GRANTED.

On May 26, 1989, I entered my standard scheduling order. To facilitate expert witness discovery pursuant, the order provided:

> *Expert Witnesses.* The identification of expert witnesses and their opinions is commonly the source of most pretrial delay. In order to expedite the discovery process, and in addition to the requirements of *Rule 26(B)(4)(A), each party shall submit to the opposing party at the earliest opportunity a list of all expert witnesses anticipated to testify at trial.* The list shall also included the address and area of expertise of each expert witness. A copy of each expert's written opinion with supporting facts and grounds, or a written summary thereof, shall be attached to the list. *Although no time deadline is set herein for the submission of this information, the parties are directed to do so sufficiently in advance of the discovery deadline set in paragraph (a) of this Order so depositions may be scheduled and taken before the discovery period ends.* Expert witnesses not timely identified as required herein, or whose expert opinions have been significantly modified or changed after discovery has ended, **[*85]** will normally not be permitted to testify at trial. [36] (emphasis added)

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[35] As a matter of standard procedure, specimens entering or leaving the Pathology Department are transported by courier. However, on occasion, a patient or a doctor may bring a sample directly to the department for analysis. Sacred Heart employed its own couriers to transport specimens between different locations within the Sacred Heart complex.

[36] ***Federal Rule of Civil Procedure 26(b)(4)*** provides:

> (4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)((1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the

Before the discovery period closed on April 30, 1990, the defendants propounded interrogatories seeking the name of each person Dr. Williamson expected to call as an expert witness at trial in this matter. In connection with **[*86]** each expert, defendants also requested that Dr. Williamson identify (1) the subject matter on which each expert would testify, (2) the substance of the opinions to which each expert would testify, and (3) a summary of the facts upon which the opinions were based.

In her responses, which are dated January 26, 1990, April 13, 1990 and April 25, 1990, Dr. Williamson interposed a general objection to the interrogatories as a whole, stating that due to delays in discovery occasioned by defendants' failure to produce relevant documents, she had been unable to fully develop responses. Specifically with regard to the expert witness interrogatories, Dr. Williamson answered that she "has not yet determined which expert may be called as a witness at trial of this matter. When this determination is made, Williamson will respond to this interrogatory."

As early as March 7, 1990, plaintiff's attorney had written to defendants' attorneys explaining that plaintiff's experts would not be able to form their opinions until all discovery was complete. Therefore, he suggested that the parties agree to engage in expert discovery after the completion of fact discovery. Defendants refused to agree to extend **[*87]** discovery beyond the April 30, 1990, cut-off date.

At the end of the discovery period, defendant Sacred Heart identified one expert. However, the expert's report was not produced until February 27, 1991, when Sacred Heart filed it as an exhibit to its motion for summary judgment. No other defendant has identified an expert. Plaintiff did not reveal any experts until April 1, 1991, almost a year after the discovery period had ended, when she incorporated their affidavits into her opposition to defendants' several motions for summary judgment.

Alleging a failure to comply with *Federal Rules of Civil Procedure 26(b)(4)* and *26(e)*, and this court's Scheduling Order of May 26, 1989, setting the April 30, 1990, discovery deadline, defendants moved to strike these affidavits, as well as the affidavits of several fact witnesses whom defendants claim plaintiff has not previously identified. In response, plaintiff claims that delays in the completion of discovery prevented her from identifying her experts until just before filing her response.

The plaintiff failed to comply with the Scheduling Order's clear requirements concerning expert witnesses. Therefore, the testimony of such witnesses **[*88]** must be disallowed, as the order expressly warns.

B. *Summary Judgment Standard*

HN1[] A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)* *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986)*; *Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987)*. An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 211 (1986)*. It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Id. See also* *Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986)*.

HN2[] "The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the **[*89]** nonmoving party has the burden of proof." *Cornelius v. Town of Highland Lake, 880 F.2d 348, 351 (11th Cir. 1989)*, *cert. denied, 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990)*. However, summary judgment is improper [if a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Id.*

substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

HN3[] On summary judgment motion, the record and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176, 177 (1962)*. Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. *See Clinkscales v. Chevron USA, Inc., 831 F.2d 1565, 1570 (11th Cir. 1987)*.

C. *Health Care Quality Improvement Act*

In their several motions for summary judgment, defendants argue that plaintiffs claims are barred by the Health Care Quality Improvement Act, Title *42, United States Code, Section 11101, et seq.* ("HCQIA"). *HN4*[] This statute creates antitrust immunity for a "professional **[*90]** review body" in connection with a "professional review action." *42 U.S.C. § 11111(a)*. Defendants correctly point out that Sacred Heart, Baptist, and Health First qualify as "professional review bodies," and that their decisions regarding privileges and membership qualify on their face as "professional review actions." [37] However, they also concede, as they must, that for immunity to attach under the HCQIA, the review action must have been taken "in the reasonable belief that the action was in the furtherance of quality care," and "in the reasonable belief that the action was warranted by the facts known after [a] reasonable effort to obtain the facts and after [providing] notice and hearing procedures." *Id.* at *§ 11112(a)*. The statute creates a rebuttable presumption that these requirements have been met. *Id.*

[*91] In this case, the major thrust of plaintiff's claims is that the defendants did not act in a reasonable belief that their actions furthered quality health care. As the evidence amply demonstrates, Dr. Williamson is a qualified professional whose services are well regarded by many of her peers. I agree with defendants that there is a substantial amount of evidence supporting the application of the HCQIA to the actions in question, but it cannot be resolved on summary judgment. Sufficient evidence exists to create a genuine issue of fact on the question of whether defendants acted reasonably in the furtherance of quality of care.

In addition, there is a question as to whether Dr. Williamson was afforded notice and a hearing within the meaning of the Act. I realize that there is no evidence suggesting that Dr. Williamson requested such a hearing, but the record is silent as to whether one was readily available. Furthermore, with regard to the hearings incident to Sacred Heart's denial of plaintiff's application, the evidence indicates that plaintiff was not given an opportunity to present evidence on quality of care issues or her expertise.

Therefore, defendants' several motions for **[*92]** summary judgment must be denied to the extent that they are based on the HCQIA. Further discussion of this issue is unnecessary in light of my conclusion, set out below, that plaintiff has failed to establish a genuine issue of material fact as to the existence of an antitrust conspiracy.

D. *Conspiracy In Restraint Of Trade*

HN5[] *Section 1* of the Sherman Act, Title *15, United States Code, Section 1*, provides:

> 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.

The threshold requirement of a conspiracy claim under this statute is existence of an agreement between two or more persons demonstrating a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991) (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946)*. *See also Bolt v. Halifax Hospital Medical Center, 891 F.2d 810, 818-19 (11th Cir. 1990)*.

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[37] Not all of the actions alleged to have been taken by the defendants necessarily qualify as "professional review actions." For example, the alleged actions taken to divert referrals from plaintiff to defendants do not so qualify. Thus, even if the HCQIA acted to bar liability for the denial of privileges, antitrust liability in theory still could exist with respect to such non-qualifying activities.

The courts recognize that ***HN6***[] it is the rare **[*93]** case in which the plaintiff can establish the existence of a conspiracy by showing an explicit agreement. Therefore, most conspiracies are inferred from the behavior of the alleged conspirators. *Seagood Trading, 924 F.2d at 1573*. However, the range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy is limited. *Id. at 1574* (citations omitted).

HN7[] To make out the conspiracy, and thus avoid summary judgment, the circumstantial evidence upon which the plaintiff relies must establish a non-legitimate motive for entering into such a conspiracy. *Seagood Trading, supra, 924 F.2d at 1574*; *Bolt, supra, 891 F.2d at 819*. In other words, the plaintiff must show that collective behavior is economically reasonable in that it accomplishes a goal that would economically inure to the defendants' benefit, and therefore reasonably exclude the possibility that defendants acted independently. *See* *Seagood Trading, supra, 924 F.2d at 1574*; *Bolt, supra, 891 F.2d at 819* (citations omitted). To make this showing, the plaintiff must adduce evidence "that tends to exclude the possibility that the alleged co-conspirators acted independently and in **[*94]** a manner consistent with rational business objectives." *Bolt, supra, 891 F.2d at 819* (citations omitted). This means that conduct which is as consistent with permissible, unilateral activity as with an illegal conspiracy does not, standing alone, permit the inference of an antitrust conspiracy. *Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)*; *Seagood Trading, supra, 924 F.2d at 1574*.

HN8[] The plaintiff need not show a specific intent to restrain trade or to build a monopoly, however. *Id. at 819-20*. "So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under *Section 1*." *Id. at 820*. Therefore, in determining whether a conspiracy exists, if an economic motive is evident, the plaintiff need only show (1) a conscious commitment on the part of the alleged conspirators to adhere to an agreement that is (2) designed to achieve an objective prohibited by the statute. *Id.*

HN9[] Once the plaintiff makes out a conspiracy, the court must decide whether the agreement had an adverse impact on competition. *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1570 **[*95]** (11th Cir. 1991)*. Certain conspiracies are deemed to have such a pernicious effect on competition, that they are said to be illegal "per se". *Id. at 1567*. "That is, the conduct involved 'always or almost always tends to restrict competition and decrease output'" without any countervailing procompetitive benefits. *Id. (quoting* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-90, 105 S. Ct. 2613, 2617, 86 L. Ed. 2d 202, 208 (1985)* (citation omitted)). The Supreme Court has made it clear that the "per se" label should be applied infrequently and with caution. *Id. (citing* *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 1519, 99 L. Ed. 2d 808, 816 (1988))*. Therefore, the presumption in *Section 1* cases is that the "rule of reason" standard applies. *Id. at 1567*.

HN10[] The rule of reason asks whether, in the circumstances of a particular case, a restrictive practice imposes an unreasonable restraint on competition. *Seagood Trading Corp., supra at 1569* (citations omitted). A restraint is "unreasonable" if it has an adverse impact on competition and cannot be justified as a procompetitive **[*96]** measure. *Id.* Thus, "the rule of reason standard hinges the ultimate legality of a restraint on whether the plaintiff has demonstrated an anticompetitive effect which is not offset by a need to achieve a procompetitive benefit or justification." *Id. at 1569* (quoting from *Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 571 (5th Cir. 1978)*.

HN11[] In order to show an injury to competition using the rule of reason analysis, the plaintiff first must establish a "particularized or relevant market in which the defendant's actions unreasonably restrain trade." *L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 422 (11th Cir. 1984)*. The relevant market is defined generally as the "area of effective competition." *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 1523, 8 L. Ed. 2d 510, 535 (1962)*. The market must contain both a product dimension and a geographic dimension. *L.A. Draper, supra, 735 F.2d at 423*. The product dimension is "determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output." *Id.* The geographic dimension is "the **[*97]** area in which the product or its reasonably interchangeable substitutes are traded." *Id.*

HN12[] Once a plaintiff has established the relevant market, the rule of reason analysis focuses on the defendants' power within the market. The meaning of market power in rule of reason cases has not been clearly explained or defined by the Supreme Court. However, I agree with Judge Posner's description of market power as the "power to raise price above the competitive level without losing so many sales that the price increase would be unprofitable." *Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1435 (7th Cir. 1986)* (citations omitted).

As described above, Dr. Williamson alleges a swirl of conspiracies. First, she contends that Sacred Heart conspired with PRC, Dr. Post, and others to prevent her from competing for radiology patients. Next, she alleges a similar conspiracy among Baptist, Radiology Associates, and unnamed others for that same purpose. Finally, she asserts that there was a "community wide" conspiracy among all the defendants to prevent her from gaining membership in Health First, which effectively disqualified her from treating HOP subscribers, and thereby prevented her from **[*98]** competing for patients in need of radiology services.

Dr. Williamson's argument proceeds from the premise that rational economic actors in the defendants' positions would have accommodated her various requests for privileges. Their failure to do so, according to Dr. Williamson, is evidence that they acted in a manner inconsistent with rational economic objectives, and hence conspired to drive her out of the market.

1. *PRC, Sacred Heart and Dr. Post Conspiracy*

As previously noted, there is no direct evidence that PRC, Dr. Post, and Sacred Heart conspired to prevent Dr. Williamson from competing for radiology patients. Accordingly, the plaintiff relies entirely on circumstantial evidence of (a) defendants' failure to accommodate Dr. Williamson's requests for staff privileges, and (b) Sacred Heart's attempts to "blackball" Dr. Williamson.

(a) Denial of Staff Privileges. (i) *The Bolt Case:* In *Bolt v. Halifax Hospital Medical Center, 891 F.2d 810 (11th Cir. 1990)*, the Eleventh Circuit held that **HN13**[] the denial or revocation of hospital privileges are presumed to be economically motivated, and are, therefore, evidence of an economic conspiracy between the defendant hospital **[*99]** and its staff. In such a case, the plaintiff need only show a conscious commitment to the agreement and that the agreement was designed to achieve an anticompetitive effect.

In *Bolt,* the plaintiff was granted probationary privileges at each of three hospitals. At the end of the probation period, one of the hospitals conditioned the plaintiff's reappointment to the active staff on his agreement to seek psychiatric counseling through the Impaired Physicians Program operated by the Florida Medical Association. Shortly thereafter, the remaining two hospitals denied reappointment.

In reversing a directed verdict in favor of the defendant hospitals, the Eleventh Circuit held that hospitals and doctors always have a "rational economic motive" sufficient for antitrust purposes when they deny or revoke a physician's privileges. *Id. at 820*. Relying solely on a simplified application of the inverse relationship between supply and demand and a law review article, and without citation to any legal authority, the court seems to presume that excluding a physician from practice in a hospital always allows the remaining doctors to charge a higher price. *Id.*

Bolt, however, is distinguishable **[*100]** from this case. It does not address the role of exclusive contracts in the staffing of hospital diagnostic facilities; nor does it deal with the role of HMO participation in the granting of privileges. In addition, *Bolt* presumed that the physician subject to denial of privileges was facially qualified under the hospital bylaws to practice medicine within the relevant department. In this case, there is no question that Dr. Williamson had the medical training necessary to qualify for privileges in the Department of Radiology. But there is no legal impropriety claimed or shown regarding Sacred Heart's exclusive contract with PRC, so it is undisputed that plaintiff is not entitled to have regular radiological privileges. Instead, Sacred Heart denied her amended and second applications for privileges in the Department of Internal Medicine on the ground that her medical training in radiology was insufficient under the bylaws to qualify her for privileges in the Department of Internal Medicine.

I realize that plaintiff is challenging Sacred Heart's reliance on the bylaws on the grounds that it was pretextual. Nevertheless, the fact that plaintiff's medical credentials have been questioned, **[*101]** along with the other factors mentioned above, makes application of the *Bolt* "economic motive" presumption to this case inappropriate. Accordingly, I must review all the evidence in the record to determine whether there is any genuine issue of material fact concerning the existence of an antitrust motive.

(ii) *The Exclusive Contract:* Preliminarily, as noted above, Dr. Williamson does not, and cannot, challenge the exclusive contract between PRC and Sacred Heart on the grounds that, by itself, it establishes a violation of *Section 1* of the Sherman Act. *Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. To the contrary, it is well established that ***HN14***[] such contracts are completely consistent with rational economic objectives. For example, the exclusive contracts in this case ensure that a radiologist will be available 24 hours a day, 365 days a year, thereby minimizing the risk of treatment delays. Dealing with a single radiology group also allows Sacred Heart to offer continuous, high quality care with a minimum of administrative effort. In this way, the exclusive contract "preserve[s] the efficiency of the department's operation and thus **[*102]** its ability to compete in the market place." *Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1458 (11th Cir. 1991)*.

Since the exclusive contract itself is facially procompetitive, it follows that the denial of Dr. Williamson's initial application for privileges in the Department of Radiology on the grounds that it violated the contract also was a facially procompetitive measure. Therefore, it is not circumstantial evidence of an antitrust conspiracy between PRC and Sacred Heart.

(iii) *Exclusive Contract as a Pretext:* According to plaintiff, her services were so desirable to both Sacred Heart and PRC that a rational economic actor in their position would have jumped at the chance to bring her on board. Faced with the exclusive contract and the apparent bylaws restrictions, rational business objectives should have compelled them to find a way to work around these obstacles. Accordingly, plaintiff contends that Sacred Heart invoked the exclusive contract as a pretext to delay, and later to deny, her initial application for privileges in radiology. Sacred Heart then used the contract as a pretext to trick her into requesting privileges in the Department of Internal Medicine.

[*103] Plaintiff correctly points out that both Dr. Post and Dr. Whitcomb admitted that the exclusive contract involved only the use of imaging modalities at the hospital. In addition, they acknowledged that the procedures Dr. Williamson wished to perform (i.e. admit patients, consult with them and the attending physician, do physical histories and medical exams, give medical advise, and review and make notations on patients' charts) were not radiology procedures within the meaning of the contract and did not require radiology privileges. In fact, any member of the staff could perform these procedures.

It is plaintiff's assessment that, under these circumstances, the economically rational decision would have been to give her privileges necessary to allow her to perform those patient care procedures not covered by the exclusive contract while imposing whatever limitations were required to protect those procedures reserved exclusively to PRC. She contends that the defendants' failure to accommodate her in this manner is not only evidence that their reliance on the contract was pretextual, but also that they conspired to drive her out of the outpatient radiology market. I cannot agree.

Plaintiff's **[*104]** argument is fundamentally flawed in that it completely ignores the fact that Sacred Heart was committed to opening the Ann Baroco Center. Under its exclusive contract, PRC would be the beneficiary of the center's business. It is undisputed that plaintiff's clinic competed with Sacred Heart for outpatient radiology referrals and that plaintiff herself competed with the physicians of PRC. The opening of its own women's center would place Sacred Heart and PRC into even more direct competition with plaintiff.

In fact, the undisputed evidence establishes that, since Baptist then had no plans to open a women's center, Pensacola Diagnostic would be the Baroco Center's *primary* competitor. The undisputed evidence in the record also indicates that Dr. Williamson was a very formidable competitor. In two years she carved out a specialty that brought her substantial remuneration. Before the Baroco Center opened, Pensacola Diagnostic's revenues were three times those of Sacred Heart for procedures and services encompassed by Dr. Williamson's specialty. As late as 1989, a full two years after opening the Baroco center, Dr. Williamson's revenues were still greater than those of Sacred Heart for **[*105]** the procedures encompassed by Dr. Williamson's specialty. Furthermore, Dr. Williamson's specialized practice grew rapidly: between 1986 and 1989 the number of breast exams that she performed more than doubled from 2007 to 4421.

In light of plaintiff's position in the market, granting her any type of privileges while she still operated her own clinic would put Sacred Heart in the position of supporting its main competition. Essentially, Sacred Heart would be competing with itself. Faced with this possibility, it clearly had a rational, pro-competitive reason for acting independently to deny Dr. Williamson's request for privileges.

Dr. Williamson counters that if PRC and Sacred Heart were acting rationally, they would have tried to "neutralize" her by merging with her. Accepting plaintiff's assertion that the relevant product and geographic markets at issue in this case are outpatient mammography in the greater Pensacola area, her argument for merging the only two significant competitors in that market would seem to have its own antitrust implications.

Putting this telling point aside, it is undisputed that PRC, with Sacred Heart's approval, did in fact enter into negotiations to **[*106]** hire Dr. Williamson. As discussed above, the parties were not able to reach an agreement. In particular, Dr. Williamson did not want to work nights, weekends, or holidays. PRC was willing to accommodate her schedule in exchange for a reduction in salary, but Dr. Williamson rejected the proposed amount as too low.

Similarly, Dr. Williamson had justifiable misgivings about the interaction between the non-compete covenant and the termination clause. Observing that, taken together, the two clauses could allow PRC to put her out of practice in Pensacola in as little as three months, Dr. Williamson asserts that these negotiations were not "genuine". She characterizes PRC's written offer as a "take it or leave it" proposition and characterizes the proposed contract as a "sham". In addition, plaintiff contends that Dr. Post wanted her to change her style of practice.

It is true that the termination clause and the non-compete clause could have harsh consequences. But such clauses are commonly utilized by professional practices, and there is no evidence that they were specifically directed toward plaintiff. Even if I accept plaintiff's contention, arguendo, that the proposed contract was a **[*107]** thinly disguised attempt to lure her into a professional trap, I cannot conclude that PRC's conduct was evidence of an antitrust conspiracy.

It is undisputed that PRC and Pensacola Diagnostic were direct competitors. I also accept the fact that PRC rationally could have chosen to address this competition by merging with Pensacola Diagnostic or by hiring Dr. Williamson. However, in her zeal to isolate economic irrationality, plaintiff appears to take the position that any action on the part of PRC and Sacred Heart short of a complete accommodation through a merger is circumstantial evidence of concerted action. She ignores the fact that PRC just as rationally could have chosen to compete with her. Clearly, the proposed Baroco Center would be a more than ample foundation upon which to base such a choice.

PRC could choose to compete by offering superior service or a lower price. Similarly, PRC rationally could choose to compete through its long term relationship with Sacred Heart. If so, that is *not* evidence of an antitrust conspiracy unless the method itself is inconsistent with both independent action and rational business objectives, even if deemed to be unfair. *L.A. Draper* **[*108]** *& Sons v. Wheelabrator-Frye, Inc., supra, 735 F.2d 414, 421 (11th Cir. 1984)*. ***HN15***[] "The use of unfair means in substituting one competitor for another without more does not violate the antitrust laws." *Id.* (citations omitted).

In this case, it is perfectly rational for PRC to attempt to compete with the plaintiff. After all, competition is what the antitrust laws are supposed to promote:

> Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? Real competition is bruising rivalry, in which people go out of business under intense pressure. . . . Competition is a gale of creative destruction.

Fishman v. Estate of Wirtz, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting).

Moreover, there is no evidence that Sacred Heart influenced PRC's negotiating posture. Sacred Heart did encourage PRC to choose a female physician to service its new women's center. In fact, there is even evidence that it encouraged PRC to reach an agreement with Dr. Williamson, perhaps for the same reason. However, PRC conducted the negotiations through its own counsel, and there is no evidence that Sacred Heart **[*109]** had any control over, or participation in, PRC's ultimate choice. For these reasons, I must conclude that the conduct of both Sacred Heart and PRC in denying plaintiff's request for privileges, and in failing to come to a contractual agreement with her, are at least as consistent with rational, independent business conduct as with an antitrust conspiracy, as *Matsushita* requires on motions for summary judgment.

In further support of her pretext argument, plaintiff points to so-called "accommodations" that Sacred Heart made for other physicians whose areas of specialty were covered by "exclusive" contracts. However, a brief examination of these "accommodations" reveals that they bear no resemblance to plaintiff's situation. For instance, the Department of Gastroenterology and the Department of Pulmonology are both subject to exclusive contracts. The exclusive contract applicable to the former specifically preserved the staff privileges of six gastroenterologists who were not Parties to the contract.

The exclusive contract associated with the Department of Pulmonology provided that

> the termination or cancellation of this agreement shall not affect the staff membership or **[*110]** clinical privileges of any physician employee of the group, except that such physician employee may not thereafter obtain or exercise any clinical privileges for which exclusive contractual arrangements have been made between the hospital and a third party.

Thus, the pulmonologists in question would retain their staff membership, as well as the privilege to perform any service not specifically named in the exclusive contract. Similarly, Sacred Heart's exclusive contract with Dr. Frank for the provision of neurological services states that exceptions may be made after consultation and joint approval of Dr. Frank and the hospital.

These contracts show only that the parties involved negotiated certain exceptions to their exclusive rights. Whatever factors led to the inclusion of these terms are unknown, but make them clearly distinguishable from the plaintiff's circumstances. In addition, each contract was an independent event completely unrelated either to the PRC contract or to Dr. Williamson's applications for staff privileges. For these reasons, they cannot be evidence that the denial of plaintiff's request was anomalous, and therefore, pretextual. It is simply not reasonable **[*111]** to infer a conspiracy from the fact that these contracts are different from the PRC contract.

The case of independent radiologist Thomas Brown, M.D. presents a somewhat different situation. Between 1975 and 1980, Dr. Brown practiced with PRC at Sacred Heart, and consequently, had full privileges there. When he left PRC in 1981 to open his own radiology clinic, Sacred Heart permitted him to retain his privileges. No objection to this arrangement was raised until 1984, when Sacred Heart told Dr. Brown he would have to resign his membership or face revocation proceedings.

Sacred Heart claims that it did not realize that Dr. Brown had retained his privileges, and that when it discovered the error, it asked him to resign. Plaintiff contends that Sacred Heart forced Dr. Brown to resign only after it discovered that his having privileges allowed him to compete for Blue Cross/Blue Shield PRC patients. Which interpretation is more accurate is immaterial. The material fact is that when Dr. Williamson submitted her application for privileges, Dr. Brown's privileges had been revoked. Thus, Dr. Williamson and Dr. Brown received the same treatment. [38]

[*112] Plaintiff's strongest argument involves the case of obstetrical ultrasound. Traditionally, this procedure was performed by radiologists. However, developments in the procedure and in the medical profession made it more common for obstetricians to perform it. In 1986, Sacred Heart determined that it was in its best interest to respond to these changes by hiring a perinatologist (a specialist in high-risk pregnancies) to perform obstetrical ultrasounds at the hospital. Initially, PRC objected to this arrangement on the basis of its exclusive contract. Nevertheless,

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[38] Of course, plaintiffs argue that the treatment itself was evidence of a conspiracy. I address this issue below. Right now I am only dealing with plaintiff's argument that her treatment was anomalous, and therefore, evidence of pretext. The evidence shows that, with respect to Dr. Brown, it was not.

Sacred Heart and PRC eventually reached an agreement to modify the exclusive contract to permit the perinatologist to perform obstetric ultrasounds.

Dr. Williamson argues that a similar transformation was occurring in the detection and treatment of breast cancer. Therefore, she contends that an accommodation along the lines of that made for the perinatologists could have, and should have, been made for her. This brings us back to the core of plaintiff's argument, which is that Sacred Heart's failure to accommodate her practice was economically unsound and was antitrust conduct. Once again, this argument ignores the fact **[*113]** that Sacred Heart had a rational business reason, in the form of its own Ann Baroco Center, for refusing to accommodate plaintiff. Failure to make special exceptions to established policy in order to accommodate a competitor is not antitrust behavior.

(iv) *Unilateral Conduct and Causation:* Even if I were to accept plaintiff's evidence of pretext as true, such evidence, standing alone, would not be sufficient to show joint action in violation of the antitrust laws. *DeLong Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1514 (11th Cir. 1989)*. Rather, ***HN16***[] evidence of pretext only serves to rebut an assertion of independent action on the part of the defendant. *Id.* In this case, however, plaintiff's argument overlooks the fact that the final authority to grant privileges or to waive bylaws requirements lies solely with Sacred Heart's Board of Directors. The Board of Directors also has the sole authority to negotiate contract modifications.

The Eleventh Circuit faced a similar set of facts in *Todorov v. DCH Healthcare Authority, 921 F.2d 1438 (11th Cir. 1991)*. In that case, the plaintiff neurologist brought an antitrust claim against a hospital and its radiologists. **[*114]** The plaintiff had applied for privileges to perform CT scans in the hospital's radiology department. The radiologists, who had developed numerous protocols for this procedure, recommended that the application be denied. The hospital followed this recommendation, and the neurologist filed his antitrust claim.

The court held that even if the radiologists had conspired among themselves to deprive the neurologist of privileges, they could not have caused his application to be denied. *Id. at 1459*. Only the Board of Directors could deny the application. Therefore, such denial was a unilateral action on the part of the hospital. *Id.* ***HN17***[] As with all tort-like causes of action, the failure to show causation is fatal to a *Section 1* claim. *Id.*

To the extent that PRC was involved in the denial of plaintiff's request for privileges, its participation was limited to the comments that Drs. Post and Hobgood made in December of 1985, in opposition to Dr. Williamson's original application for privileges in the Department of Radiology. None of PRC's physician employees sat on the Sacred Heart's Board, and none of them played any part in the drafting of the Department of Internal Medicine's **[*115]** credentialling criteria. Furthermore, with the exception of Dr. Post, who sat on the Executive Committee, none of the PRC physicians sat on any of the committees that reviewed plaintiff's application.

Plaintiff points out that all of the physicians sitting on the Credentials and Executive Committees considered Dr. Williamson a skilled practitioner, and many referred patients to her. Some were in favor of adding her to the staff, and they lobbied on her behalf with both the hospital and the Department of Radiology. Accepting plaintiff's interpretation of the facts as true, these physicians, though they personally wanted to see her on the staff, ultimately were constrained by the bylaws and were forced to recommend that her application be denied. Nevertheless, support for Dr. Williamson is evident from the occasions that the Credentials Committee, despite its adverse recommendation, continued to encourage the hospital to accommodate Dr. Williamson's practice. But, as in the *Todorov* case, the decision with regard to these matters constitutes *unilateral* action on the part of Sacred Heart, and does not implicate an antitrust conspiracy.

(b) Attempts to Blackball Dr. Williamson. **[*116]** The alleged attempts to "blackball" Dr. Williamson are much more difficult to analyze. These attempts fall into three main categories. First, there are the alleged attempts to attack Dr. Williamson's referral base through coercive reciprocal agreements with other physicians, as well as through the use of threats and pressure to force physicians to refer patients back to Sacred Heart. Second, there is the evidence relating to the needle placement controversy. Third, there is the alleged pressure on Pensacola Pathologists to fire Dr. Michael Williamson.

(i) *Attacks on Dr. Williamson's Referral Base:* Plaintiff's allegations of threats and pressure are based almost entirely on her own hearsay testimony describing what other physicians allegedly told her about what Sacred Heart administrators, in turn, told them.

Insofar as plaintiff offers her own testimony to prove that Sacred Heart, in fact, intimidated or coerced the named physicians, it is clearly inadmissible hearsay. Recognizing this fact, plaintiff argues that this testimony nevertheless is admissible as *circumstantial evidence* to show the state of mind of the declarant physicians. However, the plaintiff misunderstands **[*117]** the state of mind rule regarding what would otherwise be hearsay: it's the state of mind of the secondary declarant that must be affected without regard to the truth or falsity of the statement. In short, it does not apply to the declarant physicians. Even if it did, it does not assist plaintiff in establishing the existence of a conspiracy to blackball her. To the extent that the alleged statements may be circumstantial evidence of the physicians' states of mind, they would be admissible only for the purpose of inferring the conduct of the declarant physician, *not* to infer conduct on the part of Sacred Heart. Therefore, plaintiff must establish the conspiracy through other admissible evidence.

Plaintiff attempts to do this through proof of the circumstances surrounding the several contracts between Sacred Heart and the declarant physicians. Essentially, plaintiff argues that the contracts between Sacred Heart and Drs. Horan, Turner, Antonelli, Howard and Mixon were coercive reciprocal agreements requiring the physicians to refer patients back to Sacred Heart in exchange for much needed financial support.

As the Eleventh Circuit observed in *Key Enterprises of Delaware, Inc. **[*118]** v. Venice Hospital, 919 F.2d 1550, 1561 (11th Cir. 1990)*, "reciprocal dealing has received little attention in the courts; however, when the subject has arisen, courts have not hesitated to condemn the practice." ***HN18***[] Reciprocal dealing is conceptually similar to tying. *Id.* In a tying arrangement, a seller uses its power in the market for product A to coerce the buyer of product A to purchase product B. *Id.* However, "[a] reciprocal dealing arrangement exists when the two parties face each other as both buyer and seller." *Id. (citing Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 424 (5th Cir. 1978)*. The buyer of product A offers to buy from the other party, but only if that second party will buy product B from the first party. *Id.* The two cases are similar in that, in each case, one side of a transaction has special power in the market place . . . in reciprocal dealings, a buyer with economic power forces a seller to buy something from it." *Id.*

HN19[] The difference between the two types of arrangements is that the strict standard of coercion applied to tying cases is not applicable to reciprocal dealing cases. *Id.* If the coercion necessary for *per se* treatment **[*119]** is not present, the court may analyze the case under the rule of reason. *Id.* Therefore, "where a plaintiff shows that one party has sufficient market power to unduly influence a second party to treat the first more favorably than the free market would otherwise dictate, and the second party acts in conformity with the reciprocal arrangement, the plaintiff has proved the existence of an arrangement which unreasonably restrains trade." *Id.*

In *Venice Hospital, supra,* the Eleventh Circuit determined that it was appropriate to allow the jury to determine the existence of a coercive reciprocal agreement where the evidence showed that the defendant hospital entered into agreements with one or more home health care agencies whereby the home health care nurses would have access to patients prior to discharge in exchange for the nurses preferentially referring their patients to Medical Patient Aid Center ("MPAC"), a hospital owned company that supplied "durable medical equipment" ("DME") for home use. *Id. 919 F.2d at 1561*. At the time it entered into the agreement, the defendant hospital was the dominant hospital in the area. It controlled 76% of the available hospital beds, **[*120]** 80% of patient admissions, and 81% of the patient days in the relevant geographic market.

The defendant hospital also was the source of at least 46% of the total market for durable medical equipment. In the two-year period beginning with the agreement between the MPAC and the home health care agencies, MPAC's total market share rose from 9.2% to 61%. A total of 64% of MPAC's business originated with a referral from a home health care nurse counseling patients at the defendant hospital. Thus, MPAC got a large part of the market simply by capturing a large percentage of the defendant hospital's referrals.

Under these facts, the court concluded that although the arrangement did not fit precisely the contours of the classical reciprocal agreement, it had sufficient representative elements to allow the issue to go to the jury. *Id. at*

1562. An important aspect of the court's decision is the factual showing of the hospital's monopoly power within the relevant geographic market - - - 80% of the hospital patients and in excess of 46% of the "durable medical equipment" market.

Here, plaintiff contends that, similarly, Sacred Heart has entered into agreements with several physicians whereby **[*121]** Sacred Heart provides financial support to their practices in exchange for, or in expectation of, the physician's referral of patients back to Sacred Heart for outpatient services, including radiology services. [39] Defendants, of course, argue that these contracts contained nothing that constitutes an arrangement which unreasonably restrains trade.

In the case of Drs. Horan, Turner, and Antonelli, the contracts with Sacred Heart contain language requiring them to utilize Sacred Heart's outpatient services "to the extent feasible, and unless patient choice dictates otherwise." [40] In the case of Drs. Howard the so-called "utilization" clauses provides that "Gulf Coast Diversified (Sacred Heart's for-profit affiliate) shall be notified of any referral of patients . . . for medical services to any entity other than Sacred Heart Hospital of Pensacola." In addition, it provides **[*122]** that "[Dr. Howard] agrees to utilize specialty physicians who are members of the medical staff of Sacred Heart Hospital of Pensacola wherever practical to ensure continuity of patient care." Dr. Mixon's contract contains the same utilization clause, but with the additional specific requirement that he utilize radiology services provided by Sacred Heart unless Sacred Heart instructs him to use an outside radiologist.

Factually, as previously noted Dr. Mixon and Dr. Howard had no history of any referrals to plaintiff, and there is nothing to tie their agreements to this case. Dr. Antonelli said he always referred his patients requiring a radiologist to the plaintiff and that his agreement with Sacred Heart had no effect on referrals. The statistics regarding Drs. Moran and Turner are basically inconclusive, but **[*123]** they each deny any pressure to move referrals from plaintiff to Sacred Heart.

Nevertheless, the question remains as to whether the potential restraint imposed by these agreements was unreasonable. Plaintiff argues that the coercion involved was sufficient to allow application of the *per se* rule. I cannot agree.

HN20[] A coercive reciprocal agreement, like a tying agreement, is unreasonable *per se* whenever one party has sufficient economic leverage in one market to gain an unfair advantage in another market. *See Venice Hospital, supra, 919 F.2d at 1560-64*; *Betaseed, Inc. v. U and I, Inc., 681 F.2d 1203, 1216-18 (9th Cir. 1982)*; *Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 425-26 (5th Cir. 1978)*. In this case, the products exchanged are loans and financial credit on the one hand, and outpatient referrals of all types on the other hand. There is no evidence in the record whatsoever relating to Sacred Heart's leverage in the lending or financial market.

The Supreme Court addressed this very issue in *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977) ("Fortner II").* In that case, a subsidiary of U.S. Steel **[*124]** offered 100% financing to Fortner for the purchase of prefabricated homes manufactured by U.S. Steel. The financing was at particularly low rates, and on terms favorable to Fortner. The financing was available, however, only on sales of homes from U.S. Steel to Fortner. The homes themselves were more expensive than those of U.S. Steel's competitors. The relationship between Fortner and U.S. Steel soured, and Fortner brought an antitrust action contending that the credit had been tied to the purchase of the homes in violation of *Section 1* of the Sherman Act.

The only issue before the Supreme Court was whether Fortner had shown that U.S. Steel had economic power in the market for credit, not the market for prefabricated homes. Ignoring several other arguments, including the size

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[39] I note that plaintiff never uses the term "coercive reciprocal agreement" in her pleadings or opposition to defendants' several motions.

[40] The wording of Dr. Antonelli's contract is slightly different, and reads "to the extent feasible, and in accordance with acceptable medical practice, and unless patient choice dictates otherwise."

of U.S. Steel and the number of similar arrangements it had made, the Supreme Court determined that the question came down to one of uniqueness:

> The most significant finding made by the District Court related to the unique character of the credit extended to Fortner. This finding is particularly important because the unique character of the tying product has provided critical support for the finding **[*125]** of illegality in prior cases.

Id. at 619, 97 S. Ct. at 867, 51 L. Ed. 2d at 89. "In short, the question is whether the seller has some advantage not shared by his competitors in the market for [credit]." *Id. at 620, 97 S. Ct. at 868, 51 L. Ed. 2d at 89-90*.

The fact that the financing arrangement was unique, i.e. "without like or equal", did not mean that U.S. Steel possessed economic power. The Court concluded that the evidence merely showed that the credit terms were unique because the seller was willing to accept a lesser profit, or to incur greater risk, than its competitors. This kind of uniqueness did not give rise to an inference of economic power. Without any evidence that U.S. Steel had some cost advantage over its competitors - - - or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected - - - the unique character of the financing did not support the conclusion that U.S. Steel had the kind of economic power that would sustain a finding of *per se* illegality. *Id. at 621-22, 97 S. Ct. at 868, 51 L. Ed. 2d at 90-91*.

Assuming that the relevant geographic market in this case, **[*126]** *for this issue,* is the greater Pensacola area, there is no evidence in the record to support the conclusion that Sacred Heart had some competitive advantage over other potential lenders. Common sense requires a contrary conclusion. The fact that the physicians in question felt that they could not get as good a deal at a bank, for example, is irrelevant to my inquiry under *Fortner II. See also* *Spartan Grain, supra, 581 F.2d at 425-27* *(citing Fortner II).* Accordingly, I must conclude that application of a *per se* analysis to the reciprocal agreement alleged in this case is inappropriate.

HN21[] In order to prevail in the absence of *per se* liability, plaintiff must show that Sacred Heart's conduct unreasonably restrained competition. *Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, , 80 L. Ed. 2d 2, 23 (1984)*; *Venice Hospital, supra, 919 F.2d at 1562*. In the absence of evidence of actual detrimental effects, the rule of reason dictates that the plaintiff define the relevant market (both its product and geographical boundaries), as well as demonstrate the defendant's market power. As discussed above, there is no evidence that Sacred Heart's **[*127]** power in the lending and financial market was sufficient to restrain trade within the greater Pensacola area.

In the alternative, even assuming, as plaintiff seems to argue, that the relevant product market is not access to credit, but access to hospital services, she has still failed to meet her burden. As discussed above, the Eleventh Circuit's decision in *Venice Hospital, supra, 919 F.2d at 1550*, was based, in large part, on the factual showing of the hospital's monopoly power within the relevant geographic market - - - 80% of the hospital patients and in excess of 46% of the "durable medical equipment" market.

Unlike the defendant in *Venice Hospital,* Sacred Heart has no unreasonable ability to control access to hospital services. It is undisputed that Sacred Heart and its two main competitors, Baptist and West Florida Regional Hospital ("West Florida"), compete neck and neck within the greater Pensacola area. [41] The Navy Hospital and (at the relevant time) University Hospital were also competitors within the Pensacola market. There is nothing to indicate that Sacred Heart was able to exert any control over this market.

[*128] (ii) *The Needle Placement Controversy:* Next, plaintiff argues that banning her needle placement patients from its surgi-center is circumstantial evidence of an antitrust conspiracy.

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[41] Although it is not a part of the record, the affidavit of plaintiff's own expert establishes, by way of comparison, that Sacred Heart has only 28.3% of patient days, while Baptist and West Florida have 29.8% and 31.4%, respectively. Similarly, Sacred Heart has only 21.6% of the available beds, while Baptist and West Florida have 28.9% and 30.4%. Finally, Sacred Heart has 35.8% of the admissions, while Baptist and West Florida have 24.6% and 27.6%, respectively.

Essentially, plaintiff argues that her needle placement protocol, involving as it did, the placement of the needle at her clinic and then walking the patient across the parking lot to the surgi-center for removal, presented no greater risk to the patient or to the specimen once removed than did Sacred Heart's own protocol. Once again, plaintiff has overlooked the fact that she was in competition with Sacred Heart. As discussed above in greater detail, there is nothing in the ***antitrust law*** that mandates aid to a competitor.

In addition, there is another, procompetitive reason for the advisory board's recommendation: Dr. Williamson is outside Sacred Heart's quality assurance mechanism. It is true that Sacred Heart routinely receives specimens from outside the hospital. However, when Sacred heart takes in specimens from physicians who are on its staff, it has the power to enforce compliance with its quality assurance protocol. Similarly, when Sacred Heart sends its own specimens to an outside lab, **[*129]** it has control over the choice of labs and may adjust its choices as quality concerns dictate. It also has control over its couriers and the means of transport.

Under plaintiff's proposed needle placement protocol, Sacred Heart has no such control. She is outside its review and, more importantly, its enforcement mechanisms. If legitimate questions arise or problems occur, Sacred Heart's only recourse would be to discontinue plaintiff's use of its surgery and lab facilities. After weighing the risks and benefits of plaintiff's proposal, this is precisely what it did. The fact that the decision may have made plaintiff's needle placement practice less desirable for plaintiff to use does not detract from the legitimacy or reasonableness of the decision. Nor does it create an inference of an antitrust conspiracy.

(iii) *Termination of Michael Williamson:* As with her allegations of intimidation, plaintiff's contention that Pensacola Pathologists terminated Michael Williamson under pressure from Sacred Heart is almost entirely based on plaintiff's own and her husband's hearsay testimony. That evidence cannot be considered for purposes of the pending motion.

The admissible evidence in **[*130]** the record is what the doctors themselves have testified: that they were under no pressure from Sacred Heart, and that their termination of Michael Williamson had nothing to do with the delay in the renewal of their contract. Therefore, this does not support the plaintiff's antitrust claim. Further, Dr. Michael Williamson is not a party to this action. Any claim he may have is in a separate case in state court.

(iv) *Involvement of PRC and Dr. Post:* I must now assess the involvement of PRC and Dr. Post in all these activities. The evidence of PRC's and Dr. Post's attempts to intimidate physicians into using the Sacred Heart outpatient radiology facilities consists of Dr. Murphy's statement to the FTC. According to Dr. Murphy, Dr. Post attempted to persuade him to refer his patients to the Sacred Heart radiology department by appealing to his sense of loyalty to the hospital. Assuming that it occurred, this attempt to lobby Dr. Murphy can hardly be characterized as a threat. A threat implies the ability to harm. In this case, Dr. Post and PRC had no ability to harm Dr. Murphy's practice.

Similarly, there is no evidence that PRC or Dr. Post participated in the negotiation of the **[*131]** pathology contract, or of the allegedly coercive reciprocal agreements with Dr. Williamson's referring physicians. It is true that PRC stood to benefit from these arrangements, but so did all of Sacred Heart's other outpatient diagnostic facilities. Even if they knew about Sacred Heart's conduct, and hoped that it would succeed in diverting referrals back to the hospital, the fact that PRC and Dr. Post would benefit from Sacred Heart's allegedly improper actions is not evidence that they participated. More importantly, there is no evidence whatsoever, that PRC or Dr. Post was in position to influence Sacred Heart's lending and contract decisions.

Finally, the participation of PRC and Dr. Post in the alleged scheme to ban Dr. Williamson's needle placement patients was limited to Dr. Post's role as an advisor to the Medical Advisory Board. The evidence shows that in this capacity he did nothing more than describe the needle placement process. He was not a member of the board, and had no vote in the matter. Similarly, no other physician employee or shareholder of PRC sat on the board. For these reasons, I must conclude that the evidence is insufficient to link either PRC or Dr. Post **[*132]** to a conspiracy to drive plaintiff out of business or to limit her ability to compete for radiology patients.

(v) *Summation:* In sum, there is no genuine issue of material fact in the record as to whether the defendants PRC, Sacred Heart, and Dr. Post conspired to violate *Section 1* of the Sherman Act, and these defendants' motions for summary judgment are GRANTED.

2. *Baptist and Radiology Associates Conspiracy*

As with the Sacred Heart/PRC conspiracy, there is no direct evidence that Baptist and Radiology Associates conspired to prevent plaintiff from competing for radiology patients. Moreover, the plaintiff's circumstantial evidence relating to this conspiracy is quite limited.

Plaintiff's application for privileges at Baptist is distinguished not only by the fact that Radiology Associates interposed no objection, but also by the fact that Baptist eventually gave the plaintiff the privileges that she requested. Plaintiff argues that the process was delayed for three years. However, she ignores the fact that two and one-half years of that delay are attributable to her own lack of diligence. The events prior to February 25, 1988, are simply not relevant to plaintiff's claim **[*133]** against Baptist. There was no delay that can be attributable to anyone except the plaintiff.

Plaintiff next interposes the specious argument that Baptist did not give her all the privileges she requested. In other words, Baptist failed to accommodate plaintiff on her terms. She claims that this is evidence of an antitrust conspiracy. I do not agree.

Based on plaintiff's representations to the hospital, Baptist made the precise accommodation she had been seeking. Plaintiff requested privileges that would allow her to provide specific follow up care to the patients she saw at her clinic. Within five months of her renewal application in February 1988, Baptist granted plaintiff full courtesy privileges under supervision. It is undisputed that these privileges satisfied the professional needs plaintiff had expressed to Baptist, and that were known to it at the time.

Upon granting these privileges, Baptist explained that the interaction of the bylaws' practice requirement and the exclusive contract with Radiology Associates, plaintiff would not be eligible for unsupervised privileges. Baptist provided her with a copy of the bylaws, which she then signed, signifying her agreement to be **[*134]** bound by them in her dealings with the hospital. At the time plaintiff voiced no dissatisfaction with this arrangement.

Plaintiff's dissatisfaction with the level of her privileges arose only after Health First continued to deny her request for membership. It was only then that she revealed her true purpose in seeking privileges; and it is only since filing her complaint that plaintiff claims not to have received all the privileges for which she originally asked. Plaintiff will not now be heard to argue that Baptist's compliance with plaintiff's actual, written request is somehow evidence of an antitrust conspiracy.

Plaintiff next challenges the interaction between the exclusive contract with Radiology Associates and the bylaws practice requirement. Prior to June 1985, Baptist's contract with Radiology Associates was oral, and its terms were rather vaguely defined. In the summer of 1984, several months preceding plaintiff's first application for privileges, Baptist's Board of Directors ordered the administrative staff to negotiate a written contract.

Although the contract was not signed until June 28, 1985, Baptist represented to plaintiff that it was bound by its negotiations, **[*135]** and therefore could not process her application. When the hospital later reached an accommodation with plaintiff, it explained, as described above, that the contract, together with the bylaws practice requirement, would prevent it from granting her unsupervised privileges.

Plaintiff now attacks the exclusive contract on the grounds that the switch from a vaguely defined oral contract to a written contract "unnecessarily tied Baptist's hands." In other words, it prevented the hospital from accommodating plaintiff on her terms. The switch, according to plaintiff, was therefore economically irrational, and is evidence of an antitrust conspiracy.

This is essentially an attack on the economic validity of the exclusive contract, and I reject it out of hand. I already have discussed this issue in connection with the PRC contract, and it is settled law that the mere existence of an exclusive contract is not evidence of an antitrust conspiracy.

Plaintiff counters that Baptist decided to put its 35-year-old oral contract into writing precisely as she was applying for privileges, which implies an improper motive. However, the evidence is undisputed that negotiations on the written contract **[*136]** began several months before plaintiff submitted her application to any of the defendants in this case. Except for the actual coincidence of her application and the contract negotiations, there is absolutely nothing in the record to refute Baptist's evidence that the hospital was in the process of converting all their preexisting oral contracts into writing, and that the radiology contract was simply the next in line for conversion. Given that Baptist's explanation is consistent with permissible, unilateral business activity, I cannot conclude that the mere drafting of a contract at about the same time plaintiff submitted her application is evidence of anything.

Plaintiff also argues that, because the privileges requirement in the bylaws was not objectively necessary to assure quality medical care, Baptist's reliance on it to deny her unsupervised privileges is circumstantial evidence of an antitrust conspiracy between it and Radiology Associates. Again, this argument is, at best, specious. The bylaws existed long before plaintiff submitted her application. Nor is there any evidence that they were changed.

Plaintiff argues that, because the requirement prevents her from obtaining **[*137]** unsupervised privileges, it is irrational. Obviously, that is not the test. No requirement can satisfy every applicant. The test is whether the requirement is objectively economically reasonable in light of Baptist's legitimate business objectives. The answer, of course, is yes.

Plaintiff argues in the alternative that while the privileges requirement may be objectively rational, Baptist acted irrationally by refusing to waive the requirement for plaintiff. In other words, plaintiff argues that Baptist's failure to modify the privileges requirement is pretextual.

My previous analysis of this argument in connection with the alleged conspiracy between Sacred Heart and PRC applies with equal force here, and needs no repeating. There is simply no material evidence of pretext. Suffice it to say that, ***HN22***[] even if Baptist's reliance on the privileges requirement was pretextual, such pretext would constitute unilateral action by Baptist. *Todorov v. DCH Healthcare Authority, supra, 921 F.2d 1438, 1459 (11th Cir. 1991)*. Therefore, it is not evidence of a conspiracy between Baptist and Radiology Associates.

The same may be said for the contracts between Baptist and Drs. Westafer, French, and **[*138]** Montgomery. The Baptist situation is even stronger than with Sacred Heart, because the Baptist contracts contain a clause specifically stating that the loan in no way obligates the physician to refer patients to Baptist, and that referrals are to be made according to the best medical interests of the patient. Additionally, there is absolutely no evidence that anyone from Baptist or Radiology Associates pressured Drs. Westafer, French, or Montgomery into diverting referrals away from plaintiff and to Baptist.

Nevertheless, plaintiff makes the astounding argument that the mere lack of growth in referrals from these physicians is evidence of a conspiracy. Plaintiff does not even contend that she ever had a referral base at Baptist, or with these doctors, which was eroded by Baptist's action. Rather, she points to the growth in referrals from Dr. Epps, a Baptist physician not encumbered by a loan agreement, and concludes that referrals from Drs. Westafer, French, and Montgomery *would have grown* if they had not been parties to the offending contracts.

This comparison is meaningless. As discussed earlier, the Supreme Court has expressly held that conduct that is as consistent with **[*139]** permissible, unilateral activity as with an illegal conspiracy does not, standing alone, permit the inference of an antitrust conspiracy. There are numerous rational explanations for the disparate growth in referrals from these four physicians. Location, patient preference, and physician preference are just a few that come to mind. Under the facts of this case, each of these explanations is just as likely as plaintiff's explanation - - - if not more so. Therefore, plaintiff's contrived speculation cannot support the inference of an antitrust conspiracy.

Plaintiff herself argues that the possibility of increased referrals from her clinic provided an economic incentive for the hospital defendants to grant her requests for privileges. She does not explain why a similar, rational business-motivated exchange of benefits between Baptist and Drs. Westafer, French, and Montgomery should be subject to antitrust liability. In short, the mere referral of patients to a hospital that has loaned the referring physician money to open a practice is at least as consistent with legitimate unilateral activity as with illegal concerted activity.

I make one more observation regarding Baptist's relation **[*140]** with plaintiff. As with Sacred Heart, Baptist and plaintiff are direct competitors. Plaintiff's own statistics reveal that as of 1989, the market for services encompassed by plaintiff's specialty was split almost equally among Baptist, Sacred Heart (Ann Baroco Center), and Pensacola Diagnostic. [42] All appear to be competing with each other for patients. Thus, Baptist would have a rational economic motive to refrain from granting plaintiff's request for privileges.

Plaintiff has argued that Baptist (or Sacred Heart) would realize an economic gain from establishing a relationship with her because she often must refer **[*141]** patients to hospitals for surgery. Yet, it is undisputed that she has never admitted a patient to any hospital at which she has privileges. Since attaining privileges at Baptist, she has visited only three patients there. In only one of these cases was Dr. Williamson acting as the "primary care" physician. And, even then, it was the surgeon who admitted the patient. Similarly, at least half of plaintiff's patients are referred to her by traditional primary care physicians who, if further treatment was indicated, would dictate the choice of hospital. Regardless, it is undisputed that, as competitors, Baptist had no legal obligation to make special accommodations to aid the plaintiff.

In sum, Baptist's motion for summary judgment is GRANTED insofar as it pertains to the alleged conspiracy between Baptist, Radiology Associates, and unnamed others to prevent plaintiff from competing for radiology patients.

3. *The Community Conspiracy*

In Count III of her complaint, plaintiff alleges that there was a "community wide" conspiracy among all the defendants to prevent her from gaining membership in Health First. This effectively disqualified her from treating HOP subscribers, and thereby **[*142]** prevented her from competing for patients in need of radiology services. The evidence in support of this conspiracy consists of the parallel refusals of the defendants to accommodate plaintiff's practice. According to plaintiff, Health First's denial of her application for membership was economically irrational unless all the defendants "toed the line" by refusing to accommodate her.

The rule in this circuit is that ***HN23***[] evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that each defendant engaging in the parallel action acted contrary to its economic self-interest. *Bolt v. Halifax Hospital Medical Center, supra, 891 F.2d 810, 826 (11th Cir. 1990)*. "Thus, the plaintiff must establish that each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action." *Id. at 826-27*.

I already have determined that the evidence in this case does not tend to exclude the possibility that both Sacred Heart and Baptist acted independently and in a manner consistent with rational business **[*143]** objectives in denying plaintiff's applications for privileges. Accordingly, plaintiff's claim of conscious parallelism cannot support an inference of conspiracy.

It is important to note here that, aside from the parallel denials of staff privileges (or membership in the case of Health First), there is no evidence that the defendants conspired to deprive her of membership in Health First. It is true that the physicians serving on Health First's Board of Directors were affiliated in one way or another with either

[42] These figures in the record are based on revenues from procedures encompassed by plaintiff's specialty and were compiled by plaintiff's expert. The data omits figures for the privately-owned West Florida Regional Medical Center, an H.C.A. hospital, which is the major competitor of both Sacred Heart and Baptist, as well as the two other Pensacola hospitals, Navy and (at that time) University.

Baptist or Sacred Heart. However, **HN24**[] the mere opportunity to conspire among antitrust defendants is insufficient to permit the inference of conspiracy. *Bolt, supra, 891 F.2d at 827*.

There are other factors at work in the marketplace. By their very nature, HMOs restrict competition. As described above, Health First's bylaws initially required applicants to have privileges at a "participating hospital". At the time, the only such hospitals were Sacred Heart and Baptist. Health First maintains that it adopted this "ready made" credentialling procedure to avoid the cost of hiring a staff to screen applicants, and there is no evidence to the contrary.

The efficiency of this arrangement **[*144]** notwithstanding, it is clear that it effectively forfeits control over the selection of both physician participants and practice formats to the participating hospitals. Sacred Heart and Baptist therefore had *de facto* control over Health First's membership. Obviously, physicians who are otherwise competent in their specialties may be excluded from the HOP patient pool simply because they do not have privileges at one of these two hospitals.

In late 1985, shortly after becoming operational, HOP decided to begin admitting hospitals located outside the Pensacola area. To accommodate physicians who practiced at these hospitals, Health First amended its bylaws to provide that physicians who practiced primarily outside the greater Pensacola area could become members of Health First by obtaining privileges at one of the outlying hospitals. At the same time it retained the requirement that physicians practicing primarily within Pensacola must have privileges at Baptist or Sacred Heart. [43]

[*145] It is clear that the amended bylaws allowed Sacred Heart and Baptist to retain effective control over Health First membership within the greater Pensacola area. In order to fully understand the nature of this control, one must look to the nature of the competition between doctor owned, for-profit hospitals and nonprofit hospitals like Baptist and Sacred Heart within the greater Pensacola market.

As the record shows, Baptist and Sacred Heart compete neck and neck with the privately owned West Florida Regional Hospital. In 1984, the Medical Center Clinic at West Florida Regional created its own HMO. In order to compete, Baptist and Sacred Heart created HOP. Obviously, if Health First was to compete successfully, it could not open its membership to physicians associated with West Florida Regional, and vice versa. Viewed in this context, the procompetitive aspects of Health First's credentialling criteria become apparent.

As can be seen, **HN25**[] competition between HMOs creates something of a paradox. On one level, their restrictive practices promote competition. On another level, they have an obvious anticompetitive effect. Thus, the question becomes whether the procompetitive benefits offset **[*146]** the anticompetitive effect in the relevant product and geographic markets (the "rule of reason"). *Seagood Trading Corp. v. Jerrico, Inc., supra, 924 F.2d 1555, 1569 (11th Cir. 1991)* (citations omitted); *Construction Aggregate Transport, Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 771-72 (11th Cir. 1983)*. [44]

For the purposes of the rule of reason analysis, there does not appear to be any evidence that the relevant geographic market is other than the greater Pensacola area. This includes Pensacola proper, along with the surrounding cities of Cantonment, Gulf Breeze, and Milton. [45] Similarly, there is no real dispute over the definition of the product component of the relevant market. It is the use of outpatient diagnostic radiology in the detection and

[43] Plaintiff's claim that the 1985 amendments were adopted for the specific purpose of excluding her from membership is without merit. Plaintiff did not obtain privileges at any of the outlying hospitals until 1987. Unless Health First's Board members could foretell the future, they would have no way of knowing that their actions would impact any particular individual. Additionally, I note that plaintiff was ineligible under both the original and amended version of the bylaws.

[44] I emphasize that I am not dealing here with the conspiracy alleged by plaintiff. I already have determined that there was no conspiracy. Rather, I am looking at the fundamental structure of the HMO itself.

[45] Defendants merely assert that plaintiff has failed to present evidence establishing the relevant geographic market. It is undisputed that over 80% of Health Options subscribers live within the greater Pensacola area. In addition, over 80% of Baptist's and Sacred Heart's patients reside in this geographic area.

treatment of breast cancer. [46] In this **[*147]** case, consumers are generally limited in their choice of physicians by the type of insurance they carry.

Although HOP met with some measure of success, the health insurance market in the greater Pensacola area has been, and remains, highly fragmented. At the time Dr. Williamson filed her complaint, two HMOs, in addition to HOP, operated within the market. They were Medical Center Health Plan ("MCHP") and Metlife **[*148]** Healthcare Network of Florida ("Metlife") (formerly HMO America). At their peaks, which came around 1988, MCHP, Metlife, and HOP had enrollments of approximately 31,000, 7,000, and 23,000 respectively. From this peak, HOP membership gradually declined to approximately 15,000.00 in June of 1989. Enrollment in the other two HMOs declined similarly. As of April 1990, HOP still had approximately 15,000 members, MCHP also had about 15,000 members, while Metlife had declined to roughly 3,000 members.

In addition to the three HMOs, there are at least eight other providers of group health insurance operating in the greater Pensacola area. These include Blue Cross/Blue Shield of Florida PPC, Met-Elect PPO, and American General PPO. All of these are preferred provider programs ("PPOs"). [47] There are also three government funded programs: Champus, Medicare, and Medicaid. Finally, there are commercial indemnity insurance companies that supply group health insurance; Aetna and Providence are the largest in the Pensacola area.

[*149] Together with the three HMOs, these entities service almost the entire group health insurance market in the greater Pensacola area. This market consists of over 300,000 people. Thus, while it controlled between 38% and 45% of the HMO market between 1988 and 1990, HOP controlled only between 5% and 8% of total group health insurance market. Obviously, these percentages would be much lower if the market were expanded to include all people treated by doctors.

Although plaintiff has been excluded from HOP, she has been, and continues to be, a physician provider for Metlife, Blue Cross/Blue Shield PPC, MetElect PPO, American General PPO, Lawrence Health Care Administrative Services, Inc., Champus, and Medicare. Thus, it appears that a maximum of 8% of potential patients are excluded from choosing plaintiff's services. Under these circumstances, it would appear that the procompetitive benefit of allowing consumers the choice of an additional HMO outweighs the anticompetitive effect of the HMO structure.

In addition, it does not appear that HOP's presence has resulted in any detriment to competition in the relevant market. Plaintiff's own figures show that from the fiscal year ending **[*150]** April 30, 1985, to the fiscal year ending April 30, 1990, plaintiff's clinic receipts increased by over 300%, while her income increased in excess of 500%.

Plaintiff argues, of course, that these figures would have been even higher if defendants had not "prevented her from competing". The evidence clearly shows that plaintiff was a highly effective competitor. The injuries she complains of are merely those that every competitor must endure. Given HOP's small share of the total group health insurance market, along with plaintiff's obvious penetration and successful competition in the market, I must conclude that HOP's restrictive membership does not impose an unreasonable restraint on trade in the relevant geographic and product markets.

In sum, I conclude that defendants' parallel denials of plaintiff's various applications for privileges and staff membership do not support the inference of an antitrust conspiracy among the defendants. Moreover, I conclude that Health First's restrictive admissions practices do not unreasonably restrain trade in the relevant market. Accordingly, Defendants' various motions for summary judgment are GRANTED as to Count III.

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[46] As discussed above, the product dimension of the relevant market is "determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output." *L.A. Draper, supra, 735 F.2d at 423*.

[47] In a PPO, members are permitted to choose any physician or treatment facility they please. The insurer then reimburses the provider for a fixed amount per service or for a fixed percentage of the fee for the service. The provider then bills the subscriber for any outstanding balance. Many PPOs also have a deductible that the subscriber must pay out of his own pocket before he is eligible for reimbursement.

E. *Tortious Interference*

[*151] Count IV of plaintiff's complaint alleges that defendants Sacred Heart, PRC, and Dr. Post intentionally and wrongfully interfered with existing and prospective business relationships which plaintiff had with patients at her clinic and with other doctors, and that they further interfered with prospective relationships plaintiff had with HOP patients. Baptist is not named in this count. This is a pendent state law claim.

HN26[] Tortious interference with business relationships and tortious interference with contractual relations are "basically the same cause of action" under Florida law. *Smith v. Ocean State Bank, 335 So. 2d 641, 642 (Fla. 1st DCA 1976)*. "The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." *Id.* In order to prove a tortious interference claim, the plaintiff must demonstrate: (1) the existence of a business or contractual relationship under which the plaintiff had legal rights; (2) an intentional and unjustified interference with the relationship; and (3) damage to the plaintiff as a result of the tortious interference with that relationship. *Ad-Vantage Telephone Directory Consultants,* **[*152]** *Inc. v. GTE Directories, 849 F.2d 1336, 1348-49 (11th Cir. 1987)* (applying Florida law); *Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985)*. The relationship involved can be based on a business expectancy arising "even from an unenforceable agreement which would have been completed had the defendant net intervened." *Scussel v. Balter, 386 So. 2d 1227, 1228 (Fla. 3d DCA 1980)*, *citing* *United Yacht Brokers, Inc. v. Gillespie, 377 So. 2d 668 (Fla. 1979)*.

In order to be actionable, the interference must be direct; conduct that has only indirect consequences on the plaintiff will not support a claim for tortious interference. *See Lawler v. Eugene Wuesthoff Memorial Hospital Ass'n, 497 So. 2d 1261, 1263 (Fla. 5th DCA 1986)*; *Rosa v. Florida Coast Bank, 484 So. 2d 57 (Fla. 4th DCA 1986)*. For instance, in *Lawler, supra,* the plaintiff physician brought a claim for intentional interference with his doctor-doctor and doctor-patient relationships after the defendant hospital terminated staff privileges. The trial court dismissed the claim, and the appellate court affirmed, holding that the claimed interference was "only an indirect consequence of the **[*153]** termination of staff privileges." *Lawler, 497 So. 2d at 1263*. In contrast, the court in *Scheller v. American Medical Int'l, Inc., 502 So. 2d 1268* (Fla. 4th DCA), *cert. denied, 513 So. 2d 1060 (Fla. 1987)*, held that a physician stated a valid claim for tortious interference where he alleged that the defendant hospital wrongfully denied him access to laboratories and billing information.

Closely related is the rule ***HN27***[] in Florida that no liability for tortious interference exists where the defendant acted to protect its own legitimate economic interests. *Genet Co. v. Anheuser-Busch, Inc., 498 So. 2d 683, 684 (Fla. 3d DCA 1986)*. "So long as improper means are not employed, activities taken to safeguard or promote one's own financial and contractual interests are entirely non-actionable." *Ethyl Corp. v. Balter, 386 So. 2d 1220, 1224-25 (Fla. 3d DCA 1980) review denied 392 So. 2d 1271* (Fla.), *cert. denied, 452 U.S. 955, 101 S. Ct. 3099, 69 L. Ed. 2d 965 (1981)*.

1. Sacred Heart

Sacred Heart contends that it did not directly interfere with plaintiff's practice, but even if it did interfere directly, it did so for legitimate business reasons. I agree. Sacred **[*154]** Heart correctly points out that, in Florida, no tortious liability interference exists where the defendant acted to protect its own legitimate economic interests. Insofar as plaintiff's claim relates to the needle placement controversy, I already have determined that Sacred Heart's conduct was consistent with the maintenance of quality care, and was in the best interests of its patients. Any effect on plaintiff's practice, therefore, was incidental. Further, there seems to be no reason in the record to require Sacred Heart to change its policy in order to accommodate the plaintiff as a competitor.

The same is true for the contractual agreements between Sacred Heart and various physicians. As previously discussed, the record does not support the plaintiff's allegations regarding referrals. Even assuming that these contracts in fact lead to a decrease in referrals from these doctors, there is nothing to support plaintiff's contention that the interference was intentional. Each contract promoted Sacred Heart's legitimate business interests, and each physician gained a concomitant business benefit. Any decrease in referrals was incidental, and therefore, not actionable. For these reasons, **[*155]** Sacred Heart's motion for summary judgment on Count IV is GRANTED.

2. PRC and Dr. Post

The only evidence supporting plaintiff's tortious interference claim against Dr. Post and PRC is the fact that Dr. Post tried to convince Dr. Murphy to refer his patients to Sacred Heart's radiology department by appealing to Dr. Murphy's sense of loyalty to the hospital. This conduct simply is not tortious. ***HN28***[] Competitors have a right to attract patronage by lobbying potential customers for their business. That is the essence of competition. Such conduct becomes actionable only when the competitor uses improper means. *See, e.g., Ad-Vantage Telephone, supra,* 849 F.2d at 1348-49 (defendant contacted customers of plaintiff, improperly imposing additional burdens on them if they continued to deal with plaintiff); *Manufacturing Research Corp. v. Greenlee Tool Co., 693 F.2d 1037 (11th Cir. 1982)* (defendant contacted customers and employees of plaintiff with false information, which constituted direct interference); *Insurance Field Servs., Inc. v. White & White Inspection & Audit Serv., Inc., 384 So. 2d 303 (Fla. 5th DCA 1980)* (direct tortious interference found where defendants contacted **[*156]** plaintiff's customers to solicit their business in a wrongful manner).

In this case there is no evidence that Dr. Post did anything but talk to Dr. Murphy. There is also no evidence that PRC or Dr. Post had any ability to affect Dr. Murphy's practice. Finally, Dr. Murphy himself testified that Dr. Post's efforts were unsuccessful and that he continued to refer patients to plaintiff. Accordingly, the motion of Dr. Post and PRC for summary judgment on plaintiff's tortious interference claim is GRANTED.

3. Dismissal of State Law Claims

In the alternative, I also conclude that the state law claims against these defendants should be, and are DISMISSED, without prejudice, in the absence of any viable federal claims and as a matter of comity. *See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218, 228 (1966)*.

III. CONCLUSION

In sum, I conclude that, after a thorough review of the voluminous evidentiary record, there are no genuine issues of material fact remaining in this case and that the defendants are entitled to summary judgment on all claims. The defendants' motions are GRANTED, and the Clerk shall enter judgment in their **[*157]** favor and against the plaintiff on all claims, together with taxable costs.

DONE AND ORDERED this 28th day of May, 1993.

ROGER VINSON

United States District Judge

Hibernia Nat'l Bank v. Indus. Alloys Co.

United States Court of Appeals for the Fifth Circuit

June 4, 1993, Filed

No. 93-3035 Summary Calendar

Reporter
1993 U.S. App. LEXIS 40801 *

HIBERNIA NATIONAL BANK, Plaintiff, VERSUS INDUSTRIAL ALLOYS COMPANY, a Division of Indalloy, Inc., Defendant-Third Party Plaintiff-Appellant, VERSUS ACADIA STATE BANK, Third Party Defendant-Appellee.

Notice: RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: [*1] Appeal from the United States District Court for the Eastern District of Louisiana. (90 CV 2509 "M").

Hibernia v. Industrial Alloys, 995 F.2d 222, 1993 U.S. App. LEXIS 15827 (5th Cir. La., 1993)

Core Terms

anti-tying, stock, limitations period, district court, damages, benefits, argues, promissory note, purchase stock, four year, third-party, four-year, buy, statute of limitations, anti trust law, limitations, speculative, unprovable, correctly, evidenced, occurring, borrower, mortgage, latest

Judges: Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges. JERRY E. SMITH, Circuit Judge.

Opinion by: JERRY E. SMITH

Opinion

JERRY E. SMITH, Circuit Judge:[*]

Hibernia National Bank filed this action to recover from Industrial Alloys Company ("Industrial") on a promissory note. Industrial asserted a third-party claim against Acadia State Bank ("Acadia") under the anti-tying provisions of the Bank Holding Company Act Amendments of 1970, *12 U.S.C. §§ 1971-1978* (the "Act"). Following removal, Acadia raised defenses including the bar of the four-year statute of limitations of *12 U.S.C. § 1977*. The district court dismissed the third-party claim, concluding that it had prescribed. We agree and affirm.

I.

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[*] ***Local Rule 47.5.1*** provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens 9 profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Industrial alleged that an agent of Acadia induced Industrial's principal, Donald Surkand, to purchase stock in Acadia by promising a loan on a real estate project. The funds to acquire the stock **[*2]** were advanced by First National Bank of Covington, as evidenced by a promissory note dated May 8, 1986. Industrial claims that on June 20, 1986, Surkand was informed that the loan would not be approved. Industrial filed its third-party claim on June 20, 1990, exactly four years after that alleged notification but more than four years after the loan was made to buy the stock.

II.

Industrial argues that limitations did not begin to run until Acadia refused to go forward with the loan for the real estate purchase, which constituted the alleged tied credit. We may use ***antitrust law*** by analogy in anti-tying cases. *Swerdloff v. Miami Nat'l Bank, 584 F.2d 54, 58-59 (5th Cir. 1978)*. In applying the antitrust laws, we consider that the limitations period begins to run when the defendant commits an act that injures the plaintiff's business. *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, 677 F.2d 1045, 1051 (5th Cir. 1982)*, cert. denied, *459 U.S. 1105, 103 S. Ct. 729, 74 L. Ed. 2d 953 (1983)*.

As the district court correctly held, "The violations of the Bank Anti-tying Act occurred at the latest on the date that plaintiff purchased the stock in Acadia, as evidenced by the promissory note dated May 8, 1986." That is, the limitations period begins to run when the alleged violation occurs. *Jackson v. Union Nat'l Bank, 715 F. Supp. 892, 895 (C.D. Ill. 1989)* (citing *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 268 (7th Cir. 1984)*, cert. denied, *472 U.S. 1018, 105 S. Ct. 3480, 87 L. Ed. 2d 615 (1985))*.

The logic of this is that the anti-tying violation, if any, occurred when the unwanted **[*3]** product — i.e., the Acadia stock — was offered to Surkand in exchange for prospective favorable loan treatment and when Surkand, acting for Industrial,[1] purchased the stock on May 8, 1986. By that time, the forbidden act — tying one product to another — had occurred, and damages were cognizable.

Industrial argues, to the contrary, that there was no anti-tying claim until the loan application was rejected. We rejected a similar assertion in *Swerdloff, 584 F.2d at 60*, in which we stated, "Simply by demanding that the [plaintiffs] sell their stock, however, the bank violated the statutory prohibition." As Acadia notes, the ultimate rejection of the loan is irrelevant to this analysis, as the anti-tying injury would have been present even if Acadia had approved the loan: In either case, Surkand would have been forced to buy stock he did not want and that, under the Act, he could not be forced to buy as a condition of receiving the loan.

In support of its conclusion, the district court relied upon **[*4]** Jackson. Although that district court opinion from another circuit is not binding on us, we find its reasoning persuasive. There, the bank required the borrower's brother to execute a mortgage in order for the borrower to renew a note. The court held that limitations "expired . . . four years after [the brother] executed the . . . mortgage . . . [T]he fact that the bank customers do not suffer the final harm caused by the bank's conduct until some later time is irrelevant to the determination of whether their claim against the bank is time barred." *715 F. Supp. at 894* (citing *Lancianese v. Bank of Mount Hope, 783 F.2d 467, 470 (4th Cir. 1986))*. In Lancianese, the court held that "[i]t is not sufficient that the plaintiff may have suffered the damages caused by the defendant's violation within the limitations period. *783 F.2d at 470* (citing, inter alia, Kaiser Aluminum).

III.

Industrial argues that a recognized exception to the running of the four-year limitations statute applies to this case. That exception applies when there is a "continuing benefits violation" and the damages sustained are speculative and unprovable during the ordinary limitations period. See *Poster Exch. v. National Screen Serv. Corp., 456 F.2d 662, 666-68 (5th Cir. 1972)*.

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[1] In light of our disposition of the prescription claim, we pretermit deciding Acadia's assertion that Industrial has standing to assert an anti-tying claim on Surkand's behalf and assume, arguendo, that there is standing.

We have squarely held, however, that the continuing benefits theory cannot be applied where the damages were not speculative or unprovable **[*5]** at the time of the alleged anti-tying injury. See *Kaiser Aluminum, 677 F.2d at 1053*; *City of El Paso v. Darbyshire Steel Co., 575 F.2d 521, 523 (5th Cir. 1978)*, cert. denied, *439 U.S. 1121, 99 S. Ct. 1033, 59 L. Ed. 2d 82 (1979)*. Here, any damages that Surkand sustained were determinable on May 8, 1986, when he paid for the Acadia shares he allegedly did not want and would not have bought but for the illegal tying arrangement.

Finally, citing *Imperial Point Colonnades Condominium v. Mangurian, 549 F.2d 1029, 1043 (5th Cir.)*, cert. denied, *434 U.S. 859, 98 S. Ct. 185, 54 L. Ed. 2d 132 (1977)*, Industrial argues that a new cause of action was triggered each time Industrial made a periodic payment and when Hibernia filed suit on the note. See *Al George, Inc. v. Envirotech Corp.., 939 F.2d 1271, 1274 (5th Cir. 1991)* (per curiam). We addressed this argument in Kaiser Aluminum, holding that "[t]o the extent that Kaiser received benefits under the contract, such receipts were merely the abatable but unabated inertial consequences of some pre-limitation actions, rather than from some injurious act actually occurring during the limitation period." *677 F.2d at 1053* (citations and internal quotation marks omitted).[2] Moreover, the alleged benefits, i.e., the note payments, were received by Hibernia, not Acadia.

In summary, the district court correctly concluded that the four-year statute of limitations began running, at the latest, when the stock was purchased. The summary judgment, accordingly, is AFFIRMED.

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[2] As we noted in *City of El Paso, 575 F.2d at 523*, *Imperial Point*, unlike the case at bar, involved damages that could not be ascertained at the time of the violation. An anomaly may be *Spitz v. Buchwald, 551 F.2d 1051, 1053 (5th Cir. 1977)*, which, relying upon Imperial Point, suggests that limitations are renewed when payments are made. The panel failed to **[*6]** address the distinction, later made by this court in City of El Paso, between damages that are ascertainable at the time of the initial violation and those that are not.

Virtual Maintenance v. Prime Computer

United States Court of Appeals for the Sixth Circuit

August 9, 1991, Argued ; June 4, 1993, Decided ; June 4, 1993, Filed

Nos. 90-2249, 91-1273

Reporter

995 F.2d 1324 *; 1993 U.S. App. LEXIS 13182 **; 1993-2 Trade Cas. (CCH) P70,400

VIRTUAL MAINTENANCE, INC., Plaintiff-Appellant, v. PRIME COMPUTER, INC., Defendant-Appellee.

Subsequent History: [1]** As Corrected June 24, 1993. Amended Opinion of December 15, 1993 Reported at: *1993 U.S. App. LEXIS 32575*.

Prior History: UPON REMAND by the Supreme Court of the United States. District No. 89-71762. Horace W. Gilmore, Senior District Judge.

Core Terms

software, customer, market power, hardware, suppliers, tying product, switching, matter of law, aftermarkets, manufacturer, prices, minicomputers, automotive, derivative, consumer, package, costs, district court, locked-in, license

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN1[] **Monopolies & Monopolization, Actual Monopolization**

The United States Supreme Court has held that the existence of competition in a primary equipment market does not preclude, as a matter of law, a finding of market or monopoly power in derivative aftermarkets.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN2[] Tying Arrangements, Clayton Act

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] Tying Arrangements, Per Se Rule

The elements of a per se tying claim are as follows: (1) There must be a tying arrangement between two distinct products or services; (2) the seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and (3) the amount of commerce affected must be not insubstantial.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4[] Regulated Practices, Market Definition

An 11 percent market share, standing alone, is insufficient as a matter of law to confer the great market power, evidenced by an exceptional demand for the tying product' necessary for a per se illegal tie.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5[] Price Fixing & Restraints of Trade, Tying Arrangements

The Sixth Circuit Court of Appeals has held that market definition based solely on one customer's requirements does not create a separate product market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

The essential characteristic of an illegal tying arrangement is the ability to exploit control over the tying product to force the buyer to purchase an unwanted tied product.

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Judges: Before: JONES and SUHRHEINRICH, Circuit Judges; LIVELY, Senior Circuit Judge.

Opinion by: SUHRHEINRICH

Opinion

[*1325] SUHRHEINRICH, Circuit Judge. In our original decision in this case, [1] we reversed the judgment of the trial court, which implemented the jury's general verdict in favor of plaintiff and overruled defendant's motion for judgment notwithstanding the verdict ("j.n.o.v."). We did so upon our conclusion that each of three alternative legal theories of anticompetitive conduct that were presented to the jury were erroneous as a matter of law. We then vacated the award of damages and the injunction issued by the trial court and remanded with instructions to enter judgment in favor of the defendant. The United States Supreme Court directed us to reconsider our original decision in light of *Eastman Kodak Co. v. Image Technical Serv. Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*, in ***HN1***[] which the Supreme Court held that the existence of competition in a primary equipment market does not preclude, as a matter of law, a finding of market or monopoly power in derivative aftermarkets.

[2]** The opinion only briefly revisits the relevant facts. [2] Defendant Prime Computer, Inc. ("Prime") manufactures and markets computer systems, and provides maintenance services for those systems. Of significance to this lawsuit is one of its hardware lines, the "50 Series" minicomputer, and one of its applications software products, the so-called Computer-Aided Design/Computer-Aided Manufacturing system ("CAD/CAM"), which can be used with the 50 Series minicomputers.

Ford Motor Company ("Ford") created and owns a CAD/CAM software design program for use in designing automobiles. Ford's CAD/CAM program is called Product Design Graphic System ("PDGS"). Ford frequently revises the software program, and requires the automotive design companies with which it does business to use the most recent version of Ford's PDGS in order to facilitate the transmission of design specifications through CAD/CAM software.

Ford licenses defendant Prime as the exclusive distributor of Ford's **[**3]** version of PDGS under a year-to-year contract. Ford's version of PDGS runs only in Prime's 50 Series minicomputers, but can be translated to other systems at a higher cost.

Prime also distributes software support (i.e., revisions, modifications, updates, and **[*1326]** support services) for PDGS software. Prime offers this software support to Ford's design companies as part of a package that includes hardware maintenance on the Prime 50 Series minicomputers. The Prime 50 Series minicomputers may be purchased separately from the hardware maintenance, but only at a prohibitive expense. In contrast, the general contract to purchase PDGS does not contain a hardware maintenance requirement.

Plaintiff Virtual Maintenance, Inc. ("Virtual") brought this antitrust action after unsuccessfully attempting to enter into hardware maintenance contracts with owners of Prime 50 Series computers. Virtual contended that Prime's package constituted an illegal tying arrangement in violation of *§ 1* of the Sherman Act, ***HN2***[] *15 U.S.C. § 1*, by conditioning the purchase of software support required by Ford to hardware maintenance from Prime (the tying product).

Virtual's case was presented **[**4]** to the jury on three alternative theories of liability based on the alleged tie of hardware maintenance services to PDGS: (1) a per se claim based on a tying market of all CAD/CAM software; (2) a per se claim based on a tying product market of Ford-required PDGS; and (3) a rule of reason claim alleging that

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[1] ***Virtual Maintenance, Inc. v. Prime Computer, Inc.**, 957 F.2d 1318 (6th Cir. 1992)*, **vacated**, ***113 S. Ct. 314, 121 L. Ed. 2d 235*** (Oct. 13, 1992) (No. 92-90). ("**Virtual I**").

[2] For a more detailed history of the case, **see id.**

the clause in Prime's software maintenance package contract requiring the customer to use Prime's hardware maintenance services created unreasonable and anticompetitive effects in the market for maintaining Prime's 50 Series computer systems. The jury returned a general verdict in favor of Virtual. The district court denied Prime's motion for j.n.o.v. and entered judgment in favor of Virtual.

On appeal, we rejected each of Virtual's theories, and reversed the judgment of the district court with instructions to enter judgment in favor of Prime. In accordance with the Supreme Court's directive, we will consider whether any of these prior rulings are impacted by **Eastman Kodak**.

I.

A.

In Eastman Kodak, the antitrust plaintiffs were a group of independent service organizations (ISO's) that had been servicing Kodak copying and micrographic equipment since the early 1980s. **[**5]** They brought suit after Kodak began restricting the sale of replacement parts for its photocopiers and micrographic equipment to only those buyers who also purchased Kodak service or repaired their own machines. Kodak equipment is unique; its parts are not compatible with its competitors' machines. Because of Kodak's restrictive policy, the ISO's were unable to obtain suitable parts and many were forced out of business. The plaintiffs also offered evidence that some customers who preferred the plaintiffs' service were forced, as a result of Kodak's practice, to switch to Kodak's service. Plaintiffs alleged, inter alia, that Kodak had tied the sale of service to the sale of parts in violation of *section 1* of the Sherman Act. **Id.** at 2076-77. [3]

The district court granted summary judgment for Kodak. A divided panel of the Ninth Circuit reversed, **[**6]** finding a genuine issue of material fact as to whether Kodak had sufficient economic power in the tying product market (parts) to restrict competition appreciably in the tied product market (service). ***Id.*** *at 2078*.

Before the Supreme Court, Kodak did not offer any actual data on the proposed markets, but rather urged the adoption of a substantive legal rule that interbrand competition foreclosed finding of monopoly power in derivative aftermarkets as a matter of law. ***Id.*** *at 2082*. The Supreme Court framed the issue as "whether a defendant's lack of market power in the primary equipment market precludes--as a matter of law--the possibility of market power in derivative aftermarkets." Starting with the assumption that Kodak lacked market power in the equipment market, the Supreme Court nonetheless refused to accept on faith Kodak's proposed rule absent evidence to support **[*1327]** it. Thus, contrary to Kodak's assertion, "there [was] no immutable physical law--no 'basic economic reality'--insisting that competition in the equipment market cannot coexist with market power in the aftermarkets." ***Id.*** *at 2084*. [4]

[7]** The Court found that the plaintiffs had offered a "forceful reason" why Kodak's theory might not accurately explain the behavior of the primary and derivative markets for complex and durable goods: "the existence of significant information and switching costs." ***Id.*** *at 2085*. Regarding information costs, the Court observed that in order for the service-market price to affect equipment demand, consumers must engage in accurate "lifecycle pricing"--that is, they must inform themselves of the total cost of the package at the time of purchase. Lifecycle pricing, however, is difficult to perform. ***Id.*** *at 2085-86*.

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[3] Plaintiffs also claimed that Kodak had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines in violation of § 2 of the Sherman Act.

[4] The Supreme Court made clear that ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.****, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, did not create a special burden on plaintiffs responding to summary judgment challenges in antitrust cases, but requires only that the non-moving party's inferences be reasonable and not "economically senseless." ***Eastman Kodak****, 112 S. Ct. at 2083*.

Furthermore, the cost of switching products may be high, and consumers who have already purchased the equipment will tolerate some level of service-price increase before switching equipment brands. ***Id.** at 2087*. "Under this scenario, a seller profitably could maintain supra-competitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchases." **Id.**

Also critical **[**8]** to the Court's conclusion that summary judgment on the ISO's claims was improper was evidence presented by the plaintiffs that certain parts were available exclusively through Kodak, that Kodak had control over the availability of parts it didn't manufacture, and that Kodak's control over its parts market had excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service when plaintiffs' service would have been preferred. *Id. at 2081*. The Court stated that under existing precedents, the foregoing evidence "would be sufficient to entitle [the plaintiffs] to a trial on their claim of market power." **Id.** The Supreme Court affirmed the decision of the appellate court reversing the district court's grant of summary judgment to Kodak.

B.

1.

Eastman Kodak did not involve a rule of reason theory of liability, and we see no reason to alter our conclusion that there was insufficient evidence to support a jury verdict under the rule of reason. Even with Ford-required software support as the tying product market, Virtual failed to demonstrate a substantial threat that Prime would acquire market power in the most **[**9]** narrowly defined tied product market of hardware maintenance of Prime 50 Series systems. [5] **See *Virtual I**, 957 F.2d at 1330* (the foreclosure of at most the 400 50 Series systems out of thousands of systems capable of using PDGS is insignificant as a matter of law). Given Virtual's failure of proof under the most restrictive definition of tied product market, we do not think our ruling on this issue is affected by **Eastman Kodak**.

2.

Under Virtual's first per se claim [6] **[**11]** , the district court defined the relevant market as "the sale of software revisions and support for the CAD/CAM industry in general." We **[*1328]** found no error in the legal adequacy of the district court's definition, but concluded that Prime possessed at most an 11% share of the market, which is insufficient as a matter of law **[**10]** to confer market power. *Virtual I, 957 F.2d at 1325* (citing **Jefferson Parish Hosp. Dist. No. 2 in *Hyde**, 466 U.S. 2, 26, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (30% market share does not confer market power); ***A.I. Root v. Computer/Dynamics, Inc.**, 806 F.2d 673, 675 (6th Cir. 1986)* (2-4% market share is insufficient); ***Grappone, Inc. v. Subaru of New England, Inc.**, 858 F.2d 792, 796 (1st Cir. 1985)* (5% market share insufficient)). [7] We find nothing in **Eastman Kodak** which requires us to alter this analysis. We therefore hold that a per se tying violation could not be established under Virtual's first per se theory because Prime lacks market power in the general CAD/CAM product market, for the reasons stated here and in section II.B.1. of our decision in **Virtual I**.

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[5] Virtual claimed that a jury could find that Prime possessed almost total control over the Prime 50 Series hardware maintenance market. ***Virtual I**, 957 F.2d at 1330*.

[6] As noted in **Virtual I**, ***HN3***[] the elements of a per se tying claim are as follows: "(1) There must be a tying arrangement between two distinct products or services; (2) the seller must have sufficient economic power in the tying market to restrain appreciably competition in the tied product market; and (3) the amount of commerce affected must be not insubstantial." ***Virtual I**, 957 F.2d at 1323* (quoting ***Directory Sales Management v. Ohio Bell Tel. Co.**, 833 F.2d 606, 609 (6th Cir. 1982)* (other quotations omitted)).

[7] We stated: ***HN4***[] "An 11% market share, standing alone, is insufficient as a matter of law to confer the 'great market power, evidenced by an exceptional demand for the tying product' necessary for a per se illegal tie." ***Virtual I**, 957 F.2d at 1325* (quoting ***A.I. Root**, 806 F.2d at 676*).

3.

Our ruling regarding Virtual's second per se claim requires much closer scrutiny. The other market that Virtual urged was defined as "the sale of software revisions and support of software necessary to do business with Ford Motor Company." *Virtual I, 957 F.2d at 1325*. Prime argued that this instruction defined the tying product market too narrowly as a matter of law, and we agreed. We found that ***HN5***[] market definition defective as a matter of law because it was "based solely on one customer's requirements," which "this court has held . . . does not create a separate product market." ***Id.*** *at 1327* (citing ***International Logistics Group, Ltd. v. Chrysler Corp.****, 884 F.2d 904, 908 (6th Cir. 1989)*, **[**12] cert. denied**, *494 U.S. 1066, 108 L. Ed. 2d 784, 110 S. Ct. 1783 (1990)*; ***Dunn & Mavis, Inc. v. NU-Car Driveaway, Inc.****, 691 F.2d 241 (6th Cir. 1982))*.

In response to Virtual's contention that Ford is not the only customer of Prime's products, but that all of Ford's design suppliers made up the customer market for "Ford-required CAD/CAM," we stated:

Virtual seeks to distinguish these cases by pointing out that Ford is not the only customer of Prime's products; rather, all of Ford's design suppliers make up the customer market for "Ford-required CAD/CAM." This ignores the fact that Ford requires its suppliers to purchase the software updates for Ford's benefit. Ford is ultimately the single consumer of its specialized design software because Ford's requirements define the demand for the software and the updates. But defining the market by Ford's requirements creates the appearance of market power based only upon the demand side of the market. Defining a market, or "submarket," on the basis of demand considerations alone is erroneous because such an approach fails to consider the supply side of the market. Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** **[**13]** , 518.1g at 471 & n.26 (Supp. 1990) (citing ***United States v. Central State Bank****, 817 F.2d 22 (6th Cir. 1987))*. The relevant product market cannot be determined without considering the cross-elasticity of supply.

Id. *at 1327*.

Virtual countered that Prime has no supply side competition because of its exclusive license for PDGS. We rejected this argument as "confusing the tying product (software support for PDGS) with the interbrand market relevant for antitrust analysis," **id.**, [8] **[*1329]** and ruled that "the relevant tying market is comprised of all CAD/CAM software reasonably interchangeable with PDGS." **Id.** Critical to this analysis was the view that PDGS software support is an intrabrand "submarket":

[14]** Prime has market power in the trivial sense that no one else makes PDGS. But true market power--power sufficient to change and sustain anticompetitive prices--cannot be inferred from this because were Prime to charge exorbitant prices for its software support, its customers would simply switch to some other manufacturer of PDGS-type software. Prime's lack of market power over the general market for CAD/CAM software thus prevents Prime from controlling the "submarket" for PDGS software.

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[8] We observed that this court previously had refused to ignore interbrand competition by limiting the product market to one manufacturer's product, citing ***A.I. Root Co. v. Computer/Dynamics, Inc.****, 806 F.2d 673 (6th Cir. 1986)* and ***Kingsport Motors, Inc. v. Chrysler Corp.****, 644 F.2d 566 (6th Cir. 1991)*. Both of these cases can be distinguished from the instant one. The disposition in **A.I. Root** turned on the fact that the evidence in the case established that equipment using BOSS software had "close substitutes." ***Id.*** *806 F.2d at 676*. The relevant market was not BOSS software as a unique product market, but small business computers. ***Id.*** *at 675-76*. Thus, the defendant lacked that "essential characteristic" of an illegal tying arrangement, the seller's ability to coerce customers into buying an unwanted tied product. ***Id.*** *at 677*. In fact, the plaintiff in that case, rather than submitting to the tie, purchased new IBM equipment and software. ***Id.*** *at 675*.

Kingsport Motors*, 644 F.2d 566*, is likewise distinguishable because there the relevant product market, "properly analyzed," was "all medium priced cars available for sale in the United States." ***Id.*** *at 571*. So defined, there was simply no proof that the seller had any power to raise prices or that the tying arrangement at issue affected any appreciable number of buyers within the applicable market. **Id.** Thus, **Kingsport Motors**, by focusing on the primary equipment market rather than the aftermarket cannot compel a similar result in this case.

Id. *957 F.2d at 1327-28*. [9] Upon refusing to view Ford-required PDGS software support as a separate tying product market, we rejected Prime's lock-in and switching costs arguments as a matter of law:

[15]** Virtual responds that Ford and its design suppliers cannot switch to a new supplier of software support because they are "locked-in" to Prime as the sole supplier due to their substantial investments in Prime 50 Series computers and other hardware. While Ford might believe it is "locked-in," this is due in large part to its own decision to purchase Prime's software and invest in Prime's computer systems. But a customer's initial purchase of a particular manufacturer's product does not justify a limited market definition. Defining the market by customer demand **after** the customer has chosen a single supplier fails to take into account that the supplier (here Prime) must compete with other similar suppliers to be designated the sole source in the first place.

Id. *at 1328* (citation omitted).

Under **Eastman Kodak**, our rejection of Virtual's second per se claim based on a tying product of Ford-required software support was misguided. That Ford had many competitors to choose from when it made its initial decision to grant the exclusive license to Prime cannot, after **Eastman Kodak**, preclude as a matter of law Virtual's proposed theory of market power because it ignores information **[**16]** costs. It follows that our rejection of Virtual's "lock-in" argument, on the basis of an interbrand competitive market in the initial purchase of Prime's software package and Prime 50 Series minicomputers, was also in error.

Eastman Kodak also requires us to rethink our characterization of the tying product market here as merely the preference of one customer. Unlike **Eastman Kodak**, the initial decision to purchase Prime equipment and software was made by a single consumer, Ford. However, by shifting the focus to the derivative aftermarket of software support, there is not a single consumer, but numerous automotive design companies doing business with Ford. In contrast **[*1330]** with ***International Logistics****, 894 F.2d 902 at 904*, which involved vertical nonprice restraints unilaterally imposed by defendant Chrysler upon its distributors, the automotive design companies in the present case are independent companies, not a part of Ford. Unlike ***Dunn & Mavis****, 691 F.2d 241*, where it was held that an agreement between a single seller of transportation services and a single automobile manufacturer was not an illegal "group boycott," the **[**17]** present case does not involve merely an arrangement between a single consumer and a single supplier. Thus, the market in this case is not defined by Ford, as a customer of Prime, but by Ford's requirements that affect the choice of Prime's other customers, Ford suppliers. [10]

The similarities between this case and **Eastman Kodak** **[**18]** are apparent. As in **Eastman Kodak**, the alleged tie is not between equipment and parts, where interbrand competition would defeat market power and a per se tying claim. Rather, the alleged tie is in the derivative aftermarkets. Like Kodak, Prime is able to exercise control over the

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[9] In rejecting Virtual's contention that PDGS constitutes a relevant "submarket," we relied, in part, on the proposition in ***A.I. Root Co. v. Computer/Dynamics, Inc.****, 806 F.2d 673 (6th Cir. 1986)*, that "competitors of [defendant] could produce computer hardware and software equivalent to that manufactured by [defendant]. Accordingly, [defendant's product] did not compose a separate and distinct submarket within the computer industry as to which we should measure 'market share.'" ***Virtual I****, 957 F.2d at 1327* (quoting ***A.I. Root****, 806 F.2d at 675-76*. As previously noted, **see supra** note 7, **A.I. Root** rejected the plaintiff's attempts to define BOSS as a separate market because although it was copyrighted, there was proof of close substitutes. **Id.** Closer to the mark is a case discussed in **A.I. Root**, ***Digidyne Corp. v. Data General****, 734 F.2d 1336 (9th Cir. 1984)*. **A.I. Root** distinguished **Digidyne** on the basis that the tying product (RDOS), a computer command system, was unique. In contrast, the plaintiff in **A.I. Root** had not presented any evidence that BOSS was particularly unique or desirable. Here, Virtual has offered proof of PDGS's desirableness; namely, Ford's requirement that all the design companies with which it does business use the software and software updates.

[10] This view is not inconsistent with dicta in ***International Logistics****, 884 F.2d at 909*. There, we stated that Chrysler products could not be a relevant market "absent a government imposed distinctions between Chrysler manufactured replacement parts and Chrysler compatible replacement parts . . . ." **Id.** By implication, had such a government imposed distinction existed, it may have had the "unique characteristics that would support its consideration as a separate geographic market." **Id.** In this case, the "imposed distinction" is Ford's requirement that its automotive design suppliers use the most current version of PDGS marketed exclusively through Prime.

sale of software support because of its exclusive distribution license from Ford, and Ford's requirement that its automotive design suppliers use the most current version of Prime's software support. Thus, it can be argued that Prime enjoys a significant advantage in the Ford-required software support market by virtue of Ford's license and the requirement Ford places on the automotive design companies to use the most current version of PDGS. In other words, there is evidence to make the argument that Prime's tying arrangement bears ***HN6***[] that "essential characteristic" of an illegal tying arrangement, the ability to exploit control over the tying product to force the buyer to purchase an unwanted tied product. **Jefferson Parish**, 466 U.S. at 12.

Like the ISO's in **Eastman Kodak**, Virtual presented evidence of price manipulation. An expert for Virtual testified that although Prime **[**19]** offered software support for sale separately, repurchase of software to obtain updates would cost as much as 900% more than if purchased in the software support/hardware maintenance package. There was also evidence that Prime does not treat all customers equally. Prime apparently allows one customer, Ford Aerospace, to continue to receive software support without purchasing hardware maintenance from Prime. Virtual also offered proof that customers would have preferred Virtual's service to Prime's, but were effectively precluded by the tie.

Virtual offered expert testimony concerning lock-in and switching costs. Virtual's industry experts testified that customers were "locked-in" to the hardware maintenance by the substantial cost incurred for hardware, maintenance, and training, most of which would be substantially worthless if the customer switched to another manufacture's system. A Ford employee, called by Prime, testified that Ford itself felt "locked-in" to Prime, stating that Ford could not change from Prime's computer system and remain economically viable in the automotive industry. Virtual's expert also opined that Prime could substantially raise its maintenance prices before **[**20]** customers would abandon their investment.

Finally, Virtual made a showing that a "not insubstantial" amount of commerce was affected in that it stood to lose an estimated $ 8 million dollars over a five-year period. Thus, under **Eastman Kodak**, we conclude that Virtual's second definition of market power was proper.

C.

Eastman Kodak dictates that we vacate our holding as to Virtual's second definition of market power on a per se tying claim. All other aspects of our holdings in **Virtual I** **[*1331]** are reaffirmed and reinstated. Because the general jury verdict in the first trial provides no indication of the jury's reliance on this theory in support of the original verdict, we are obligated to reverse the verdict and remand for a new trial. **See** ***Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.****, 370 U.S. 19, 29-30, 8 L. Ed. 2d 305, 82 S. Ct. 1130 (1962)*; ***United New York and New Jersey Sandy Hook Pilots Assoc. v. Halecki****, 358 U.S. 613, 619, 3 L. Ed. 2d 541, 79 S. Ct. 517 (1959)*; ***Wilmington Star Mining Co. v. Fulton****, 205 U.S. 60, 51 L. Ed. 708, 27 S. Ct. 412 (1907)*; **Maryland v. Baldwin**, 112 U.S. 490, *28 L. Ed. 822, 5 S. Ct. 278 (1884)*; **see also** ***Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.****, 729 F.2d 1050* **[**21]** (6th Cir.), **cert. denied**, *469 U.S. 1036, 83 L. Ed. 2d 401, 105 S. Ct. 510, 105 S. Ct. 511 (1984)*. On remand, the district court is instructed to conduct a new trial on the sole theory of a per se claim based on a tying product market of Ford-required PDGS software support.

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Cimarron Pipeline Constr. v. National Council on CompenasationIns.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19987 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, final judgment, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of May 15, 1992, Commercial Union Insurance Company, American Employers Insurance Company, Employers Fire Insurance Company and Northern Assurance Company of America (hereinafter collectively referred to as "Commercial Union") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 28, 1992; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs is hereby barred from prosecuting any claims and causes of action against Commercial Union (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These **[*2]** Actions up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 28, 1992, are hereby barred from prosecuting any claims and causes of action against Commercial Union (as more fully defined in paragraph I.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO,

insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph I.B. of the Settlement Agreement against Commercial Union, and Commercial Union is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all Plaintiffs and class members **[*3]** in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, is hereby determined that no just reason exists for delay in entering this final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Commercial Union, each with prejudice and without costs, and, therefore, entry of this final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19970 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of February 8, 1991, The Charter Oak Fire Insurance Company, The Phoenix Insurance Company, The Travelers Indemnity Company, The Travelers Indemnity Company of America, The Travelers Indemnity Company of Illinois, The Travelers Indemnity Company of Rhode Island and The Travelers Insurance Company (hereinafter collectively referred to as "Travelers") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Travelers (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, **[*2]** RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Travelers (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Travelers and Travelers is hereby discharged from any and all liability **[*3]** with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Travelers, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

[*4] United States District Judge

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19971 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: Ralph G. Thompson

Opinion

ORDER AND JUDGMENT

As of February 12, 1991, Aberdeen Insurance Company, Highlands Casualty Company, Highlands Insurance Company, Highlands Lloyd's and Highlands Underwriters Insurance Company (hereinafter collectively referred to as "Highlands") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Highlands (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions **[*2]** up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Highlands (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Highlands and Highlands is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph **[*3]** 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Highlands, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

Case No. CIV-89-1186-T, Case No. CIV-89-822-T

Reporter

1993 U.S. Dist. LEXIS 19972 *

CIMARRON PIPELINE CONSTRUCTION, INC., Plaintiff, v. THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGNENT

As of February 12, 1991, Defendants American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh and New Hampshire Insurance Company (hereinafter collectively referred to as "AIG") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against AIG (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of **[*2]** the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against AIG (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance

laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against AIG and AIG is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, **[*3]** other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed.R.Civ.P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against AIG, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

DATED: June 7, 1993

Ralph G. Thompson

United States District Court

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19973 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of February 21, 1991, United States Fire Insurance Company ("United States Fire") and The North River Insurance Company ("The North River") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated July 22, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against United States Fire and The North River (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members **[*2]** of the Settlement Class, as defined and approved in Preliminary Approval Order dated July 22, 1991, are hereby barred from prosecuting any claims and causes of action against United States Fire and The North River (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against United States Fire and The North River and United States Fire and The North River are hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members **[*3]** in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against United States Fire and The North River, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

Civil Action No. 89-1186 T, Civil Action No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19974 *

CIMARRON PIPELINE CONSTRUCTION, INC., Plaintiff, v. THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, anti-trust, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of February 15, 1991, St. Paul Fire & Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Insurance Company and St. Paul Mercury Insurance Company (hereinafter collectively referred to as "St. Paul") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the Court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991 relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against St. Paul (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state anti-trust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions **[*2]** up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against St. Paul (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against St. Paul and St. Paul is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph **[*3]** 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(A)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against St. Paul, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186T, CIVIL ACTION No. 89 822T

Reporter
1993 U.S. Dist. LEXIS 19975 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of January 31, 1991, Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company and Liberty Insurance Corporation (hereinafter collectively referred to as "Liberty") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Liberty (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All **[*2]** members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Liberty (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Liberty and Liberty is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those **[*3]** class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed.R.Civ.P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Liberty, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19976 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of February 7, 1991, Bituminous Casualty Corporation, Bituminous Fire and Marine Insurance Company and Bituminous Insurance Company (hereinafter collectively referred to as "Bituminous") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Bituminous (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement **[*2]** Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Bituminous (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance

laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Bituminous and Bituminous is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, **[*3]** other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Bituminous, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19978 *

CIMARRON PIPELINE CONSTRUCTION, INC., Plaintiffs, v. THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] THOMPSON

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of January 30, 1991, Hartford Accident and Indemnity Company, Hartford Insurance Company of the Midwest and Twin City Fire Insurance Company (hereinafter collectively referred to as "Hartford") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs is hereby barred from prosecuting any claims and causes of action against Hartford (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement **[*2]** Agreement.

2. All members of the Settlement Class as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Hartford (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Hartford and Hartford is hereby discharged form any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, **[*3]** other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interest of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed.R.Civ.P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Hartford, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

RALPH G. THOMPSON

UNITED STATES DISTRICT JUDGE

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19981 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of February 21, 1991, Defendant Atlantic Mutual Insurance Company ("Atlantic") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Atlantic (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May **[*2]** 1, 1991, are hereby barred from prosecuting any claims and causes of action against Atlantic (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Atlantic and Atlantic is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court **[*3]** hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Atlantic, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

LexisNexis

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19982 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, insurance law, class member, common law, prosecuting, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

FINAL JUDGMENT DISMISSING BROTHERHOOD MUTUAL INSURANCE COMPANY WITH PREJUDICE

As of January 30, 1990, Defendant Brotherhood Mutual Insurance Company ("Brotherhood") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Brotherhood (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in these Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in these Actions up to the date of the Settlement Agreement.

2. All members of the Settlement **[*2]** Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Brotherhood (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in these Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in these Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Brotherhood, and Brotherhood is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members **[*3]** who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over these actions for all further purposes.

6. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Brotherhood, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

LexisNexis

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19983 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of January 31, 1991, The Home Indemnity Company, The Home Insurance Company and The City Insurance Company (hereinafter collectively referred to as "Home") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Home (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members of the Settlement **[*2]** Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Home (as more fully defined in paragraph 1.A of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Home and Home is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs **[*3]** from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Home, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19984 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of January 4, 1991, First National Insurance Company of America, General Insurance Company of America and Safeco Insurance Company of America (hereinafter collectively referred to as "Safeco") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Safeco (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

[*2] 2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Safeco (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Safeco and Safeco is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those **[*3]** class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Safeco, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19985 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, insurance law, class member, common law, prosecuting, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

FINAL JUDGMENT DISMISSING FARMERS ALLIANCE MUTUAL INSURANCE COMPANY WITH PREJUDICE

As of January 30, 1990, Defendant Farmers Alliance Mutual Insurance Company ("Farmers") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Farmers (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in these Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in these Actions up to the date of the Settlement Agreement.

2. All members of the Settlement **[*2]** Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Farmers (as more fully defined in paragraph 1.A; of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in these Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in these Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Farmers, and Farmers is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely **[*3]** opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over these actions for all further purposes.

6. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Farmers, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

[Cimarron Pipeline Constr. v. National Council on Compensation Ins.](#)

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19989 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of April 5, 1991, Defendant Ranger Insurance Company (hereinafter referred to as "Ranger") entered in to a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated November 4, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Ranger (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All member of the Settlement Class, as defined and approved in Preliminary Approval **[*2]** Order dated November 4, 1991, are hereby barred from prosecuting any claims and causes of action against Ranger (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Ranger and Ranger is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

[*3] 5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Ranger, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19990 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, rates, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, final judgment, best interest, insurance law, class member, common law, prosecuting, equitable, insurer, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of July 31, 1992, Century Indemnity Company, Insurance Company of North America and Pacific Employers Insurance Company (hereinafter collectively referred to as "Cigna") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated August 13, 1992; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs is hereby barred from prosecuting any claims and causes of action against Cigna (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members **[*2]** of the Settlement Class, as defined and approved in Preliminary Approval Order dated August 13, 1992, are hereby barred from prosecuting any claims and causes of action against Cigna (as more fully defined in paragraph I.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance

laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Without entering any finding or conclusion, and recognizing that Cigna has denied any liability and wrongdoing of any kind whatsoever, until July 30, 1993, Cigna is prohibited from entering into any agreement, arrangement, or understanding with any other insurer or group of insurers to utilize workers' compensation insurance rates in excess of the maximum rates approved for use in Oklahoma by the Oklahoma State Board for Property and Casualty Rates, whether by use of a "consent **[*3]** to rate" procedure or otherwise, except as is permitted by law.

4. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph I.B. of the Settlement Agreement against Cigna, and Cigna is hereby discharged from any and all liability with respect thereto.

5. This judgment includes and binds all Plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

6. The Court hereby retains jurisdiction over These Actions for all further purposes.

7. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

8. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, is hereby determined that **[*4]** no just reason exists for delay in entering this final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Cigna, each with prejudice and without costs, and, therefore, entry of this final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

[Cimarron Pipeline Constr. v. National Council on Compensation Ins.](#)

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

Civil Action No. 89 1186 T, Civil Action No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19991 *

CIMARRON PIPELINE CONSTRUCTION, INC., Plaintiffs, v. THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, ET AL., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of February 18, 1991, Defendant The Continental Insurance Company ("Continental") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the Court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Continental (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order **[*2]** dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Continental (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Continental and Continental is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class **[*3]** notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of fact as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Continental, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

DATED: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19992 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of July 29, 1991, The Ohio Casualty Insurance Company, West American Insurance Company, American Fire & Casualty Company and its affiliates (hereinafter collectively referred to as "Ohio Casualty") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Ohio Casualty (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement **[*2]** Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 1, 1991, are hereby barred from prosecuting any claims and causes of action against Ohio Casualty (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Ohio Casualty and Ohio Casualty is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement **[*3]** Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Ohio Casualty, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19993 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of May 21, 1992, Defendant American Manufacturers Mutual Insurance Company, American Motorists Insurance Company and Lumbermens Mutual Insurance Company (hereinafter collectively referred to as "KNIC") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 28, 1992; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against KNIC (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the **[*2]** Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated May 28, 1992, are hereby barred from prosecuting any claims and causes of action against KNIC (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance

laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against KNIC and KNIC is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, **[*3]** other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against KNIC, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

Civil Action No. 89 1186 T, Civil Action No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19994 *

CIMARRON PIPELINE CONSTRUCTION, INC., Plaintiffs, v. THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, ET AL., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of May 28, 1992, Trinity Universal Insurance Company, Trinity Universal Insurance Company of Kansas, Inc. and Security National Insurance Company (hereinafter collectively referred to as "Trinity") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the Court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated June 1, 1992; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs is hereby barred from prosecuting any claims and causes of action against Trinity (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement **[*2]** Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated June 3, 1992, are hereby barred from prosecuting any claims and causes of action against Trinity (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Trinity, and Trinity is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, **[*3]** other than those class members who filed timely opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of fact as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Trinity, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

DATED: June 7, 1993

Ralph G. Thompson

United States District Judge

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19996 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

FINAL JUDGMENT

As of April 5, 1991, Defendant Fireman's Fund Insurance Company ("Fireman's Fund") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated July 22, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Fireman's Fund (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in these Actions against Fireman's Fund (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in these Actions up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary **[*2]** Approval Order dated July 22, 1991, are hereby barred from prosecuting any claims and causes of action against Fireman's Fund (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in these Actions against Fireman's Fund (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in these Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Fireman's Fund and Fireman's Fund is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely **[*3]** opt-outs from the class in response to class notice.

5. The Court hereby retains jurisdiction over these actions for all further purposes, including any proceeding to enforce the terms of paragraph 3 hereof.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Fireman's Fund, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

[Cimarron Pipeline Constr. v. National Council on Compensation Ins.](#)

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 19997 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, final judgment, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of May 21, 1992, Truck Insurance Exchange and Truck Underwriters Association (hereinafter collectively referred to as "Truck") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the Court approved the Settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 28, 1992; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs is hereby barred from prosecuting any claims and causes of action against Truck (as more fully defined in paragraph I.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and **[*2]** approved in Preliminary Approval Order dated May 28, 1992, are hereby barred from prosecuting any claims and causes of action against Truck (as more fully defined in paragraph I.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph I.B. of the Settlement Agreement against Truck, and Truck is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all Plaintiffs and class members in Actions identified in paragraph l.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class **[*3]** in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, is hereby determined that no just reason exists for delay in entering this final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Truck, each with prejudice and without costs, and, therefore, entry of this final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 19998 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, rates, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, final judgment, best interest, insurance law, class member, common law, prosecuting, equitable, insurer, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of December 1, 1992, United States Fidelity & Guaranty Company and Fidelity and Guaranty Insurance Company (hereinafter collectively referred to as "USF&G") entered into a Settlement Agreement with Plaintiffs. By separate order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated February 12, 1993; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs is hereby barred from prosecuting any claims and causes of action against USF&G (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members of **[*2]** the Settlement Class, as defined and approved in Preliminary Approval Order dated February 12, 1993, are hereby barred from prosecuting any claims and causes of action against USF&G (as more fully defined in paragraph I.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO,

insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Without entering any finding or conclusion, and recognizing that USF&G has denied any liability and wrongdoing of any kind whatsoever, until July 30, 1995, USF&G is prohibited from entering into any agreement, arrangement, or understanding with any other insurer or group of insurers to utilize workers' compensation insurance rates in excess of the maximum rates approved for use in Oklahoma by the Oklahoma State Board for Property and Casualty Rates, whether by use of a "consent **[*3]** to rate" procedure or otherwise, except as is permitted by law.

4. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph I.B. of the Settlement Agreement against USF&G, and USF&G is hereby discharged from any and all liability with respect thereto.

5. This judgment includes and binds all Plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

6. The Court hereby retains jurisdiction over These Actions for all further purposes.

7. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

8. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined **[*4]** that no just reason exists for delay in entering this final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against USF&G, each with prejudice and without costs, and, therefore, entry of this final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 20001 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, rates, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, final judgment, best interest, insurance law, class member, common law, prosecuting, equitable, insurer, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

ORDER AND JUDGMENT

As of August 7, 1992, Federal Insurance Company, Northwestern Pacific Indemnity Company, Pacific Indemnity Company and Vigilant Insurance Company (hereinafter collectively referred to as "Chubb") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated August 13, 1992; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs is hereby barred from prosecuting any claims and causes of action against Chubb (as more fully defined in paragraph I.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement **[*2]** Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated August 13, 1992, are hereby barred from prosecuting any claims and causes of action against Chubb (as more fully defined in paragraph I.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Without entering any finding or conclusion, and recognizing that Chubb has denied any liability and wrongdoing of any kind whatsoever, until July 30, 1993, Chubb is prohibited from entering into any agreement, arrangement, or understanding with any other insurer or group of insurers to utilize workers' compensation insurance rates in excess of the maximum rates approved for use in Oklahoma by the Oklahoma State Board for Property and Casualty Rates, **[*3]** whether by use of a "consent to rate" procedure or otherwise, except as is permitted by law.

4. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph I.B. of the Settlement Agreement against Chubb, and Chubb is hereby discharged from any and all liability with respect thereto.

5. This judgment includes and binds all Plaintiffs and class members in Actions identified in paragraph l.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

6. The Court hereby retains jurisdiction over These Actions for all further purposes.

7. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

8. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ.* ***[*4]*** *P.*, it is hereby determined that no just reason exists for delay in entering this final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Chubb, each with prejudice and without costs, and, therefore, entry of this final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter

1993 U.S. Dist. LEXIS 20002 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, unfair trade practice, preliminary approval, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

As of December 28, 1990, Employers Insurance of Wausau A Mutual Company and Wausau Underwriters Insurance Company (hereinafter collectively referred to as "Wausau") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated May 1, 1991; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Wausau (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members of the Settlement Class, **[*2]** as defined and approved in Preliminary Approval Order dated May 1, 1991; are hereby barred from prosecuting any claims and causes of action against Wausau (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph 1.B. of the Settlement Agreement against Wausau and Wausau is hereby discharged from any and all liability with respect thereto.

4. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the **[*3]** class in response to class notice.

5. The Court hereby retains jurisdiction over These Actions for all further purposes.

6. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein.

7. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Wausau, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

End of Document

Cimarron Pipeline Constr. v. National Council on Compensation Ins.

United States District Court for the Western District of Oklahoma

June 7, 1993, Decided ; June 7, 1993, Filed, Entered

CIVIL ACTION No. 89 1186 T, CIVIL ACTION No. 89 822 T

Reporter
1993 U.S. Dist. LEXIS 20003 *

Cimarron Pipeline Construction, Inc., Plaintiffs, v. The National Council on Compensation Insurance, et al., Defendants.

Core Terms

Settlement, cause of action, rates, unfair trade practice, preliminary approval, state ***antitrust law***, alleged violation, punitive damages, best interest, insurance law, class member, common law, prosecuting, equitable, insurer, trebled, costs

Judges: [*1] Thompson

Opinion by: RALPH G. THOMPSON

Opinion

As of September 24, 1992, Defendant, Mid-Continent Casualty Company ("Mid-Continent") entered into a Settlement Agreement with Plaintiffs. By separate Order dated June 7, 1993, the court approved the settlement as fair, reasonable, adequate, equitable and in the best interests of the Settlement Class. (See also Order dated September 24, 1992; relating to preliminary approval.)

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Each of the named Plaintiffs are hereby barred from prosecuting any claims and causes of action against Mid-Continent (as more fully defined in paragraph 1.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual, trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions up to the date of the Settlement Agreement.

2. All members of the Settlement Class, as defined and approved in Preliminary Approval Order dated September **[*2]** 24, 1992; are hereby barred from prosecuting any claims and causes of action against Mid-Continent (as more fully defined in paragraph I.A. of the Settlement Agreement) which Plaintiffs have alleged, have sought to allege, or could have alleged in These Actions (including but not limited to any claims for actual trebled or punitive damages, or other relief based upon alleged violations of federal or state antitrust laws, unfair trade practices laws, RICO, insurance laws or any other statutory or common laws) in any way relating to the conduct complained of in These Actions for the period July 1, 1985 through June 30, 1989.

3. Without entering any finding or conclusion, and recognizing that Mid-Continent has denied any liability and wrongdoing of any kind whatsoever, until July 30, 1995, Mid-Continent is prohibited from entering into any

agreement, arrangement, or understanding with any other insurer or group of insurers to utilize workers compensation insurance rates in excess of the maximum rates approved for use in Oklahoma by the Oklahoma State Board for Property and Casualty Rates, whether by use of a "consent to rate" procedure or otherwise, except as is permitted by law.

4. **[*3]** Judgment shall be and it is hereby entered dismissing with prejudice, on the merits, and without costs, all claims or causes of action contained in those civil actions listed in paragraph I.B. of the Settlement Agreement against Mid-Continent, and Mid-Continent is hereby discharged from any and all liability with respect thereto.

5. This judgment includes and binds all plaintiffs and class members in Actions identified in paragraph 1.B. of the Settlement Agreement, other than those class members who filed timely opt-outs from the class in response to class notice.

6. The Court hereby retains jurisdiction over These Actions for all further purposes.

7. The Court enters this judgment on the record before it; the judgment is entered without the taking of evidence, without any adjudication as to the allegations of the Complaint or the defenses raised thereto; other than determining that the settlement is fair, reasonable, adequate, equitable and in the best interests of the class, the Court makes no findings of facts as to any of the matters raised herein

8. Pursuant to *Rules 41(a)* and *54(b), Fed. R. Civ. P.*, it is hereby determined that no just reason exists for delay in entering this **[*4]** Final Judgment dismissing the claims of Plaintiffs and members of the finally certified Settlement Class against Mid-Continent, each with prejudice and without costs, and, therefore, entry of this Final Judgment is hereby directed.

Dated: June 7, 1993

Ralph G. Thompson

United States District Judge

North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.

United States Court of Appeals for the Fourth Circuit

March 2, 1993, Argued ; June 9, 1993, Decided

No. 92-1517

Reporter
1993 U.S. App. LEXIS 13524 *; 1993-1 Trade Cas. (CCH) P70,264

NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION; HAYWOOD ELECTRIC MEMBERSHIP CORPORATION; PITT & GREENE ELECTRIC MEMBERSHIP CORPORATION; FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION; PIEDMONT ELECTRIC MEMBERSHIP CORPORATION; HALIFAX ELECTRIC MEMBERSHIP CORPORATION; RANDOLPH ELECTRIC MEMBERSHIP CORPORATION; HARKERS ISLAND ELECTRIC MEMBERSHIP CORPORATION; BRUNSWICK ELECTRIC MEMBERSHIP CORPORATION; JONES-ONSLOW ELECTRIC MEMBERSHIP CORPORATION; FRENCH BROAD ELECTRIC MEMBERSHIP CORPORATION; WAKE ELECTRIC MEMBERSHIP CORPORATION; TRI-COUNTY ELECTRIC MEMBERSHIP CORPORATION; LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION; SOUTH RIVER ELECTRIC MEMBERSHIP CORPORATION; CARTERET-CRAVEN ELECTRIC MEMBERSHIP CORPORATION; CENTRAL ELECTRIC MEMBERSHIP CORPORATION, Plaintiffs-Appellants, v. CAROLINA POWER AND LIGHT COMPANY, Defendant-Appellee, and SOUTH CAROLINA ELECTRIC & GAS COMPANY, Defendant.

Notice: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: *995 F.2d 1063, 1993 U.S. App. LEXIS 37859*.

Prior History: Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Frank W. Bullock, Jr., Chief District Judge. (CA-77-396-C-G)

Core Terms

plant, wholesale, generation, part interest, cooperatives, purchasing, retail, feasible, power company, electric, directed verdict, monopoly power, own power, negotiations

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

A court reviews de novo the district court's decision to grant a directed verdict.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Contracts Law > Personal Property > Personalty Leases > General Overview

Evidence > Inferences & Presumptions > General Overview

HN2[] **Monopolies & Monopolization, Actual Monopolization**

A firm with lawful monopoly power has no general duty to help its competitors.The lone exception to this "no-duty-to-help competitors" rule is the essential facilities doctrine. For a monopolist to be liable under the essential facilities doctrine, a plaintiff must show: (1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility. The plaintiff has the burden of proving each of these elements.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Inferences & Presumptions > General Overview

HN3[] **Monopolies & Monopolization, Actual Monopolization**

To prove the inability of the competitor seeking access to practically or reasonably duplicate the facility, a plaintiff has to show that, in seeking to generate its own power, it had no economically feasible alternative to purchasing a part interest in a generation plant.

Counsel: Argued: Jerry S. Cohen, COHEN, MILSTEIN, HAUSFELD & TOLL, Washington, D.C., for Appellants.

Argued: Ray S. Bolze, HOWREY & SIMON, Washington, D.C., for Appellee.

On Brief: Wallace E. Brand, Sean T. Beeny, Melvin G. Berger, BRAND, BEENY, BERGER & WHITLER, Washington, D.C.; Edward L. Murrelle, Kenneth Kyre, Jr., Richard J. Votta, NICHOLS, CAFFREY, HILL, EVANS & MURRELLE, Greensboro, North Carolina, for Appellants.

On Brief: John C. Peirce, Joseph A. Ostoyich, HOWREY & SIMON, Washington, D.C.; Richard G. Bernhardt, Jr., SMITH, HELMS, MULLISS & MOORE, Greensboro, North Carolina; Richard E. Jones, H. Ray Starling, Jr., CAROLINA POWER & LIGHT COMPANY, Raleigh, North Carolina, for Appellee.

Judges: Before BUTZNER, Senior Circuit Judge, VOORHEES, Chief United States District Judge for the Western District of North Carolina, sitting by designation, and WILLIAMS, Senior **[*2]** United States District Judge for the Eastern District of Virginia, sitting by designation.

Opinion by: PER CURIAM

Opinion

OPINION

PER CURIAM:

Plaintiffs, the North Carolina Electric Membership Corp. and sixteen of its member retail electric cooperatives (together, "NCEMC"), appeal the district court's grant of a directed verdict for defendant Carolina Power & Light (CPL) on NCEMC's claim under Section 2 of the Sherman Act. We find no error in the district court's decision and affirm.

I

The retail electric cooperatives that are members of NCEMC purchase electric power at wholesale and sell it at retail in several areas of North Carolina. These cooperatives purchase their wholesale power from CPL, Duke Power Company, and Virginia Power Company, all of whom generate and transmit wholesale power. With some exceptions, CPL, Duke Power and Virginia Power serve different areas in North Carolina; in the areas that CPL serves, for example, it supplied 97% of the wholesale electric power during the period at issue in this case. Each cooperative buys its wholesale power from the company that serves the area in which the cooperative is located.

In 1974, a new Rural Electrification Administration (REA) **[*3]** financing program became available to the cooperatives. NCEMC determined that it would attempt to use its members' new financing ability to acquire its own generation facilities and enter into the wholesale power market in those areas of North Carolina where its members operated at retail. Its idea was that by entering the wholesale power market and generating power itself, it could obtain cheaper wholesale power for its member retail cooperatives.

To this end, NCEMC initiated discussions with CPL in August, 1974, about purchasing a part interest in one or more of CPL's generation units. CPL, which had never before sold a part interest in one of its generation plants, responded that it was not interested in selling any plants currently in operation or nearing completion, but that it was willing to discuss joint ownership of a plant that would be constructed in the future. NCEMC and CPL continued talks about joint ownership of a generation plant for eighteen months until February, 1976, at which point NCEMC broke them off because it did not feel that CPL was serious about the possibility.

NCEMC and those member retail cooperatives that buy wholesale power from CPL filed suit against **[*4]** CPL in August, 1977, claiming that CPL had refused to sell NCEMC a part interest in one of its generation plants and that this refusal violated Section 2 of the Sherman Act. They sought treble damages of $ 1.2 billion. After an extensive pretrial period, NCEMC's case was tried before Judge Bullock in February, 1992. The following evidence was presented.

When NCEMC sought to produce its own power and enter the wholesale power market, two general alternatives were available to it: building its own generation plant or buying a part interest in another plant operated by another wholesaler. Testimony of NCEMC's employees indicated that it considered both alternatives. NCEMC's cooperatives only serve a small percentage of the retail markets in which they are located; those cooperatives that purchase wholesale power from CPL, for example, have an average market share of ten percent. If NCEMC were to build a generation plant to generate wholesale power only for its own retail cooperatives, the plant would have been relatively small. While generation plants of the size NCEMC required were built during the period when NCEMC was considering building one, [1] large economies of scale are available **[*5]** in generating electrical power. It appears that, as a result, NCEMC determined that it could generate its own power more efficiently by purchasing a part interest in a generation plant operated by a large wholesale company than by constructing its own plant.

NCEMC, therefore, entered into the discussions with CPL that are the subject of this suit; it also initiated negotiations with Virginia Power Company, Duke Power Company, and Georgia Power Company about purchasing a part interest in one of their generation plants. The negotiations with CPL were unsuccessful, as described above. NCEMC also elected not to purchase a part interest in one of Virginia Power's plants because the savings to its cooperatives of purchasing wholesale power that NCEMC would generate at this plant, rather than purchasing wholesale power under their existing arrangements, **[*6]** were too small. Negotiations between NCEMC and Georgia Power for NCEMC to purchase a part interest in one of Georgia Power's generation plants were similarly

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[1] CPL presented testimony that the City of Fayetteville, North Carolina built a generation plant during this period approximately the size that NCEMC would have required.

unsuccessful, although there was conflicting testimony as to why. CPL asserted that Georgia Power's asking price was too high for NCEMC; NCEMC offered testimony that in order for it to market wholesale power in North Carolina that it generated at the joint Georgia Power plant in Georgia, CPL would have had to supply NCEMC with "back-up power," which CPL declined to do because it did not have "back-up power" available at the time.

NCEMC's efforts to generate its own power and enter the wholesale power market through acquiring a part interest in a generation plant came to fruition, however, when it purchased a part interest in Duke Power's Catawba plant for $ 1 billion in 1980. After Catawba was completed, NCEMC used the power generated under its part interest there to enter the wholesale power market in all of the areas of North Carolina where its retail cooperatives are located. [2] 5 At the conclusion of the NCEMC's evidence, the district court granted CPL's *Fed. R. Civ. P. 50* motion for a directed verdict. Judge Bullock stated **[*7]** from the bench that NCEMC's claim failed because even if CPL had a monopoly in the market for wholesale power, it had no duty to sell NCEMC an equity interest in one of its plants. Judge Bullock supplemented his oral statement with a brief written opinion indicating that NCEMC had not presented evidence from which a reasonable jury could find:

> (1) that the relevant market was other than the generation market, (2) that Defendant possessed monopoly power in the generation market, (3) that Defendant caused injury or fact of damage to Plaintiffs in the generation market, (4) that Defendant's conduct improperly excluded Plaintiffs from the wholesale requirements power market, and (5) that Defendant's conduct was not as consistent with permissible competition as with the illegal exercise of monopoly power.

NCEMC appeals from the district court's directed verdict.

[*8] II

NCEMC contends that the district court erred in granting a directed verdict for CPL. Taken in pieces, NCEMC's argument is as follows. CPL had monopoly power in the market for wholesale power in those areas of North Carolina where CPL operated. By initiating discussions with CPL about acquiring a part interest in one of CPL's generation plants, NCEMC sought to compete with CPL in this market for wholesale power. The failure of CPL and NCEMC to reach an agreement for NCEMC to purchase a part interest in a CPL generation plant constituted a refusal by CPL to sell it such an interest. Because this refusal was motivated by CPL's desire to avoid competition in its wholesale power market, CPL's actions violated Section 2 of the Sherman Act.

HN1[] We review *de novo* the district court's decision to grant a directed verdict for CPL, *Gairola v. Virginia Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985)*, and find that its decision was correct. Even if NCEMC established that the relevant market in this case was the market for wholesale power in those areas of North Carolina where CPL sold wholesale power and CPL possessed monopoly power in this **[*9]** market, [3] NCEMC's claim must fail.

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[2] A negotiator for NCEMC, Robert Cleveland, testified that CPL, Virginia Power, and Duke Power all refused from 1974-1976 to sell NCEMC a part interest in one of their generation plants unless NCEMC would agree to sell the power generated from the joint plant only in those areas of the state where their company controlled the wholesale market. As a result, Cleveland stated that NCEMC was precluded from purchasing a joint interest in a single generation plant owned by CPL, Duke Power, or Virginia Power, and using that joint interest to generate power for all of its cooperatives throughout North Carolina. Retail cooperatives in CPL's areas, thus, were precluded from having NCEMC purchase a part interest in a Duke Power or a Virginia Power plant and sell the power from its part interest to them.

The strength of the wholesale companies' refusal, however, is questionable given that Duke Power later sold NCEMC the part interest in its Catawba plant and allowed NCEMC to sell the wholesale power generated at Catawba throughout North Carolina. There was some evidence that Duke Power dropped its requirement that power generated at Catawba only be sold in areas of the state where Duke Power controlled the wholesale market when REA, which helped finance NCEMC's purchase of the part interest in Catawba, asked Duke Power to drop this requirement.

[3] There are obvious problems with defining the areas in which CPL sold wholesale power as the relevant market, and the district court did not find that NCEMC presented evidence to establish such a market. Because NCEMC's Section 2 claim fails for other reasons, however, we need not address this issue.

HN2[] "[A] firm with lawful monopoly power has no general duty to help its competitors . . . ." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 375 (7th Cir. 1986)*, *cert. denied*, *480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574 (1987)*. The lone exception to this"no-duty-to-helpcompetitors" rule is the "essential facilities doctrine." *Olympic Equipment Leasing Co., 797 F.2d at 376*. For a monopolist to be liable under the essential facilities doctrine, a plaintiff must show: "(1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility." *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544 (4th Cir.)*, *cert. denied*, *116 L. Ed. 2d 39, 112 S. Ct. 64 (1991)*; *Advanced Health-Care Services v. Radford Community Hosp., 910 F.2d 139, 150 (4th Cir. 1990)*; *MCI Communications Corp.* ***[*10]*** *v. American Tel. & Tel. Co., 708 F.2d 1081, 113233 (7th Cir.)*, *cert. denied*, *464 U.S. 891 (1983)*. The plaintiff has the burden of proving each of these elements. *Laurel Sand, 924 F.2d at 544*.

We need not examine all of these elements because we find that NCEMC failed to meet the second one. ***HN3***[] To satisfy the second element, NCEMC had to show that, in seeking to generate its own power, it had no "economically feasible" alternative to purchasing a part interest in a CPL generation plant. *MCI Communications, 708 F.2d at 1133*. *See* Phillip E. Areeda and Herbert Hovencamp, ***Antitrust Law*** P 736.2, at 808 (1991 Supp.) ("An essential facility is, at minimum, a resource possessed by the defendant that is vital to the plaintiff's competitive viability.").

[*11] NCEMC failed to make this showing. One alternative for NCEMC to purchasing a part interest in a CPL generation plant was purchasing 7 a part interest in a generation plant owned by one of the other large power companies in the region. NCEMC did not demonstrate that it was not economically feasible to purchase such a part interest from any of these companies; in fact, the evidence appears to have established that it was quite feasible. NCEMC conducted serious negotiations with both Virginia Power and Georgia Power over purchasing a part interest in one of their plants, and only in the case of the Georgia Power negotiations did NCEMC present any evidence that such a purchase was not feasible. [4] In addition, four years after CPL and NCEMC had failed to come to agreement, NCEMC actually purchased a part interest in Duke Power's Catawba generation plant. In light of this evidence, no reasonable jury could have found that buying a part interest in a generation plant from a company other than CPL was not economically feasible for NCEMC. *See* *City of Malden v. Union Elec. Co., 887 F.2d 157, 162 (8th Cir. 1989)* (reasonable alternatives existed to a monopolist's **[*12]** transmission lines when neighboring companies had available, though more expensive, transmission lines). [5]

[*13] In short, NCEMC's only possible claim that CPL violated section 2 of the Sherman Act by refusing to sell it a part interest in a CPL generation plant was under the "essential facilities" doctrine. NCEMC clearly did not have a valid claim under this doctrine because it failed to show that, in seeking to generate its own power, it had no economi 8 cally feasible alternative to purchasing a part interest in a CPL plant. The district court, therefore, correctly dismissed NCEMC's claim. [6]

III

For the reasons stated, we affirm the district court's order dismissing NCEMC's claim.

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[4] NCEMC asserts that the reason it did not buy a part interest in a Georgia Power plant was that, in order to use the power generated at the Georgia Power plant, it needed CPL to supply it with"back-up power" and CPL could not supply this "back-up power" at the time it was requested.

[5] NCEMC asserts that purchasing a part interest in one of Virginia Power's or Duke Power's generation plants and using it to produce power in the market at issue here, the market where CPL generated power, was impossible because Virginia Power and Duke Power refused to sell NCEMC a part interest in a generation plant that could be used to supply wholesale power in areas of North Carolina controlled by CPL. We find this assertion untenable because four years after NCEMC's claim arose, Duke Power agreed, without any great fight, to sell NCEMC a part interest in a generation plant that NCEMC could use to market wholesale power throughout North Carolina, including in areas controlled by CPL.

[6] NCEMC also contends that the district court abused its discretion in not admitting a number of its exhibits. We find this contention without merit. In addition, we deny NCEMC's motion to strike a portion of CPL's brief.

AFFIRMED

Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.

United States Court of Appeals for the Second Circuit

November 9, 1992, Argued ; June 10, 1993, Decided

Docket No. 92-7639

Reporter
996 F.2d 537 *; 1993 U.S. App. LEXIS 13622 **; 1993-1 Trade Cas. (CCH) P70,270

CAPITAL IMAGING ASSOCIATES, P.C., Plaintiff-Appellant, v. MOHAWK VALLEY MEDICAL ASSOCIATES, INC., MOHAWK VALLEY PHYSICIANS HEALTH PLAN, INC., Defendants-Appellees.

Prior History: [1]** Capital Imaging Associates, P.C., plaintiff in a private antitrust action brought under the Sherman Act, appeals from a memorandum and order entered May 8, 1992 by the United States District Court for the Northern District of New York (McCurn, C.J.), granting summary judgment to defendants Mohawk Valley Medical Associates, Inc. and Mohawk Valley Physicians Health Plan, Inc.

Disposition: Affirmed.

Core Terms

antitrust, rule of reason, district court, market power, conspiracy, radiology, summary judgment, membership, horizontal, Sherman Act, conspire, patients, anti trust law, enrollees, staff, referrals, vertical, effects, genuine, unreasonable restraint, medical services, service area, defendants', competitor, imaging, restraint of trade, initial burden, medical care, pro-competitive, associations

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Summary Judgment, Opposing Materials**

Summary judgment is appropriately entered for the moving party as a matter of law when all the papers before a trial court show that there are no genuine issues of material fact. *Fed. R. Civ. P. 56(c)*. The litigant seeking summary disposition of a case bears the initial burden of demonstrating, through affidavits or otherwise, the absence of genuine factual issues. If the moving party meets its burden, the non-moving party then has the obligation to produce probative evidence supporting its view that a dispute exists. The party opposing summary judgment must do more than simply show that there is some metaphysical doubt as to the material facts, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited; the non-moving party must set forth facts that tend to preclude an inference of permissible conduct.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN2[] **Standards of Review, De Novo Review**

In reviewing a summary judgment challenge, the court views the evidence in a light most favorable to the non-moving party, and applies a de novo standard of review to ensure that the substantive ***antitrust law*** was correctly applied.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Sherman Act, Claims**

See *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN4[] **Practices Governed by Per Se Rule, Boycotts**

Conduct considered illegal per se is invoked only in a limited class of cases, where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination. Per se violations include, for example, horizontal and vertical price-fixing, division of a market into territories, certain tying arrangements, and some group boycotts involving concerted refusals to deal with a competitor. In discussing group boycotts the Supreme Court cautions against application of the per se rule against professional associations because the economic impact of professional activities is so difficult to track.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Evidence > Burdens of Proof > General Overview

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In the general run of cases, a plaintiff must prove an antitrust injury under the rule of reason. Under this test, the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Evidence > Burdens of Proof > General Overview

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive "redeeming virtues" of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior in antitrust cases. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Evidence > Burdens of Proof > General Overview

HN8[] **Conspiracy to Monopolize, Sherman Act**

The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred. A plaintiff must prove the defendants illegally conspired. The plaintiff's evidence must prove the actors had an intent to adhere to an agreement that was designed to achieve an unlawful objective; it is not required that the proof show the actors specifically intended to restrain trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Rule of reason analysis requires antitrust plaintiffs to bear initial burden of demonstrating that defendants' conduct or policy has had a substantially harmful effect on competition. The plaintiff may satisfy this burden without detailed market analysis by offering proof of actual detrimental effects, such as a reduction of output. Yet, where plaintiff is unable to demonstrate such actual effects, it must at least establish that defendants possess the requisite market power so that their arrangement has the potential for genuine adverse effects on competition.

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WILLIAM G. KOPIT, New York, New York (Clifford E. Barnes, Epstein, Becker & Green, P.C., New York, New York; J. Edward Neugebauer, Washington, D.C., of counsel), for Defendants-Appellees.

Judges: Before: NEWMAN, CARDAMONE, and MAHONEY Circuit Judges.

Opinion by: CARDAMONE

Opinion

[*538] CARDAMONE, *Circuit Judge*:

We have before us on this appeal a claimed violation of the Sherman Antitrust Act. Certainly one strand of the philosophical underpinning leading to the passage of that Act is derived from the thinking of John Stuart **[*539]** Mill, who, in his influential essay "On Liberty," observed: "trade is a social act. Whoever undertakes to sell any description of goods to the public, does what affects **[**2]** the interest of other persons, and of society in general; and thus his conduct, in principle, comes within the jurisdiction of society," J.S. Mill, *On Liberty*, Chapt. V, 303 (Harv. Class., Eliot ed., 1909). Plainly, not all competitive conduct that injures another allows resort to laws regulating trade. ***Antitrust law*** is not intended to be as available as an over-the-counter cold remedy, because were its heavy power brought into play too readily it would not safeguard competition, but destroy it. Determining whether conduct allegedly in restraint of trade violates the Sherman Act requires careful analysis and fine discernment between those actions that generally tend to inhibit competition and those that either tend to promote it or at least not injure it. Such an analysis is our task on the present appeal.

A private radiology group brought this antitrust action in the district court against a health maintenance organization and the group of physicians organized to provide medical care to the health plan's enrollees. The radiologists complained that they were improperly excluded from providing services to the patients of the health care purveyor. Such exclusion, they argued, constituted **[**3]** a violation of the Sherman Act. After limited discovery, the district court granted the defendants summary judgment. In so doing, it examined only the "vertical" relationship between the health maintenance organization and its physicians' association, which the plaintiff radiologists argue was error. Although we agree with the radiology group that certain "horizontal" aspects of the defendants' practices improperly were not considered, we affirm the judgment of the district court, though for somewhat different reasons, because it reached the correct result.

BACKGROUND

A. *The Parties*

Capital Imaging Associates, P.C. (Capital, plaintiff or appellant) is a private radiology group of doctors who practice in Latham, a suburb of Albany, located at the northern tip of Albany County, New York, only a few miles from the borders of Schenectady, Saratoga, and Rensselaer Counties. Capital operates as a referral practice, that is, its physicians do not treat their own patients; rather, they supervise the performance of diagnostic radiological procedures on patients referred to the group by general clinicians, interpret the resulting images, and report their findings to the primary care physicians. **[**4]** The radiology group offers a full range of diagnostic imaging services, including such specialized radiological procedures as ultrasound, Magnetic Resonance Imaging (MRI), and Computerized Axial Tomography (CAT) scanning. The only comparable full-service radiology practice within a 100-mile radius of Albany County is Two Rivers Radiology, P.C. (Two Rivers), which has two offices, one in Rensselaer County and the other in Albany County directly across the street from Capital in Latham.

Mohawk Valley Medical Associates (Mohawk Valley, defendant or appellee) is an independent association of private physicians providing medical care to over 100,000 enrollees in appellee Mohawk Valley Physicians Health Plan (Plan). Mohawk Valley and the Plan were defendants at the district court. Together the physicians' association and the Plan constitute an independent practice association (IPA) model health maintenance organization (HMO). Under the IPA-HMO arrangement, the managed health care purveyor (in this case the Plan) contracts with the physicians' practice association, Mohawk Valley, to provide a full range of medical services for the HMO's enrollees, who must then go to Mohawk Valley physicians **[**5]** for all their medical care needs.

According to the terms of their agreement, the Plan purchases medical services from Mohawk Valley at a fixed contract or capitation rate per individual health plan enrollee. Although the arrangement among the Mohawk Valley physicians apparently does not permit price competition among the doctors, the capitation system promotes efficiency and is viewed as pro-competitive because it gives the independent practice physicians an incentive to keep medical costs down. That is, unless Mohawk Valley agrees to a sufficiently **[*540]** low capitation rate, the Plan will be unable to compete with other health care providers in the private insurance market, in which case the Mohawk Valley physicians will not receive a steady stream of patients and income from the HMO. *See generally U.S. Healthcare, Inc. v. Healthsource, Inc.*, 1993 WL 47370 (1st Cir. Feb. 26, 1993) (describing HMO cost containment procedures).

In order to operate as an HMO in New York, the Plan was required to apply for and receive a certificate of authority from the New York State Department of Health (Department). The Department regulates HMOs to ensure that patients are afforded with comprehensive **[**6]** and continuous medical care. It also certifies the service area within which an HMO may offer its benefits package. *See* *N.Y. Pub. Health Law § 4402* (McKinney 1985). At the commencement of this lawsuit, the Plan was licensed to operate in several central and upstate New York communities, but not in Albany County.

Mohawk Valley is also regulated by the Department. In accordance with state law it is obligated to, *inter alia*, staff itself with physicians and other health care professionals as necessary to meet the full needs of the Plan's enrollees, and to establish credential requirements for membership in its practice association. Consonant with these obligations, Mohawk Valley promulgated standards for admission of doctors into its association. To be admitted, a member physician must have (1) privileges in hospitals participating with the Plan, (2) offices within the state-certified service area, and (3) staff and facilities to provide adequate and continuous care to Plan patients. Limited exceptions to these admission requirements have been made when a pressing need exists for additional primary care physicians or specialists.

An application for membership is reviewed by the **[**7]** Mohawk Valley credentials committee, which makes a recommendation to its board of directors. According to the association's guidelines, the board may either approve the admission request or inform the applicant that it intends to deny it. If the board chooses the latter course, the applicant may request a hearing, during which he or she may present materials to support the application.

B. *The Complaint*

This litigation came about as a result of the denial of appellant Capital's application for membership in Mohawk Valley. Appellant alleges that on February 24, 1987 it sent a written request for admission into the practice association, which was denied on July 21 because Capital was located outside of the Plan's designated service area. According to Capital, its application was spurned without prior notice and an opportunity for a hearing before the association's board of directors, procedures mandated by Mohawk Valley's standards for admission. Moreover, appellant contends the purported reason for denial is inconsistent with the Plan's description of its service area in its promotional literature to enrollees and with Mohawk Valley's treatment of other Latham-based physicians **[**8]** seeking membership.

In support of that contention, Capital points out that following the veto of its admissions application, it was asked to bid on an exclusive one-year contract to provide imaging services for Mohawk Valley. In October 1987 the association's board of directors rejected Capital's bid and voted instead to award the contract to Two Rivers because Two Rivers' bid was $ 40 per scan lower. Appellant believes the bidding process was flawed and provides further evidence of appellees' hostility towards it.

As a result of these events, on December 5, 1988, Capital commenced the instant litigation against both appellees in the United States District Court for the Northern District of New York (McCurn, C.J.). The complaint alleged that commencing September 1986 and continuing to the present time, appellees, along with Two Rivers and other unnamed parties, engaged in a conspiracy to exclude Capital from membership in the independent practice association. According to Capital this action constitutes an unlawful combination in restraint of trade in violation of *§ 1* of the Sherman Act and an attempt to monopolize trade and commerce in violation of § 2 of the Sherman Act. The complaint **[**9]** further alleged that these activities violate **[*541]** New York State's General Business Law and the common law barring unfair competition.

C. *Prior Proceedings*

Appellees made a motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)* and for failure to state a claim under *Rule 12(b)(6)*. They also moved, in the alternative, for summary judgment under *Fed. R. Civ. P. 56* on the ground that there were no genuine issues of material fact. In a memorandum and order dated November 28, 1989, the district court granted the *Rule 12(b)(6)* motion with respect to Capital's claim of monopolization under Sherman Act § 2 because the court found it to be "against logic." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs. (Capital I), 725 F. Supp. 669, 678 (N.D.N.Y. 1989)*. By contrast, it held that Capital's allegation of antitrust conspiracy under Sherman Act *§ 1* was sufficient to withstand a dismissal motion. With respect to this claim, the court reserved decision on appellees' motion for summary judgment and granted Capital limited discovery under *Fed. R. Civ. P. 56(f)*. *Id. at 679-80*. **[**10]**

Following the completion of discovery, appellees renewed their motion for summary judgment, which the district court then granted on May 8, 1992. *See* *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs. (Capital II), 791 F. Supp. 956, 967-68 (N.D.N.Y. 1992)*. In so doing, the court noted that the plaintiffs demonstrated neither an illegal antitrust combination nor an unreasonable restraint of trade -- the two essential elements to a *§ 1* claim. *Id. at 968*. The only evidence of a conspiracy to exclude Capital from membership in Mohawk Valley was the imaging award to Two Rivers and even if, as Capital alleged, the bidding process was flawed, it did not indicate, so the district court thought, an unlawful conspiracy, especially in light of Capital's concession that the contract between Two Rivers and Mohawk Valley was not in itself an antitrust violation. *See* *id. at 963-64*. In reaching the conclusion that Capital failed to demonstrate an unreasonable restraint of trade, the court reasoned that the Plan's and Mohawk Valley's exclusivity practice constituted "a vertical, nonprice restraint" **[**11]** and that such a restraint needed to be analyzed under the rule of reason. *Id. at 964* (quoting *Capital I, 725 F. Supp. at 677*). Employing such rule, it held that Capital, "as a preliminary matter, must demonstrate that defendants have significant market power in the relevant market," and determined that the plaintiff failed to come forward with such proof. *Id. at 966-67*. The trial court stated that even though appellees' conduct may have adversely impacted appellant as an individual competitor, competition as a whole was not harmed. It refused to entertain Capital's state law claims since, having dismissed the federal causes of action, it had discretion to decline to exercise pendent or supplemental jurisdiction over them. *See* *id. at 968*. This appeal followed.

DISCUSSION

I Summary Judgment in the Antitrust Arena

Because this appeal arises from a grant of summary judgment dismissing a complaint, we discuss the rules guiding application of that remedy in the antitrust context. Capital appeals only that portion of the final order summarily dismissing its *§ 1* antitrust cause of action. Several courts have noted summary **[**12]** disposition of antitrust cases is difficult to obtain because of their inherent factual complexity. *See* *Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 68 (2d Cir. 1984)*; *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409* (9th Cir.), *cert. denied*, *116 L. Ed. 2d 639, 112 S. Ct. 617 (1991)*. But that does not mean summary disposition is thereby precluded or even disfavored in ***antitrust law***; rather, as the Supreme Court observed in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 593-94, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, summary judgment remains a vital procedural tool to avoid wasteful trials and may be particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces. *See* *Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991)* (*en banc*), *cert. denied*, *117 L. Ed. 2d 137, 112 S. Ct. 973 (1992)*; *Indiana Grocery, Inc. v.* ***[*542]*** *Super Valu Stores, Inc., 864 F.2d 1409, 1412 (7th Cir. 1989)*.

HN1[] Summary judgment is appropriately entered **[**13]** for the moving party as a matter of law when all the papers before a trial court show that there are no genuine issues of material fact. *Fed. R. Civ. P. 56(c)*. The litigant seeking summary disposition of a case bears the initial burden of demonstrating, through affidavits or otherwise, the absence of genuine factual issues. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. If the moving party meets its burden, the non-moving party then has the obligation to produce probative evidence supporting its view that a dispute exists. The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts . . ., the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita, 475 U.S. at 586-87* (quoting *Fed. R. Civ. P. 56(e)*). In the context of antitrust litigation the range of inferences that may be drawn from ambiguous evidence is limited; the non-moving party must set forth facts that tend to preclude an inference of permissible conduct. *Id. at 587-88*; *accord* *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252* **[**14]** (2d Cir.), *cert. denied*, *484 U.S. 977, 98 L. Ed. 2d 487, 108 S. Ct. 489 (1987)*.

Our role is to determine whether the district court correctly ruled that there was no genuine factual issues for trial as to Capital's claim of a *§ 1* Sherman Act violation, thereby entitling the appellees to judgment as a matter of law. *See* *H.L. Hayden Co. of N.Y. v. Siemens Medical Sys., Inc., 879 F.2d 1005, 1011 (2d Cir. 1989)*. ***HN2***[] In carrying out this task, we view the evidence in a light most favorable to appellant, the non-moving party, *see* *Burtnieks v. City of*

New York, 716 F.2d 982, 985 (2d Cir. 1983), and apply a *de novo* standard of review to ensure that the substantive ***antitrust law*** was correctly applied. *See* *Hayden, 879 F.2d at 1011*.

II The Sherman Act, *§ 1*

A. *Overview*

In reviewing the substantive law, it is initially useful to set out the general contours of *§ 1* of the Sherman Act (Act), which states: ***HN3***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." *15 U.S.C. § 1* ***[**15]*** *(1988)*. Thus, according to the statute, a plaintiff claiming a *§ 1* violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities. Unilateral conduct on the part of a single person or enterprise falls outside the purview of this provision in the ***antitrust law***. *See* *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *Belfiore v. New York Times Co., 826 F.2d 177, 181-82 (2d Cir. 1987)*, *cert. denied*, *484 U.S. 1067, 98 L. Ed. 2d 994, 108 S. Ct. 1030 (1988)*. For that reason, an agreement between a parent corporation and its wholly-owned subsidiary or its agents is not a concerted action for purposes of the Act. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*.

If a plaintiff establishes the existence of an illegal contract or combination, it must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade either *per se* or under the rule of reason. ***HN4***[] Conduct considered illegal *per se* is invoked only in a limited class of cases, *see* *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, **[**16]** where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are "conclusively presumed illegal without further examination." *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. *Per se* violations include, for example, horizontal and vertical price-fixing, *see* *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; *Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 405, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*; division of a market into territories, *see* *United States v. Topco Assocs., 405 U.S. 596, 609, 92 S. Ct.* ***[*543]*** *1126, 31 L. Ed. 2d 515 (1972)*; certain tying arrangements, *see* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; and some group boycotts involving concerted refusals to deal with a competitor, *see* *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211-12, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*. In discussing group boycotts the Supreme Court cautions against application of the *per se* rule against professional associations because the economic impact of professional activities **[**17]** is so difficult to track. *See* *Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*.

Most cases fall outside these narrow, carefully demarcated categories held to be illegal *per se*. ***HN5***[] In the general run of cases a plaintiff must prove an antitrust injury under the rule of reason. Under this test plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Insisting on proof of harm to the whole market fulfills the broad purpose of the ***antitrust law*** that was enacted to ensure competition in general, not narrowly focused to protect individual competitors. *See, e.g.*, *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 1893-94, 109 L. Ed. 2d 333 (1990)*; *Austin v. McNamara, 979 F.2d 728, 739 (9th Cir. 1992)*. Were the law construed otherwise, routine disputes between business competitors would be elevated to the status of an antitrust action, thereby trivializing the Act because of its too ready availability. **[**18]** *See* *Oksanen, 945 F.2d at 708*; *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986)* ("antitrust laws are not balm for rivals' wounds").

HN6[] After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive "redeeming virtues" of their combination. 7 Phillip Areeda, ***Antitrust Law*** P 1502, at 371 (1986); *accord* *Bhan, 929 F.2d at 1413*. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole. *See* Bhan, 929 F.2d at 1413; *see also* Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1493-95 (D.C. Cir. 1984); Areeda, *supra*.

HN7[] Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior. The classic articulation **[**19]** of how the rule of reason analysis should be undertaken is found in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918), where Justice Brandeis speaking for the Supreme Court said:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

This classic test is easier to state than to apply. It at least seems clear that the factfinder must decide the overarching question of whether the **[**20]** challenged action purports to promote or to destroy competition. Resolving this under the rule of reason approach requires a careful and complete analysis of the competitive effects of the challenged restraint.

Capital avers it has set forth enough facts to meet its threshold burden of showing that appellees' actions constituted an antitrust conspiracy; it also contends it has demonstrated an unreasonable restraint of trade **[*544]** under the rule of reason sufficient to withstand appellees' motion for summary judgment. It further asserts that in finding no horizontal antitrust conspiracy, the district court was led by this error into employing an improper analytical approach to the rule of reason, focusing too narrowly on appellees' market share.

B. *Contract, Combination or Conspiracy*

We address this contention in light of the § 1 principles just reviewed. Our attention is first directed to whether the district court's failure to find an antitrust conspiracy was predicated on its erroneous focus on the vertical relationship between the health Plan and Mohawk Valley, the physicians' group with which it contracted. *See* Capital II, 791 F. Supp. at 963; Capital I, 725 F. Supp. at 677. **[**21]** This ordinary contract between a buyer and seller of medical services at different levels in the market structure, Capital itself acknowledges, poses few antitrust problems. But, its argument goes, the district court ignored the antitrust concerns that arise from the horizontal collaboration of competing independent physicians that make up the roster of Mohawk Valley. This association of sellers of medical services, Capital continues, conspired illegally to boycott Capital, another seller of the same medical services.

Appellees have two responses to appellant's allegation of horizontal collaboration. Initially, they declare the physicians associated with Mohawk Valley are a single entity economically, incapable of forming a § 1 conspiracy among themselves. Next they declare that even were this not to be the fact, appellant failed to proffer sufficient proof of an actual illegal horizontal boycott to negate permissible inferences of proper conduct on appellees' part.

1. *Capacity to Conspire*. The first question is -- are member physicians of an independent practice association legally capable of conspiring among themselves? We think the answer is "yes," they have such a capacity. **[**22]** The nature of the combination here at issue is similar to that described in Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810 (11th Cir.), *cert. denied*, *495 U.S. 924, 109 L. Ed. 2d 322, 110 S. Ct. 1960 (1990)*. The plaintiff physician in *Bolt* was denied staff membership and privileges in several Florida hospitals, just as Capital here was denied membership in Mohawk Valley's practice association. Dr. Bolt filed suit alleging the defendant hospitals conspired

with their medical staffs to restrain competition in violation of *§ 1* of the Sherman Act. The Eleventh Circuit ruled that nothing prevents members of a medical staff from conspiring, if they are so inclined, with one another. Each doctor practices medicine in his or her own individual capacity; each is a "separate economic entity potentially in competition with other physicians." *Id. at 819*; *accord* *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1455-56 (11th Cir. 1991)*.

The Fourth Circuit sitting *en banc* similarly recognized that hospital staff physicians have independent and competing economic interests. When such is the case, the court **[**23]** reasoned, the doctors are not a single entity, as Mohawk Valley insists it is, and have the ability "to conspire as a matter of law." *Oksanen, 945 F.2d at 706*. But in *Oksanen* the conspiratorial capacity was not found as a fact because the physicians lacked final decisionmaking authority, that authority having been vested in the hospital board of directors. *Id*. Hence, the defendant doctors were corporate agents of the hospital and not separate economic actors. *Cf*. *Copperweld, 467 U.S. at 769*.

The reasoning of *Bolt* and *Oksanen* is persuasive and we adopt it. Mohawk Valley is a multi-member association of competing doctors, including radiologists, all of whom are in private practice for themselves and who allegedly joined together to deny Capital access to the HMO's patients. As members of an independent practice association, the doctors are not staff physicians employed by the HMO on a salaried basis, that is, they are not agents of the HMO. Instead, these health care professionals are independent practitioners with separate economic interests. *See* Clark Havighurst, *Doctors and Hospitals: An Antitrust* **[**24]** *Perspective on Traditional Relationships*, *1984 Duke L.J. 1071, 1073* n.3 (describing HMO arrangements with physicians). Accordingly, the physicians associated together in Mohawk Valley had the **[*545]** capacity to conspire among themselves much like the members of the medical staff in *Bolt*.

2. *Actual Conspiracy*. Our finding of a legal capacity to conspire does not resolve the issue of whether *§ 1* of the Sherman Act has been shown to be violated. ***HN8***[] The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred. A plaintiff must prove the defendants illegally conspired. *See* *Todorov, 921 F.2d at 1456*; *cf*. *Monsanto, 465 U.S. at 763-64*. As stated before, this means that a plaintiff -- to withstand defendants' summary judgment motion -- must present evidence that casts doubt on inferences of independent (not combined) action or proper conduct by defendants. *See* *Matsushita, 475 U.S. at 588*. The plaintiff's evidence must prove the actors had an intent to adhere to an agreement that was designed to achieve an **[**25]** unlawful objective; it is not required that the proof show the actors specifically intended to restrain trade. *See* *Bolt, 891 F.2d at 819-20*.

Capital has made such a showing. It has presented circumstantial evidence that Mohawk Valley excluded it from the practice association in order to insulate Mohawk Valley's member radiologists from increased competition. For example, Capital has shown that Mohawk Valley recruited primary care doctors -- who, like Capital, were located in Latham -- because they could attract new patients and bring increased referrals to Mohawk Valley medical specialists. By contrast, Mohawk Valley excluded Capital's referral practice because accepting it would only increase internal competition among its members for radiology referrals.

As further circumstantial evidence of an agreement to boycott Capital, appellant demonstrated that its application for admission was denied despite its offer to open an office within the Plan's service area and despite the New York State Department of Health's lack of objection to the inclusion of a medical purveyor located outside the HMO's service area. Again, Capital noted its application was denied **[**26]** by Mohawk Valley without adherence to its membership admission practices, which require pre-rejection notification and an opportunity for a hearing. Ignoring its own written standards in the case of Capital's application for membership strongly suggests the objection to that application based on appellant's geographic location may have been a sham.

This evidence -- when viewed as it must be in a light most favorable to appellant -- tends to prove "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 768*. Thus, the district court erred when it failed to find a *§ 1* contract, combination or conspiracy. It apparently feared that such a finding would create a danger that "all HMOs would be illegal as *per se* violations of the antitrust laws." *Capital II, 791 F. Supp. at 963*. This concern is misplaced, at least with respect to the finding of a horizontal conspiracy. Our view does not interfere with either an HMO's ability to enter into vertical agreements with doctors associations or with physicians' abilities to regulate membership in practice associations for medically **[**27]** supportable reasons. Concluding that conspiracy was sufficiently shown in the instant case, at least for purposes of escaping summary judgment, leads to the second question in antitrust analysis: whether the defendants' action constitutes an unreasonable restraint of trade.

C. *Unreasonable Restraint of Trade*

Despite its determination that no antitrust conspiracy existed, the district court undertook an assessment of the alleged restraint under the rule of reason. *See* *Capital II, 791 F. Supp. at 964*. Capital does not contend on appeal that the district court erred in utilizing the rule of reason instead of the rule of *per se* illegality. It apparently recognizes that such an argument would be futile given not only the Supreme Court's caution about extension of the *per se* doctrine into new areas, *see* *Indiana Fed'n of Dentists, 476 U.S. at 458-59*, but also the recognized procompetitive virtues of independent practice association forms of HMOs. Rather, appellant argues the district court's inquiry was fatally flawed because it viewed the relevant restraint as being vertical in nature. This misapprehension, according **[**28]** **[*546]** to Capital, led the court to focus too narrowly on the appellees' market power and ignore the other necessary elements of a rule of reason inquiry into horizontal restraints.

The precise role that market power plays in rule of reason analysis of horizontal combinations or conspiracies is a matter of some dispute. Some courts and commentators have argued for a "safe harbor" approach. Thomas M. Jorde & David J. Teece, *Rule of Reason Analysis of Horizontal Agreements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 Antitrust L.J. 579, 606 (1993). Under this concept, unless an antitrust plaintiff makes a threshold demonstration that the defendants possess significant market power, the defendants' cooperative effort is immune from further rule of reason inquiry. *See* *Polk Bros. v. Forest City Enters., 776 F.2d 185, 191 (7th Cir. 1985)*. *Compare* *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 253 U.S. App. D.C. 142, 792 F.2d 210, 229 (D.C. Cir. 1986)* (Bork, J.) (employing safe harbor analysis), *cert. denied*, *479 U.S. 1033, 93 L. Ed. 2d 834, 107 S. Ct. 880 (1987) with* *id. at 230* **[**29]** (Wald, J. concurring) (criticizing this method and arguing that reliance on market power alone is inappropriate).

The Supreme Court has never explicitly endorsed such a preclusive threshold approach. *See* *Indiana Fed'n of Dentists, 476 U.S. at 460*; *National Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 108-09, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*. Nor have we embraced the view that market power is the *sine qua non* of antitrust liability. *See* *North American Soccer League v. National Football League, 670 F.2d 1249, 1259-60* (2d Cir.) (market power not mentioned as threshold factor), *cert. denied*, *459 U.S. 1074, 74 L. Ed. 2d 639, 103 S. Ct. 499 (1982)*; *see also* *State of N.Y. v. Anheuser-Busch, Inc., 673 F. Supp. 664, 667-68 (E.D.N.Y. 1987)* (assessing, in a vertical restraint case, this Court's view of the role of market power). Still, we recognize that in most cases where horizontal restraints on competition are alleged, market power remains a highly relevant factor in rule of reason analysis because market power bears a particularly strong relationship to **[**30]** a party's ability to injure competition. *Cf*. *Cox Broadcasting Corp., 730 F.2d at 69-70*.

HN9[] Rule of reason analysis requires the antitrust plaintiff to bear the initial burden of demonstrating that the defendants' conduct or policy has had a substantially harmful effect on competition. The plaintiff may satisfy this burden without "detailed market analysis" by offering "'proof of actual detrimental effects, such as a reduction of output.'" *Indiana Fed'n of Dentists, 476 U.S. at 460-61* (quoting Areeda, *supra*, P 1511, at 429). Yet, where the plaintiff is unable to demonstrate such actual effects, it must at least establish that defendants possess the requisite market power so that their "arrangement has the potential for genuine adverse effects on competition." *Id*. Market power in that way serves as a "'surrogate for detrimental effects,'" *id*. (quoting Areeda, *supra*, P 1511, at 429), because

> firms lacking substantial market power act against their own self-interest when they raise prices, reduce output, or otherwise restrain trade. The marketplace itself will discipline such misguided efforts as buyers **[**31]** switch to substitutes or new sources of supply enter the market. When market power is lacking, antitrust litigation is not needed to police restraints and maintain competition . . . .

Jorde & Teece, *supra*, at 602-03.

In the case at hand, Capital believes its exclusion from Mohawk Valley has had actual detrimental effects: an increase in prices for and a deterioration of the quality of radiological services to Plan enrollees. But, Capital concedes in its brief that whether or not it is admitted into the physicians' association, the fee for radiological services would remain the same. In addition, Capital failed to adduce significant evidence that its exclusion has, in fact, resulted in any decrease in the quality of radiology services to the HMO's patients. Therefore, Capital has not made an adequate showing of detrimental effects to obviate the need to show that appellees possess market power sufficient to stifle competition.

[*547] Thus, turning to the question of market power, we agree with the district court that Capital has failed to demonstrate that a genuine issue of material fact exists with respect to appellees' strength in the marketplace. Capital defined the relevant geographic **[**32]** market as that area lying within a 100-mile radius of Albany, New York, and it defined the product market as the market for radiological services. *See* *Capital II, 791 F. Supp. at 965*. Appellees have accepted these market boundaries and have presented proof that within this 100-mile radius, the Plan's 100,500 enrollees represent only 2.3 percent of the region's HMO subscribers and Mohawk Valley's membership includes only 6.75 percent of the region's physicians. Once competition from non-HMO sources within the 100 mile radius is included, the appellees' market share drops even further to merely 1.15 percent of the total insured patient population. Capital has not contravened the *accuracy* of these figures. Consequently, it is clear that with such a *de minimis* market share, appellees lack the power to injure competition or force consumers to accept supracompetitive health care premiums or lower quality medical care.

Capital objects that reliance on these statistics is improper because Mohawk Valley competes in the market for radiology referrals and not in the health insurance market, within which the Plan competes. We disagree. The radiology referrals **[**33]** controlled by the appellees are those referrals emanating from the HMO's enrollees and, therefore, focusing on the HMO's share of the consumer population is appropriate. Appellant next attempts to have us consider a new smaller geographic market within the 100-mile radius of Albany. This new market definition was not presented to the trial court and comes too late for our consideration. *See* *Singleton v. Wulff, 428 U.S. 106, 120, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)*. Moreover, even if we were to accept appellant's attempted new market definition, Capital's cause of action still would not withstand summary judgment because it has presented us with no claim -- either in its briefs or after repeated inquiries at oral argument -- that it would be able to present reliable data indicating what share of this new smaller market appellees control.

Finally, appellant points out that appellees have not put forward any pro-competitive justifications for their conduct. This argument is unavailing. Such justifications are unnecessary where Capital, as the plaintiff in this case, has not carried its own initial burden of showing a restraint on competition. *See* *Bhan, 929 F.2d at 1413*. **[**34]** Only after a plaintiff has successfully met its initial burden under the rule of reason must an antitrust defendant offer evidence to exonerate its conduct.

In sum, Capital's position is simply that it has been harmed as an individual competitor. It has not shown that defendants' activities have had any adverse impact on price, quality, or output of medical services offered to consumers in the relevant market. In *Jefferson Parish, 466 U.S. at 31*, the Supreme Court rejected a rule of reason claim arising out the exclusion of an anesthesiologist from staff privileges at a hospital, stating that "without a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws . . . . " *Id*. Because no such showing has been made in the instant case, appellant's claim must also fail.

CONCLUSION

We have carefully considered all the other arguments raised by the parties and find they do not warrant further discussion because our opinion fully disposes of them. Accordingly, for the reasons stated the order of the district court granting summary judgment to the defendants-appellees is affirmed.

Caldwell v. American Basketball Ass'n

United States District Court for the Southern District of New York

June 14, 1993, Decided ; June 14, 1993, Filed

75 Civ. 1235 (LBS)

Reporter

825 F. Supp. 558 *; 1993 U.S. Dist. LEXIS 8024 **; 125 Lab. Cas. (CCH) P10,764; 1993-1 Trade Cas. (CCH) P70,289

JOSEPH L. CALDWELL, Plaintiff, v. THE AMERICAN BASKETBALL ASSOCIATION, INC., THE SPIRITS OF ST. LOUIS BASKETBALL CLUB, a limited partnership, OZZIE SILNA, DANIEL SILNA, HARRY WELTMAN, DONALD SCHUPAK and TEDD MUNCHAK, Respondents.

Core Terms

Spirits, team, suspension, basketball, player, suspended, by-laws, conspiracy, summary judgment, monopolize, motive, reasonable jury, boycott, concerted action, monopoly power, terminated, antitrust, played, contends, negotiating, prima facie tort, defendants', conspired, Cougars, salary, season, intentional torts, no evidence, give rise, indefinite

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

When considering a motion for summary judgment, all justifiable inferences are to be drawn in the non-movant's favor.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

15 U.S.C.S. § 1, provides in pertinent part that every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Sherman Act, Claims

To establish a violation of, *15 U.S.C.S. § 1*, of the Sherman Act, a plaintiff must prove two elements: (1) a conspiracy; and (2) an unreasonable restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A particular restraint may be adjudged unreasonable: Either because it fits within a class of restraints that has been held to be per se unreasonable, or because it violates what has come to known as the Rule of Reason, under which the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN5[] Entitlement as Matter of Law, Genuine Disputes

Summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN6[] Summary Judgment, Motions for Summary Judgment

During a motion for summary judgment the court must view the facts in the light most favorable to the non-moving party, and must resolve all ambiguities and draw all inferences against the moving party. In determining whether to grant a motion for summary judgment, the court is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Evidence > Burdens of Proof > Initial Burden of Persuasion

HN7[] **Burdens of Proof, Movant Persuasion & Proof**

Under a summary judgment motion the moving party bears the initial burden of establishing the absence of a material issue of fact. However, if the non-moving party would bear the burden of proof on a claim at trial, the moving party may satisfy its burden by demonstrating an absence of evidence to support an essential element of such a claim.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN8[] **Summary Judgment, Opposing Materials**

To defeat a motion for summary judgment, the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts, but instead must point to evidence sufficient to establish each element of his case.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

HN9[] **Sherman Act, Claims**

The standard of proof required to find an antitrust conspiracy in violation of, *15 U.S.C.S. § 1*, is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Inchoate Crimes, Conspiracy**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. Thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment a plaintiff seeking damages for a violation of *§ 1*, must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Respondent must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

In the context of an antitrust conspiracy, to prove that an agreement exists between two or more persons, a plaintiff must demonstrate a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN12[] **Summary Judgment, Evidentiary Considerations**

To defeat a motion for summary judgment, it is not required that the non-moving party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. The non-moving party must proffer evidence that is admissible in substance. The non-moving party cannot rely on inadmissible hearsay in opposing a motion for summary judgment.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN13[] **Supporting Materials, Affidavits**

Under, *Fed. R. Civ. P. 56(e)*, affidavits supporting and opposing summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Evidence > ... > Statements as Evidence > Hearsay > General Overview

HN14[] **Statements as Evidence, Hearsay**

See *Fed. R. Evid. 803(24)*.

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Contract Formation > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN15[] **Antitrust & Trade Law, Sherman Act**

There must be direct or circumstantial evidence that reasonably tends to prove a conscious commitment to a common scheme designed to achieve an unlawful objective. At a minimum, the circumstances must warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN16[] **Summary Judgment, Burdens of Proof**

To survive a motion for summary judgment a plaintiff seeking damages for a violation of, *15 U.S.C.S. § 1*, must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN17[] **Conspiracy to Monopolize, Sherman Act**

15 U.S.C.S. § 2, of the Sherman Act provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN18[] **Monopolies & Monopolization, Actual Monopolization**

Unlawful monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN19[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power defined as the impairment of competition through an unlawfully acquired market structure which allows the monopolist to exclude competition or to raise prices without being undercut.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN20[] **Summary Judgment, Burdens of Proof**

Summary judgment is appropriate in *15 U.S.C.S. § 2* cases where the defendant's market share is less than 50 percent, or even somewhat above that figure, and the record contains no significant evidence concerning the market structure to show that the defendant's share of that market gives it monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN21[] **Monopolies & Monopolization, Attempts to Monopolize**

To make out a claim for attempted monopolization, the plaintiff must demonstrate (1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN22[] **Conspiracy to Monopolize, Elements**

Under, *15 U.S.C.S. § 2*, of the Sherman Act, the offense of conspiracy to monopolize requires proof of (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize.

Torts > Intentional Torts > Prima Facie Tort > Elements

Torts > Intentional Torts > Prima Facie Tort > General Overview

HN23[] **Prima Facie Tort, Elements**

The elements of prima facie tort are: (1) intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; (4) by an act or series of acts that would otherwise be lawful.

Torts > Intentional Torts > Prima Facie Tort > General Overview

Torts > Intentional Torts > General Overview

HN24[] **Intentional Torts, Prima Facie Tort**

To prove intentional tort under New York law, the plaintiff must demonstrate, in the very least (1) the intentional infliction of harm, (2) resulting in special damages, and (3) without excuse or justification.

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Judges: Sand

Opinion by: LEONARD B. SAND

Opinion

[*560] OPINION

SAND, J.

This case requires the Court to revisit questions relating to the application of the antitrust laws to professional basketball. *Cf.* *United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988)*; *North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1982)*, **[**2]** *cert. denied, 459 U.S. 1074, 74 L. Ed. 2d 639, 103 S. Ct. 499 (1982)*. Plaintiff Joe L. Caldwell, a former professional basketball player, was suspended on December 3, 1974 by The Spirits of St. Louis Basketball Club (the "Spirits"), a member team of the now defunct American Basketball Association ("ABA"). In his complaint, Caldwell alleges that the circumstances surrounding his suspension constitute a "concerted refusal to deal" or a "group boycott" on the part of all named defendants, in violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*. Plaintiff also asserts a pendent claim for either intentional tort or *prima facie* tort under New York law against the Spirits, Donald Schupak, and Daniel Silna (collectively the "Spirits Defendants").

The Spirits Defendants have moved for summary judgment. Defendant Tedd Munchak has also moved for summary judgment. The other defendants -- the American Basketball Association, Inc., Ozzie Silna, and Harry Weltman -- have not moved for summary judgment and, according to Caldwell, are in default. Pl.'s Mem. at 1 n.1. The Spirits Defendants have also moved to strike, pursuant to *Fed. R. Civ. P. 56(e)*, **[**3]** portions of the plaintiff's papers in opposition to the defendants' motions for summary judgment.

For the reasons that follow, the defendants' motions for summary judgment are granted in their entirety, and the complaint is dismissed as against the moving defendants. The Spirits Defendants' motion to strike is granted to the extent set forth herein.

BACKGROUND

HN1[] When considering a motion for summary judgment, all justifiable inferences are to be drawn in the non-movant's favor. *Eastman Kodak Co. v. Image Technical Services, Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2076-77 (1992)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Accordingly, the Court will resolve any factual disputes in favor of the plaintiff.

In 1964 plaintiff Joe L. Caldwell, who had been an all-American basketball player at Arizona State University, was drafted to play professional basketball for the Detroit Pistons, a member team of the National Basketball Association ("NBA"). Caldwell was subsequently traded to the St. Louis Hawks, also a member team of the NBA. The Hawks later moved to Atlanta and became known as the Atlanta Hawks.

When Caldwell's contract **[**4]** with the Hawks expired in 1970, both the Hawks and the Carolina Cougars, an ABA team, offered Caldwell lucrative contracts. On October 30, 1970, Caldwell signed a five year contract with Southern Sports Corporation ("Southern Sports"), the corporate owner of the Cougars. The contract provided for annual compensation of $ 220,000, a pension of $ 600 per month for each of Caldwell's years of service as a professional basketball player, and life insurance equal to 100 times the cash value of the pension. Defendant Tedd Munchak, one of the owners of Southern Sports, personally guaranteed the contract. The contract expired by its own terms on October 29, 1975. *See* Caldwell Employment Agreement ("Caldwell Agreement") P 2, attached **[*561]** as Ex. A to the Affidavit of Jack David ("David Aff.").

Because Caldwell was a nationally recognized player -- known by his fans as "Jumping Joe Caldwell" -- he had the bargaining power to negotiate a contract which incorporated by reference only certain provisions of the ABA Uniform Player's Contract ("ABAUPC"). *See* Caldwell Agreement P 11(b). Among those provisions of ABAUPC that were incorporated by reference was Article 3(b) which provided, in pertinent **[**5]** part:

> Compliance with CLUB Rules. The CLUB may from time to time . . . establish reasonable rules for the government of its players. . . . The CLUB may also suspend the player for violation of any rules so established, and during such suspension, the player shall not be entitled to any compensation under this contract. All of the foregoing shall be in addition to any other rights and remedies the CLUB may have at law, equity or otherwise. When the player is fined or suspended, he shall be given notice in writing, stating the amount of the fine or the duration of the suspension and the reasons therefore.

ABAUPC P 3(b). The Caldwell Agreement also incorporated by reference ABAUPC P 12(c)(3), which gave the Cougars the power to terminate the contract in the event of a breach by Caldwell. The Caldwell Agreement did *not* incorporate P 14 of ABAUPC pursuant to which the player agreed to be bound by the ABA's Constitution and by-laws. *See* Caldwell Aff. P 13; *Caldwell v. American Basketball Ass'n,* 75 Civ. 1235 (LBS), *1991 U.S. Dist. LEXIS 17902, 1991 WL 270473* at *5 (S.D.N.Y. December 11, 1991).

The ABA by-laws provided that a suspended player was placed on a "reserve list" and that no ABA team **[**6]** could "contract with" a player on a member team's reserve list. [1] **[**7]** In order to remove a player from the reserve list, the team suspending the player was required to provide written notice to the Commissioner of the ABA. [2] The

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[1] Section 14.12 of the ABA by-laws provided in part:

> A. The reserve list of a Member Club shall consist of:
>
> * * *
>
> (3) Players suspended or declared ineligible, or expelled from the League for violation of the contract between the player and the club or for other reasons permitted by the Certificate of Incorporation and By-Laws of the League;
>
> * * *
>
> B. A player on a club's reserve list shall not be eligible to contract with any other club unless and until the player is released or his contract assigned as provided in the Certificate of Incorporation and By-laws of the League.

ABA By-laws § 14.12, attached as Ex. 10 to Munchak's 3(g) Statement.

Commissioner, in turn, was required to send written notice to each ABA member team that the player was no longer on the reserve list of the team that had suspended him. These notice requirements are sometimes referred to as "waivers." The Spirits Defendants claim that Caldwell was never placed on such a reserve list and that the plaintiff has not come forward with any proof that such a reserve list existed. The plaintiff avers that when Caldwell was suspended he automatically was placed on the Spirits' reserve list by operation of the ABA by-laws.

During the four basketball seasons between 1970 and 1974, Caldwell played ably for the Carolina Cougars and was elected to the All-Star team during two of those four years. In addition, Caldwell was elected Vice-President and later President of the ABA Players Association ("ABAPA"), the player's union. Caldwell was also selected as the player representative for the Cougars and as the Cougars' team captain.

After Caldwell's fourth season with the Cougars, defendant Munchak sold **[**8]** the team **[*562]** to a group of investors headed by Defendants Ozzie Silna and Daniel Silna. *See generally* *Caldwell v. Munchak, 548 F. Supp. 755, 755 & n.1 (N.D. Georgia 1982)* (describing details of sale of Cougars). The new owners assumed all unexpired obligations to Caldwell under his employment contract except that their obligation to provide pension benefits was limited to $ 10,000. Also in connection with the sale, the ABA provided Munchak with a broad "hold harmless" if the Spirits defaulted on their obligations to Caldwell. However, this indemnification, with respect to the pension benefits, was limited to $ 10,000. The cougars subsequently moved to St. Louis and were renamed The Spirits of St. Louis.

Munchak became Commissioner of the ABA after he sold his interest in the Cougars. Although Munchak initially told the ABA member clubs that we would agree to serve as Commissioner only for sixty days, his tenure lasted from June 1974 until July 1975. In return for his services as Commissioner, Caldwell received an annual salary of one dollar. Caldwell states in his affidavit that at this time he believed that Munchak continued to own the spirits based upon **[**9]** alleged representations made by Munchak that such was the case. Caldwell Aff. PP 19-21.

The Barnes Incident and Caldwell's Suspension

On November 20, 1974, Marvin Barnes, another star player for the Spirits, failed to appear for an important game between the Spirits and the New York Nets. Just prior to the game, Caldwell had accompanied Barnes and Marshall Boyer, Caldwell and Barnes' agent, in a limousine to LaGuardia Airport. Barnes and Boyer boarded a plane for Dayton, Ohio. Apparently Barnes' dissatisfaction with the contract he had negotiated with the Spirits motivated him to adopt this negotiating tactic. When the Spirits' Coach Jack MacKinnon inquired later that evening where Barnes was, Caldwell denied any knowledge of Barnes' whereabouts. Caldwell claims that he never advised Barnes to "jump" the team, breach his contract, or do anything else detrimental to the team.

Although Barnes returned to the team shortly thereafter, the Spirits suspended Caldwell because they believed that Caldwell had played a role in the Barnes episode. On December 3, 1974, Caldwell received a telegram from the Spirits informing him that "THE SPIRITS OF ST LOUIS HAVE SUSPENDED YOU INDEFINITELY." **[**10]** David Aff., Ex. G. Caldwell was also advised of his suspension in a letter dated December 3, 1974 which stated in pertinent part:

> We wish to advise you that you are hereby suspended without pay or other privileges in accordance with Section 11(c) of an agreement between you and Southern Sports Corporation entered into in October 1970. The duration of your suspension has not as yet been determined and unless good cause is shown by you to the contrary, the suspension will remain in effect for the remainder of the current basketball season and/or your contract will be terminated pursuant to Section 11(i) thereof.

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[2] Section 14.11 of the ABA by-laws provided in part:

> Except as otherwise provided in the By-Laws, a player shall be considered a member of a team until the Commissioner shall have received notice from that team that the other Member Clubs are free to negotiate with such player. The Commissioner shall upon receipt of such notice immediately and simultaneously notify all the other Member Clubs accordingly; until such notice is sent, no team shall negotiate with any player who is either under contract or on the reserve list of another member team.

ABA By-laws § 14.11, attached as Ex. 10 to Munchak's 3(g) Statement.

The reason for the foregoing act is as follows:

(i) violation of Section 11(b) of your contract; and

(ii) tortious conduct against the Club . . . .

Letter from Harry Weltman to Joe Caldwell, dated December 3, 1974, attached as Ex. G to David Aff. This letter also informed Caldwell that he was free to contact the Spirits or the ABA Commissioner to discuss the matter further.

The parties are in dispute as to precise duration of Caldwell's suspension. The defendants claim that at some point in early 1975, the Spirits terminated Caldwell's services altogether. **[**11]** They rely on the findings of fact in *Caldwell v. Munchak, 548 F. Supp. 755, 759 (N.D. Georgia 1982)*, discussed below, to support their position. Defendants argue in the alternative that if Caldwell's contract was not terminated by the Spirits in December 1974, it would have expired by its own terms on October 29, 1975. In contrast, Caldwell claims that he "was never told that his suspension was lifted, or that the Spirits had terminated his contract, or that other teams were free to negotiate with him." Pl.'s 3(g) Statement at 27; Caldwell Aff. P 26. In other words, Caldwell claims that he was **[*563]** placed on the Spirit's reserve list "forever." Pl.'s Mem. at 32.

In early December 1974, Caldwell appealed his suspension through the ABAPA to the Office of the Commissioner. By letter dated December 6, 1974, Prentiss Q. Yancey, the General Counsel of the ABA Players' Association, urged Munchak to commence an investigation of the Caldwell suspension and to hold a hearing. On December 10, 1974, the Commissioner's Office advised Yancey that the investigation would commence promptly and that a hearing date would be set. A hearing was set for February 12, 1975 and **[**12]** then adjourned to March 1, 1975.

All parties agree that ABA Commissioner Munchak told the Spirits' management that an indefinite suspension would not be permitted. Munchak also informed the parties that he was willing to recuse himself as an arbitrator because he had personally guaranteed Caldwell's basketball contract.

Shortly thereafter, Caldwell decided he no longer wanted to pursue his remedies before the ABA but instead wanted to litigate his suspension in court. Caldwell claims that the factors that influenced his decision not to arbitrate included: the fact that he had played approximately twenty-five percent of the 1974-75 season for the Spirits and had not received any salary; that Munchak's lawsuit regarding the pension obligations was still pending; that his role as president of the ABAPA made him a target for ABA management; and that he had valuable rights that were negotiated in his contract that he was afraid he would lose in an arbitration. Caldwell Aff. P 32.

Accordingly, in February 1975 Caldwell brought an action in federal district court in Georgia (the "Georgia action") against Munchak, as guarantor of his contract, for unpaid 1974-75 salary that Caldwell claimed **[**13]** was due under the contract. The dispositive issue in the Georgia action was whether the Spirits (and thus Munchak as personal guarantor) were excused from their obligation to pay Caldwell's salary because of the role that Caldwell played in the Barnes incident. After a bench trial, Judge Evans rendered a judgement in Caldwell's favor for unpaid salary in the amount of $ 220,000, plus interest, costs, and expenses. *See* *Caldwell, 548 F. Supp. at 764*. The judgment in this action was paid in full. The parties disagree as to the res judicata effect of Judge Evans's findings of fact and conclusions of law.

Caldwell also filed the instant antitrust lawsuit in early 1975. Two factors account for the extraordinary lapse of time between the filing of the complaint and the making of the instant motions. First, in the belief that collateral litigation, especially the Georgia action, would resolve or enable the parties to resolve this controversy, this case was placed on the Court's suspense calendar at the request of the parties. Thereafter, Caldwell went into personal bankruptcy and reactivated this suit only after his discharge. *See Caldwell v. American Basketball* **[**14]** *Ass'n,* 75 Civ. 1235 (LBS), *1991 U.S. Dist. LEXIS 17902, 1991 WL 270473* at *4 (S.D.N.Y. December 11, 1991) (discussing procedural history of instant lawsuit).

Other Litigation Involving Caldwell

In addition to the Georgia action and the instant lawsuit, some of the parties to this action were involved in several other disputes, litigated in various fora, at the time Caldwell was suspended. Caldwell claims that these disputes provided defendants with a motive to conspire to keep him from playing professional basketball.

First, a dispute arose between Caldwell and Munchak regarding pension obligations owed to Caldwell under Caldwell's contract. In 1972 Munchak brought suit against Caldwell in North Carolina state court to reform the employment contract. Munchak contended that the pension was supposed to be $ 60.00 per month for each year Caldwell played professional basketball, not $ 600.00 per month. Caldwell counterclaimed to enforce the provisions of his contract. The trial in this action was scheduled to begin on the day that Caldwell was suspended, but was adjourned several times. Ultimately a jury returned a verdict in Caldwell's favor.

Second, at the time the Spirits suspended him, Caldwell, then **[**15]** president of the ABA Player's Association, had refused to sign or approve a labor agreement with the ABA because Caldwell believed that the agreement failed to provide the players with adequate **[*564]** pension benefits, adequate medical benefits, or contract protection in the event the NBA and ABA merged. In October of 1973, a member of the ABAPA negotiating team, William Melchionni, signed a hand-written contract with Mike Storen, who served as the Commissioner of the ABA at that time. Caldwell refused to acknowledge that contract, as did the other representatives of the ABAPA, since it was done without the consent of the ABAPA negotiating committee. This matter was pending before the National Labor Relations Board when Caldwell was suspended.

Finally, at the time of his suspension, Caldwell was one of the plaintiffs in *Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975)*, which was pending in the Southern District of New York before Judge Carter. One of the purposes of this lawsuit was to challenge the merger of the NBA and the ABA as violative of federal ***antitrust law***.

Caldwell's Professional History After his Suspension

After **[**16]** he was suspended by the Spirits, Caldwell never again played professional basketball. In fact, no professional basketball team ever gave him a tryout or an opportunity to compete for a spot on a team.

Caldwell states that he was at all times, ready, willing, and able to perform all obligations and duties required of him under his contract with the Spirits and that he was otherwise fit to play professional basketball at the time of his suspension. He concludes that the failure of any other NBA or ABA team to hire him evidences the boycott of his professional services that he alleges in his complaint. Defendants dispute Caldwell's ability to play basketball at a professional level at the time of his suspension on several grounds. First, defendants claim that Caldwell's age at the time of his suspension -- he was 34 years old -- made him an undesirable recruit. The defendants provide statistics, undisputed by the plaintiff, that demonstrate that less than two percent of NBA players during the five basketball seasons between 1976 and 1981 were 34 years old or older. Spirits' Defs.' Mem. at 22 n.17. Second, defendants claim that a torn ligament Caldwell sustained during the 1971 season **[**17]** interfered with his playing ability. Finally, defendants claim an injury sustained by Caldwell in a January 15, 1975 automobile accident adversely affected Caldwell's ability to play basketball at a professional level.

We will discuss below, in much greater detail, the relevant facts concerning the existence of the alleged boycott of plaintiff's services.

The Demise of the ABA

The Spirits lost money in both of the two years the team played, an experience not uncommon to member teams of the ABA. On or about July 1976, five ABA teams were invited to join the NBA; four teams accepted the invitation. The Spirits desired to join the NBA, but were not allowed to for reasons that are not clear. The ABA ceased operations after the 1975-76 season.

DISCUSSION

I.

VIOLATION OF *SECTION 1* OF THE SHERMAN ACT

The plaintiff's *§ 1* claim is straightforward: he claims that "the defendants combined and conspired to blacklist him and deprive him of the opportunity to continue his career as a professional basketball player." Pl.'s Mem. at 29. Plaintiff contends that this constitutes a "group boycott" or a "concerted refusal to deal" in violation of *§ 1*.

Section 1 provides in pertinent **[**18]** part:

> ***HN2***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. ***HN3***[] To establish a violation of *§ 1* of the Sherman Act, a plaintiff must prove two elements: (1) a conspiracy; and (2) an unreasonable restraint of trade. ***HN4***[] A particular restraint may be adjudged unreasonable:

> Either because it fits within a class of restraints that has been held to be *'per se'* unreasonable, or because it violates what has come to known as the 'Rule of Reason,' under which the test of legality is whether **[*565]** the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Federal Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447, 458, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986) (citations omitted).

A. *Summary Judgment*

HN5[] Summary judgment is appropriate where there is "no genuine issue as to any material fact," and the moving party is entitled to "judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. ***HN6***[] The Court **[**19]** must view the facts in the light most favorable to the non-moving party, and must resolve all ambiguities and draw all inferences against the moving party. *Coach Leatherware Co., Inc. v. AnnTaylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991)*. In determining whether to grant a motion for summary judgment, the Court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

HN7[] The moving party bears the initial burden of establishing the absence of a material issue of fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. However, if the non-moving party would bear the burden of proof on a claim at trial -- as would Caldwell on his antitrust claims -- the moving party may satisfy its burden by demonstrating an absence of evidence to support an essential element of such a claim. *Id. at 325*. ***HN8***[] To defeat the motion, the non-moving party must "do more than simply show that there is some metaphysical doubt at to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, **[**20]** but instead must point to evidence sufficient to establish each element of his case. *Celotex Corp., 477 U.S. at 322*.

In the last decade, the Supreme Court has considered the propriety of summary judgment in cases arising under *§ 1* several times. In *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*, the Court affirmed a judgment for a terminated distributor of agricultural herbicides who had alleged a *§ 1* conspiracy between the manufacturer and other distributors to fix resale prices, and termination of the distributor in furtherance of the conspiracy. Addressing the question of ***HN9***[] the standard of proof required to find an antitrust conspiracy in violation of *§ 1*, the Court held:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto, 465 U.S. at 768.

The Court later **[**21]** revisited the issue in *Matsushita Elec.* Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), where a group of American corporations that manufactured or sold consumer electronic products alleged that the defendants, 21 Japanese corporations, had engaged in a 20-year predatory pricing conspiracy. The Court held that a reasonable jury could not return a verdict for the plaintiffs because of the speculative nature of the plaintiffs' theory of predatory pricing, id. at 588-89, and "the absence of any plausible motive to engage in the conduct charged," id. at 596. Turning to the applicable standards for summary judgment in antitrust cases, the Court noted:

> **HN10**[] ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus in *[Monsanto],* we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence that 'tends to exclude the possibility' **[**22]** that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy **[*566]** is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Id. at 588 (citations omitted). The Court was particularly concerned that courts "not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." Id. at 593.

Most recently, in Eastman Kodak Co. v. Image Technical Services, Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2083 (1992), the Court reviewed, again, the standards for summary judgment in a § 1 case. The Court held:

> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary **[**23]** judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Id. at 2083 (footnote omitted).

With these standards in mind, we turn to the specifics of Caldwell's § 1 claim.

B. *Contract, Combination, or Conspiracy*

The defendants contend that Caldwell did not offer evidence of any contract, combination, or conspiracy to deprive Caldwell of the opportunity to play professional basketball after the Spirits suspended him in 1974. Spirits Defs.' Reply at 8-9. Defendant Munchak claims that Caldwell has presented no evidence that he was part of the alleged conspiracy.

The terms "contract, combination . . ., or conspiracy" are used interchangeably to describe the requisite agreement between two or more persons to restrain trade. **HN11**[] To prove that an agreement exists between two or more persons, a plaintiff must demonstrate "a unity of purpose or a common design and understanding, **[**24]** or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946). Section 1 does not proscribe conduct that is wholly unilateral. Monsanto, 465 U.S. at 761. The Court recognizes that it is the rare case in which a plaintiff bringing a § 1 claim can establish the existence of an explicit agreement among the defendants; most conspiracies are proven by inferences drawn from behavior of the alleged conspirators.

1. *The ABA By-Laws*

Caldwell contends that the operation of the ABA's by-laws "is sufficient by itself," Pl.'s Mem. at 32-33, to satisfy *§ 1*'s concerted action requirement because all of the ABA teams "automatically agreed to an indefinite group boycott of Caldwell's services, in accordance with their By-laws" once he was suspended by the Spirits. [3] *Id.* at 11. When the Spirits suspended him, Caldwell argues, he was automatically placed on the Spirits' "reserve list" by operation of § 14.11 and § 14.12 of the ABA by-laws. Consequently all other ABA teams were prohibited from negotiating or contracting with Caldwell unless and until the Spirits effected "waivers" **[**25]** -- *i.e.,* unless and until the Spirits gave notice to the Commissioner that Caldwell was removed from the reserve list, and then the Commissioner gave notice of the same to the other ABA teams. No such "waiver" was ever effected. Caldwell further argues that these by-laws prohibited other ABA teams from negotiating with him even if the Spirits terminated his contract in late 1974 -- a fact which Caldwell contests vigorously -- and even *after* his contract with the Spirits expired by its own terms on October 29, 1975, simply because the Spirits never gave the **[*567]** notice required by § 14.11 of the by-laws. Pl.'s Mem. at 10-11; *see also id.* at 15.

Essentially, Caldwell claims that the manner in which the by-laws were applied in his case, so as to leave him on the Spirits' reserve list permanently, satisfies the concerted action requirement of *§ 1*. Although the enforcement **[**26]** of sports league by-laws or rules can constitute concerted action for the purposes of *§ 1*, *see, e.g., North American Soccer League v. National Football League, 670 F.2d 1249, 1256-57 (2d Cir. 1982)* (NFL's rule banning franchise owners from having ownership interest in any other professional sports team in competing league), *cert. denied, 459 U.S. 1074, 74 L. Ed. 2d 639, 103 S. Ct. 499 (1982)*, we do not believe that Caldwell has come forward with evidence sufficient to convince a reasonable jury that the ABA by-laws were enforced in the manner he suggests.

First, the only evidence offered by Caldwell to prove that the Spirits had a "reserve list" or that Caldwell was placed on a "reserve list" is the existence of the by-laws themselves and certain ambiguous deposition testimony. [4] The Court has serious doubts as to whether a reasonable jury could infer, based on this evidence, that Caldwell was ever placed on the Spirits' reserve list.

[27]** Second, even if the Court were inclined to presume that by operation of the ABA by-laws Caldwell was placed on the Spirits' reserve list when he was suspended and that he was never "waived" off the list by the Spirits, there is absolutely no evidence in the record that Caldwell was placed on the reserve list "forever" as Caldwell argues. Pl.'s Mem. at 32. In other words, plaintiff has failed to come forward with any evidence supporting his contention that he remained on the Spirits' reserve list *after* his contract expired by its own terms (or *after* he was terminated by the Spirits, if he was terminated). Indeed, the undisputed evidence leads to the contrary conclusion.

The letter notifying Caldwell that he had been suspended specifically stated:

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[3] Although Caldwell's contract exempted him from the ABA by-laws, the Spirits and all other member teams of the ABA were bound by the by-laws.

[4] To "confirm" that this is the manner in which the ABA by-laws operated, Caldwell cites the deposition testimony of Prentiss Yancey and Dave DeBusschere. Yancey was the General Counsel of the ABA Player's Association. DeBusschere was general manager of the New York Nets at the time of Caldwell's suspension; he later became Commissioner of the ABA.

In his deposition, Yancey stated that he was "almost certain that [Caldwell's contract] under either the bylaws or a combination of bylaws and the contract extended beyond the termination date." Yancey Dep. at 96. Yancey also stated, not without equivocation, that it was his opinion at the time of the events giving rise to this lawsuit that the ABA by-laws applied to Caldwell even though they were referenced out of his contract. *Id.* at 98.

Caldwell also cites portions of Dave DeBusschere's Deposition. When asked whether he had any independent recollection of the ABA procedures regarding the waiver of players, DeBusschere answered unequivocally "not really." DeBusschere Dep. at 55. DeBusschere's answers to a long series of questions put to him regarding the ABA by-laws were based on the assumption that the by-laws, as described to him by plaintiff's counsel, were the ones in effect during his time as ABA commissioner. *See id.* at 52. Specifically, DeBusschere testified that he did not recall whether he did or did not ever receive notice when he was general manager of the Nets that Caldwell was a free agent. *Id.* at 71-72.

> The duration of your suspension has not as yet been determined and unless good cause is shown by you to the contrary, *the suspension will remain in effect for the remainder of the current basketball season* and/or your contract will be terminated pursuant to Section 11(1) thereof.

Letter from Harry Weltman to Joe Caldwell, dated December 3, 1974, attached as Ex. G to David Aff (emphasis added). The language of the letter **[**28]** contradicts Caldwell's claim that his suspension was to last perpetually; the letter specifically says that the suspension would remain in effect until the end of the 1974-1975 basketball season unless Caldwell was notified otherwise. In any event, Caldwell has presented no evidence, nor presented a credible interpretation of his employment contract or the ABA by-laws, that would permit a reasonable jury to conclude that Caldwell remained on the Spirits' reserve list *after* his contract with the Spirits expired by its own terms on October 29, 1975. [5] **[**29]** Accordingly, the longest period of **[*568]** time during which Caldwell could have been on the Spirits' reserve list, by operation of the ABA by-laws, is from the date of his suspension until October 29, 1975. [6] The Court also notes that Caldwell never requested a waiver from the Spirits. Indeed, he never even made an application to the ABA for a clarification of his status. *See* Transcript of Proceedings, March 11, 1993, at 44.

Finally, and most importantly, Caldwell has presented no evidence that the ABA member teams failed to offer Caldwell a position with their teams because he was on the Spirits' reserve list. To prove concerted action under *§ 1* by resort to the ABA by-laws, Caldwell would be required to prove that the other ABA teams failed to offer **[**30]** Caldwell a position on account of those by-laws. There is no evidence that, subsequent to his suspension, any ABA team believed itself impeded from employing Caldwell by the ABA by-laws.

To summarize, this Court concludes, after resolving all doubts in Caldwell's favor, that there is no evidence that Caldwell was on the Spirits' reserve list beyond October 29, 1975, the date on which his contract expired by its own terms. Caldwell claims only that "the enforcement of the By-Law under which Caldwell was placed and remained *forever* on the Spirits' reserve list" constitutes concerted action in violation of *§ 1*. Pl.'s Mem. at 32-33 (emphasis supplied). Since we believe that no reasonable jury could conclude that Caldwell was placed "forever" on the Spirits' reserve list, and since Caldwell does not claim that the placement of him on the reserve list for the period of time remaining under his contract would constitute concerted action in violation *§ 1*, [7] we conclude that the ABA by-laws are not sufficient by themselves to satisfy *§ 1*'s requirement of concerted action.

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[5] The defendants contend that Caldwell was terminated shortly after he was suspended, and therefore even if he had been placed on the Spirits' reserve list, he would have been removed at that time. The parties dispute whether this issue is res judicata based on the district court's finding in the Georgia action. We need not address this issue since we take the facts in the light most favorable to the plaintiff and assume that Caldwell was never terminated.

[6] Caldwell's charge that an antitrust conspiracy prevented him from playing major league professional basketball in 1975 and thereafter is further belied by the terms of the settlement of *American Basketball Ass'n Players Ass'n v. National Basketball Ass'n, 72 F.R.D. 594, 596 (S.D.N.Y. 1976)*. The settlement provided that all former ABA players not employed on the expansion teams -- *i.e.,* the ABA teams that joined the NBA -- and not selected in the NBA draft of players from the two excluded ABA teams were free agents and could seek to compete for placement on team rosters in the NBA as of July 26, 1976. *Id.* Accordingly, Caldwell could not have been on the Spirits' reserve list after the execution of the *Robertson* settlement.

[7] As noted above, Caldwell argues that "the enforcement of the ABA By-Law under which Caldwell was placed and *remained forever* on the Spirits' reserve list is sufficient by itself to satisfy *Section 1*'s requirement of concerted action." Pl.'s Mem. at 32-33 (emphasis supplied). Nowhere in these protracted proceedings has Caldwell attempted to limit his boycott claim to a specific period of time shorter than "forever." Specifically, Caldwell does not claim that placement of him on the Spirits' reserve list for the period remaining under his contract violates the Sherman Act. Defendants pointed this out to the Court in its moving papers, *see* Spirits Defs.' Reply at 19-20, and again at oral argument, *see* Transcript of Proceedings, March 11, 1993, at 16. Caldwell never informed the Court that he was in fact making such a claim.

If Caldwell were making such a claim, he would face the formidable task of demonstrating to the satisfaction of a jury that the operation of these by-laws violated *§ 1* under a Rule of Reason analysis. *See Federal Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447, 458-59, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986) ("per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a

[31]** 2. *Caldwell's Other Evidence of an Antitrust Conspiracy*

The Court must determine whether the other evidence proffered by Caldwell is sufficient to raise genuine issues of material fact as to whether the defendants participated in a concerted refusal to deal with Caldwell. Caldwell's claims are as follows:

[*569] 1. Caldwell contends that the failure of any member teams of the ABA or the NBA to offer him a contract, or even a tryout, gives rise to the inference that a boycott was in effect.

2. Caldwell claims that he was suspended for no legitimate reason, and that the Spirits Defendants knew this because defendant Munchak had told the Spirits Defendants that he believed that an "indefinite" suspension was not permitted under the ABA by-laws.

3. Caldwell argues that the evidence supports the inference that the defendants had an "economic incentive to conspire to make sure that Caldwell" would never play professional basketball again. Pl.'s Mem. at 7. Specifically, Caldwell claims that the Spirits could not afford to pay his $ 120,000 salary for the 1974-1975 season in part because they had also contracted to pay Barnes a large salary, and that the Spirits suspended Caldwell to relieve **[**32]** themselves of the salary obligation.

Caldwell also contends that the defendants had a further motive for removing Caldwell. As noted above, Caldwell was both president of the ABAPA and the Spirits' player representative. During the relevant period, the ABA was attempting to merge with the NBA. To ensure competitive bidding with the NBA for players' services, Caldwell opposed a merger between the NBA and the ABA, and had taken some steps to prevent the fruition of such a merger. Caldwell was a plaintiff in a pending antitrust action which sought, inter alia, to block any such merger. *See* *Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 873 (S.D.N.Y. 1975)*. In addition Caldwell, in his role as president of the ABAPA, had refused to sign a collective bargaining agreement with the ABA because he believed the agreement did not adequately provide for pension or health care benefits for the players. Based on these facts, Caldwell concludes:

> Removing Caldwell thus would eliminate an aggressive union leader who was a major obstacle to a merger the ABA needed and to a collective bargaining agreement the ABA owners, but not the players, wanted; and **[**33]** it would send a chilling message to the other ABA players, and especially union leaders, that aggressive union action, or even counseling a teammate, might jeopardize their careers.

Pl.s' Mem. at 8.

4. In September of 1975, nine months after his suspension, the ABA teams negotiated a new agreement with their players which outlawed indefinite suspensions of players. Caldwell claims that the ABA Players Association wanted the agreement to be retroactive, and therefore to apply specifically to Caldwell, and that the ABA teams insisted that the agreement operate prospectively only. Yancey Aff. at 3-9. Caldwell contends that the ABA teams' ultimate decision that the new agreement would have prospective effect only is evidence of the ABA teams' continued group boycott of Caldwell.

5. Caldwell claims that the defendants acted, on at least one occasion, to prevent an *NBA* team from hiring Caldwell. Caldwell claims that sometime in 1975, after Caldwell's contract expired by its terms, Jerry Colangelo, then general manager of the NBA's Phoenix Suns, expressed an interest in Caldwell. Caldwell claims that Dave DeBusschere [8] called to ask Colangelo whether the Suns were "talking" with **[**34]** Caldwell. Colangelo allegedly

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competitor"); *North America Soccer League, 670 F.2d at 1259* ("Because agreements between members of a joint venture can under some circumstances have legitimate purposes as well as anticompetitive effects, they are subject to scrutiny under a rule of reason."); *see also* *Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961)*. We also note that if Caldwell were claiming that his placement on the Spirits' reserve list until the expiration of his contract violated the Sherman Act, any recovery would be off-set by the amount he collected in the Georgia action.

[8] Caldwell claims that at this time DeBusschere was Commissioner of the ABA. However the newspaper article which Caldwell relies on describes DeBusschere as the general manager of the New York Nets. *See also* Pl.s' Mem at 12 (DeBusschere was

told reporter Robert Eger that he "asked [DeBusschere] what concern that was of his." Since the Suns thereafter discontinued their pursuit of Caldwell, Caldwell concludes that DeBusschere "at least implicitly warned [Colangelo] against signing Caldwell." Pl.'s Mem. at 22. Caldwell further concludes that the fact that Caldwell remained on the Spirits' reserve list "chilled NBA teams from pursuing him and it led [DeBusschere] to warn at least one NBA **[*570]** team not to sign him, or, presumably, face additional charges in the pending antitrust suit." Pl.'s Mem. at 23. DeBusschere is not named as a defendant in this case.

[35]** As proof that this "implicit threat" was made, Caldwell cites Eger's December 8, 1975 newspaper article which contains the statements attributed to DeBusschere and Colangelo, within quotation marks. In an accompanying affidavit, Eger states that he would not have placed quotation marks around these statements unless he had accurately reported the precise words spoken by Colangelo and DeBusschere. Eger Aff. PP 9-11. Defendants have moved to strike the affidavit of Robert Eger and the article in their entirety as inadmissible hearsay.

6. Caldwell claims that a letter from Schupak to the ABA, dated February 4, 1975, indicated that Schupak would object to Caldwell's playing for another team unless he received "some assurance" that the terms of Caldwell's new employment represented a bona fide agreement. In that letter, Schupak wrote:

> I personally advised Prentiss Yancey and Caldwell's then attorney, Bynum Hunter, that the Spirits would release Caldwell from any contractual obligation he had to them, and gave him virtual carte blanche to seek other employment. I also agreed, on behalf of the Spirits, not to object to employment with another basketball club as long as I received **[**36]** some assurance that the terms of employment represent a bona fide agreement. The Spirits had and have no intention of conducting a vendetta against Caldwell, and while he has not met the standards for employment by the Spirits, the Club has no interest whatsoever in seeing Caldwell remain unemployed.

Letter from Donald Schupak to Michael Goldberg, counsel for the ABA, dated February 4, 1975, attached as Ex. I to David Aff. Caldwell contends that this letter created a Catch-22: the Spirits would release Caldwell only if he received a bona fide offer from another team, but the by-laws prohibited all other teams from offering him a position. Pl.'s Mem. at 14 n.14.

7. Finally, Caldwell repeats several times in his opposition papers that defendant Schupak said to Prentiss Yancey that Caldwell "would never play basketball again." Yancey also testified that Schupak said he would not terminate Caldwell's contract or cap the suspension. Yancey Dep. Tr. at 52-53.

Resolving all relevant factual disputes in Caldwell's favor, this Court concludes that the defendants have demonstrated an absence of evidence supporting elements of Caldwell's *§ 1* claim and, accordingly, summary judgment is **[**37]** appropriate. *Celotex, 477 U.S. at 325*. Eighteen years after the complaint in this action was filed, and after extensive discovery has been conducted, plaintiff has failed to come forward with sufficient evidence of the existence of a contract, combination, or conspiracy to allow a reasonable jury to find in his favor. We will briefly explain our reasons for reaching this conclusion.

First, the mere fact that Caldwell never again was offered a position to play professional basketball does not, in and of itself, give rise to the inference that the defendants conspired to blacklist Caldwell from professional basketball. This is especially true since the defendants have proffered a great deal of evidence, much of it uncontroverted by the plaintiff, that Caldwell's age and physical condition made him a less than appealing prospect to other ball clubs.

Second, the fact that ABA Commissioner Munchak, was of the opinion that an "indefinite" suspension of Caldwell was not permitted under the ABA by-laws, and that Caldwell's suspension may not have been justified, does not give rise to the inference that the defendants acted in concert to blacklist Caldwell. **[**38]** At most it indicates that some of the defendants may have breached Caldwell's contract. This, of course, cannot give rise to an antitrust

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General Manager of the Nets during the period from Caldwell's suspension until the summer of 1975). Apparently, this discrepancy was the result of an error on Eger's part. *See* Eger Aff. P 6 (DeBusschere incorrectly identified in article as general manager of Nets).

violation. *Cf.* *Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1004 (2d Cir. 1970)* (Friendly, J.) (combining assertion of antitrust violation with a claim of injury from breach of contract or tort "does not automatically make the latter a claim arising under the antitrust laws"), *cert. denied, 400 U.S. 1001 (1971)*; *Molinas v. National Basketball Ass'n, 190 F. Supp. 241* ***[*571]*** *(S.D.N.Y. 1961)* (Kaufman, J.) (NBA reserve clause did not convert basketball player's indefinite disciplinary suspension into a group boycott against him).

Third, the fact that the Spirits Defendants, and the ABA, may have had an "economic motive" to see that Caldwell was suspended, does not give rise to the inference that they entered into a contract, combination or conspiracy to *forever* ban Caldwell from playing professional basketball. [9] It does not even give rise to an inference that the defendants conspired to make sure that Caldwell was suspended, absent **[**39]** other evidence supporting such a claim.

Nor does Schupak's letter of February 4, 1975, support Caldwell's contention that the defendants engaged in a concerted failure to deal. Caldwell claims that Schupak put impossible conditions on Caldwell's obtaining other employment: specifically that Caldwell get a bona fide offer from another team before the Spirits would agree not to object to Caldwell's employment with another club. Caldwell claims that this was a Catch 22 because no other club could offer Caldwell a position because ABA by-laws **[**40]** prohibited all other teams from negotiating with him. However, Schupak has stated in an affidavit that the concern he was addressing in this letter was that another team would obtain Caldwell's services for some nominal salary, with the Spirits remaining potentially liable for Caldwell's $ 220,000 per year contractual salary while Caldwell played for another team. Schupak's Reply Aff. P 3. This is consistent with a common sense reading of the letter. Further, since the Court concluded, *supra,* that no reasonable jury could find that the by-laws operated in the manner contended by Caldwell, it follows that no reasonable jury could conclude that this letter created a Catch 22 or that it gives rise to an inference of a group boycott.

The only overt act alleged on the part of any of the defendants in furtherance of the alleged boycott is the alleged "implicit threat" made by DeBusschere to Colangelo. As we have already noted, the Spirits Defendants have moved to strike the affidavit. We will consider defendants' motion to strike first.

HN12[] To defeat a motion for summary judgment, it is not required that the non-moving party "produce evidence in a form that would be admissible at trial **[**41]** in order to avoid summary judgment. Obviously, *Rule 56* does not require the nonmoving party to depose her own witnesses." *Celotex, 477 U.S. at 324*. However, the non-moving party must proffer evidence that is admissible in substance. ***HN13***[] Affidavits supporting and opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Fed. R. Civ. P. 56(e)*. Thus it is well established that the non-moving party "cannot rely on inadmissible hearsay in opposing a motion for summary judgment." *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919, 924 (2d Cir. 1985)*; *see also* *Schwimmer v. Sony Corp. of America, 637 F.2d 41, 45 n.9 (2d Cir. 1980)* ("A hearsay affidavit is a nullity on a motion for summary judgment."); *United States Football League v. National Football League, 634 F. Supp. 1155, 1177 (S.D.N.Y. 1986)*. We note that the Eger affidavit and Eger's article constitute hearsay that does not **[**42]** fall within one of the traditional exceptions rendering it admissible. Plaintiff argues that Eger's article is admissible under the catch-all exception to the hearsay rules because it has "circumstantial guarantees of trustworthiness." *Fed. R. Evid. 803(24)*. [10] **[*572]** This Court disagrees. Eger's reliance not on his memory but on

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[9] Furthermore, Caldwell's postulated motives can only be described as speculative. For example, Caldwell's claim that the Spirits could not afford to pay Caldwell's salary is not supported by any evidence in the record. Moreover, even if the Spirits were motivated to suspend Caldwell to avoid paying his salary, it does not follow that the Spirits were motivated to enter into an illegal agreement to boycott Caldwell from playing baseball for other teams for the remainder of his career.

[10] *Rule 803(24)* provides:

> ***HN14***[] **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rule and the interests of justice

the fact that he employed quotation marks does not furnish circumstantial guarantees of trustworthiness. Accordingly, defendants' motion to strike is granted.

[43]** In any event, even were the "evidence" admissible, it is doubtful that a reasonable trier of fact would have concluded that Caldwell's description of the events as an "implicit threat" was accurate. The article reports that DeBusschere called Colangelo to inquire "about whether the Suns were talking with Caldwell," to which Colangelo reportedly responded, "I asked him what concern that was of his." We believe that it is doubtful that a reasonable jury could conclude that either DeBusschere's alleged question, or Colangelo's alleged answer, suggests intimidation. Further, the article reports that Colangelo's statement that "ABA pressure had nothing to do with the Suns' decision not to give Caldwell a shot," but rather that the Sun's decision was based on observation of Caldwell in the 1975 summer league. Finally, DeBusschere is not a defendant in this action, nor does Caldwell present evidence that DeBusschere made this "implicit threat," if that it be, at the behest of the ABA or in furtherance of a conspiracy between the ABA and the other defendants.

The Court also does not believe that a reasonable jury could find concerted action on the part of the moving defendants based on **[**44]** the fact that the ABA did not give retroactive effect to the agreement with the players outlawing indefinite suspensions. The reason for this is simple: plaintiff does not allege that the moving defendants participated in the decision to apply the new agreement prospectively only.

Finally, Caldwell speculates a great deal about what might have motivated the defendants to engage in a conspiracy or "boycott" against Caldwell. Even assuming that these motives as postulated by Caldwell are accurate -- and the Court seriously doubts Caldwell could prove them to the satisfaction of a jury -- we do not believe that the various motives each individual defendant may or may not have had to be rid of Caldwell gives rise to an inference that the defendants *conspired* to boycott Caldwell in violation of the antitrust laws. As the Supreme Court has noted, ***HN15***[] there must be direct or circumstantial evidence that reasonably tends to prove "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 768*. At a minimum, the circumstances must "warrant a jury in finding that the conspirators had a unity of purpose or a common **[**45]** design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co., 327 U.S. at 810*. The evidence presented by Caldwell does not support that such a common design existed in this case. For similar reasons, defendant Schupak's alleged threat that Caldwell "would never play basketball again" cannot, standing alone, give rise to a justifiable inference that Schupak and the other defendants conspired to blacklist Caldwell. Caldwell presents no evidence that Schupak took any action to back up this threat in concert with others.

At trial, Caldwell would ask the jury to construct a conspiracy from the fact that he never obtained employment after the Spirits suspended him -- although there are other explanations for the lack of interest demonstrated by other teams -- and that the defendants had economic motives to be rid of him -- although these so-called "motives" are speculative. As we have noted above, ***HN16***[] "to survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of *§ 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita, 475 U.S. at 588*. **[*573]** **[**46]** Even assuming that the Spirits' suspension of Caldwell was improper; that the Spirits had an economic motive to remove Caldwell from the team; that the ABA would have been advantaged by Caldwell's exit from professional basketball, no inference of *concerted* action is proper based on the evidence submitted by the parties. The defendants' motions for summary judgment on the first claim is granted.

Having considered each of Caldwell's claims individually, we state, in the interests of clarity, that his evidence, when considered in the aggregate fares no better in raising a genuine issue of material fact upon which a reasonable jury could infer the existence of concerted action by the defendants in violation of *§ 1*.

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will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 803(24).

3. *Munchak's Alleged Participation in the Conspiracy* [11]

[47]** While Caldwell concedes that there is no "direct evidence" that Munchak endorsed the Caldwell suspension, *see* Pl.'s Mem. at 17, he contends that Munchak nonetheless was part of the boycott. In support, Caldwell claims that Munchak (1) did not warn Caldwell of the boycott and thereby deprived Caldwell of the opportunity to seek preemptive injunctive relief and (2) ultimately did nothing to stop the boycott.

Caldwell further claims that Munchak had an economic incentive to terminate Caldwell's career: Munchak was personally liable for all but $ 10,000 of the pension obligation to Caldwell. Since this obligation increased with each additional year that Caldwell played professional basketball, shortening Caldwell's career, this argument goes, would reduce Munchak's contractual obligation for pension benefits. As further support that Munchak wanted to limit his contractual obligation to Caldwell, Caldwell notes that Munchak had sued Caldwell to reduce his pension obligation from $ 600 to $ 60 per month for each year he played professional basketball. Caldwell also emphasizes that he was notified of his suspension on the day his trial against Munchak regarding Munchak's pension obligations **[**48]** was scheduled to begin and that this "resulted in a lengthy adjournment of that case," which purportedly inured to Munchak's benefit. *Id.*

Even assuming the existence of a conspiratorial boycott of Caldwell by the other defendants (or by other persons), this Court concludes that Caldwell did not offer any evidence that could support the inference that Munchak participated in or approved a conspiracy to boycott Caldwell from professional basketball. While admitting that no "direct evidence" exists which demonstrates Munchak's participation in the boycott, Caldwell claims that Munchak should have acted affirmatively to prevent the boycott. Specifically, Caldwell argues that Munchak was empowered under ABA By-laws to unilaterally reinstate Caldwell with back pay, an assertion disputed by Munchak. Munchak's Mem. at 17. Caldwell claims that Munchak should have used this unilateral power despite the fact that Caldwell decided to bring suit in federal court rather than pursue remedies available to him through the Office of the Commissioner.

Even assuming that Munchak had the unilateral power to reinstate Caldwell with back pay -- and there is much undisputed evidence in the record that **[**49]** indicates that Munchak acted entirely appropriately and in accordance with relevant by-laws -- Caldwell does not point to a single shred of evidence that shows that Munchak's failure to act was in furtherance of a conspiracy to boycott Caldwell. *See also* *Caldwell, 548 F. Supp. at 761* (ABA by-laws "merely gives the Commissioner the power to resolve all disputes that are submitted to him"). There is no evidence in the record to suggest that Munchak's alleged failure to act was anything but unilateral.

Moreover, the undisputed evidence indicates that: (1) Munchak did not participate in the decision to suspend Caldwell; (2) as ABA Commissioner, he scheduled a hearing, at the joint request of Caldwell and the **[*574]** Players' Association, to resolve the dispute between Caldwell and the Spirits; and (3) he also offered to recuse himself from presiding over his hearing to avoid any conflict of interest. It is not without significance that it was *Caldwell* who decided not to pursue remedies available through the Office of the ABA Commissioner. Having stripped the Office of the Commissioner of jurisdiction over his dispute with the Spirits, Caldwell cannot plausibly **[**50]** assert that Munchak's failure to resolve that dispute unilaterally is a conspiratorial act in violation of *§ 1* of the Sherman Act.

Finally, Caldwell's postulated economic motive on the part of Munchak, without more, does not support the conclusion that Munchak participated in a group boycott of Caldwell. This motive argument is undercut by the undisputed evidence that Munchak advanced funds to enable Caldwell to participate in an exhibition summer league. Further, this Court does not believe that the so-called economic motive makes any sense: if Munchak really wanted to limit his exposure as guarantor of the pension provisions in Caldwell's contract, why would he wait until the final year of the five year contract to attempt to minimize his potential exposure?

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[11] Although we conclude that there is insufficient evidence to allow a reasonable jury to conclude that there was concerted action on the part of any of the defendants to boycott Caldwell, we write separately with regard to defendant Munchak to address the issues raised in Munchak's motion and to emphasize the dearth of evidence supporting Caldwell's *§ 1* claim.

Therefore, even if this Court had found that genuine issues of fact existed as to whether the other defendants had engaged in a concerted refusal to deal with Caldwell, summary judgment would still have been appropriate in favor of Munchak because Caldwell has presented *no* evidence that he participated in such a boycott.

II.

VIOLATION OF *SECTION 2* OF THE SHERMAN ACT

Section 2 of the Sherman Act provides that: **[**51]**

> ***HN17***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

15 U.S.C. § 2. Caldwell claims that the defendants violated *§ 2* of the Sherman Act in three ways: "they monopolized the market for professional basketball player services; they attempted to monopolize that market; and they conspired to monopolize that market." Pl.'s Mem. at 68. For many of the reasons already stated, this Court concludes that the plaintiff has failed to present evidence sufficient to support elements of his *§ 2* claims, and, accordingly, the defendants are entitled to summary judgment. We will discuss each of Caldwell's *§ 2* claims separately.

1. *Unlawful Monopolization*

HN18[] Unlawful monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co., 112 S. Ct. at 2089* **[**52]** (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*; *accord* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596, 86 L. Ed. 2d 467, 105 S. Ct. 2847 n.19 (1985)*.

The Court must first determine the relevant market and then decide whether the defendants had "monopoly power" in that market. *Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 188 (2d Cir. 1992)*. Defining the relevant product and geographic markets in an antitrust case is often a difficult task. *See generally* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *United States v. Yellow Cab Co., 332 U.S. 218, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947)*. In its opposition papers, the plaintiff has defined the relevant market as "the market for professional player services." [12] Pl.'s Mem. at 68. The defendants have accepted, for the purposes of this motion, that the plaintiff's market definition is correct. The parties **[*575]** assume that this market includes all ABA and NBA teams during the mid 1970s.

[53]** "Monopoly Power is the power to control prices or exclude competition." *E.I. du Pont, 351 U.S. at 391*. *See also* *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 14, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (market power is the "power to force a purchaser to do something he would not do in a competitive market"); *Apex Oil Co. v. DiMauro, 713 F. Supp. 587, 600 (S.D.N.Y. 1989)* (***HN19***[] monopoly power defined as "the impairment of competition through an unlawfully acquired market structure which allows the monopolist to exclude competition or to raise prices without being undercut"). The existence of monopoly power "ordinarily is inferred from the seller's possession of a predominant share of the market." *Eastman Kodak Co., 112 S. Ct. at 2081*; *Jefferson Parish, 466 U.S. at 17*; *Grinnell Corp., 384 U.S. at 571*. Judge Learned Hand's rule of thumb in the *ALCOA* case has guided courts for nearly half a century: 90 percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly **[**54]** thirty-three percent is not." *United States v. Aluminum Co. of America, 148 F.2d 416, 424 (1945)*. Courts routinely find monopoly power where the defendant possesses a market share greater than 70 percent. *See* *Grinnell, 384 U.S. at 571* (87 percent of the market constituted monopoly

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[12] In his complaint, Caldwell defines the relevant market as "producing, staging and performing professional basketball in the United States." Complaint P 12.

power); *Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 974 & n.6 (8th Cir. 1968)* (surveying cases and noting that percentages greater than 70 percent generally are found to constitute monopoly power), *cert. denied, 395 U.S. 961, 23 L. Ed. 2d 748, 89 S. Ct. 2096 (1969)*.

The Second Circuit has stated that ***HN20***[] summary judgment is appropriate in *§ 2* cases where the defendant's market share is "less than 50%, or even somewhat above that figure, *and* the record contains no significant evidence concerning the market structure to show that the defendant's share of that market gives it monopoly power." *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc., 651 F.2d 122, 129* (2d Cir.) (emphasis in original), *cert. denied, 454 U.S. 968, 70 L. Ed. 2d 384, 102 S. Ct. 512 (1981)*. This is such **[**55]** a case.

Plaintiff contends that the ABA member teams held 36% of the relevant market's capacity for professional basketball player services at the time Caldwell was suspended. This number is arrived at by creating a fraction in which the number of ABA teams (10) is the numerator, and the total number of teams in the MBA and the ABA (28) is the denominator. We believe that plaintiff's approach to define market share can be described, charitably, as simplistic. The Supreme Court has recently reiterated that in determining the existence of market power, the court must "examine[] closely the economic reality of the market at issue." *Eastman Kodak Co., 112 S. Ct. at 2082*. Plaintiff's conclusion regarding the ABA's market share does not take into account disparities between the leagues in ticket sales, broadcast revenues, licensing fees, and other income. In addition, the fact that the ABA was never as successful as the MBA at recruiting the best basketball players and that the ABA collapsed approximately two years after Caldwell's suspension emphasizes that measuring the ABA's monopoly power by reference to the number of teams in the league greatly overstates **[**56]** its strength in the relevant market. [13]

Moreover, even assuming that the ABA had a market share of 36%, that would hardly be sufficient to constitute "market power." Plaintiff, however contends that it is the ABA's market share, combined with additional actions taken by the defendants, which "gave them total market control and which permitted them to ban Caldwell from professional basketball throughout the entire United States." Pl.'s Mem. at 69. These other factors are as follows:

> a) the filing of antitrust suits against the NBA accusing the NBA of trying to drive the ABA out of business by raiding ABA players; b) the threat of a lawsuit for contract interference if an NBA team **[*576]** signed an ABA player to whom an ABA team claimed exclusive rights; and c) actual intervention by the ABA Commissioner to dissuade an NBA team from giving Caldwell a tryout, even after Caldwell's **[**57]** contract with the Spirits had expired.

Pl.'s Mem. at 69.

We conclude there is no basis in fact or law for concluding that the defendants obtained "total market control," *id.,* "complete monopsony control over the players services market," *id. at 70*, or "control over the market for player services," *id.,* as Caldwell alleges based on the ABA's position in the market coupled with these other factors. These other factors cannot be equated with monopoly power, as that term is defined under *§ 2*. This is an obvious attempt by Caldwell to dress his unsuccessful *§ 1* claim in the garb of *§ 2*, which must fail.

2. *Attempted Monopolization*

HN21[] To make out a claim for attempted monopolization, the plaintiff must demonstrate: "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-91 (1993)*; *see also* *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 822 F. Supp. 145, 1993 U.S. Dist. LEXIS 7101, 93* Civ. 2656 (LBS), 1993 WL 181333 at *7 (S.D.N.Y. May 28, 1993). We do not believe **[**58]** that Caldwell has demonstrated a genuine issue of fact as to any of the three elements.

Caldwell's evidence of the first element -- intent to monopolize -- simply reiterates the evidence from which Caldwell claims that concerted action under *§ 1* can be inferred. *See* Pl.'s Mem. at 72. Caldwell relies on the same body of

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[13] Obviously, the Spirits' share of the relevant market is significantly less than 36% since the Spirits were merely one member team of the ABA.

evidence to support the second element -- predatory or anticompetitive conduct. Id. We do not believe that a reasonable jury could conclude that this evidence, discussed at length in Part I of this Opinion, satisfies either element.

Plaintiff contends that the third element of attempted monopolization -- a dangerous probability of achieving monopoly power -- is satisfied because "defendants were effectively able to control 100% of the market as demonstrated by the fact that Caldwell was not even able to get a tryout with *any* pro team in either league after his suspension." Pl.'s Mem. at 73 (emphasis in original). We have considered and rejected this argument in connection with Caldwell's *§ 1* claim. We conclude that no reasonable trier of fact could infer, based on the fact that no team ever expressed an interest in hiring Caldwell, that the defendants were **[**59]** dangerously close to monopolizing the professional basketball market.

Plaintiff also claims that he has shown more than a mere probability of achieving monopoly: he claims that "the defendants actually succeeded here because they cut Caldwell off from the entire market." Pl.'s Mem. at 72. Even assuming, arguendo, that the defendants "cut Caldwell off," [14] this does not indicate that there was a dangerous probability that the ABA or the Spirits or any of the other named defendants were close to monopolizing the market of "professional player services." Once again, it appears that Caldwell's confusion originates in his obvious attempt to fit his *§ 1* group boycott claim within the elements of a claim of attempted monopolization under *§ 2*. Plaintiff's attempted monopolization claim is without merit.

3. *Conspiracy to Monopolize*

Finally, **[**60]** ***HN22***[] under *§ 2* of the Sherman Act, the offense of conspiracy to monopolize requires proof of "(1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize." *Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988)*; *accord* *United States v. Yellow Cab Co., 332 U.S. 218, 225, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947)*; *Apex Oil Co. v. DiMauro, 713 F. Supp. 587, 599-600 (S.D.N.Y. 1989)*. As we have discussed at great length in Part I of this Opinion, Caldwell has failed to offer evidence which would enable a reasonable jury to find concerted action on the part of **[*577]** any of the defendants. Accordingly, Caldwell's final claim under *§ 2* must be rejected as meritless.

III.

CALDWELL'S PENDENT STATE CLAIMS

In his complaint, Caldwell asserts:

> At the time the Defendants indefinitely suspended Plaintiff, Defendants acted maliciously with the intent to destroy Plaintiff's ability to further practice and work in his chosen profession.

Complaint, P 35. Caldwell admits that this was not well pleaded, Pl.'s Mem. at 75, and now contends -- eighteen **[**61]** years after this lawsuit was instituted -- that it sets forth a claim for either intentional tort or *prima facie* tort under New York law. This claim is asserted against the Spirits Defendants only. Pl.'s Mem. at 74.

1. *Prima Facie Tort*

HN23[] The elements of *prima facie* tort are: "(1) intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; (4) by an act or series of acts that would otherwise be lawful." *Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332, 451 N.E.2d 459, 467, 464 N.Y.S.2d 712, 720 (1983)*; *accord* *Twin Laboratories v. Weider Health & Fitness, 900 F.2d 566, 571 (2d Cir. 1990)*. This tort is "designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy." *Curiano v. Suozzi, 63 N.Y.2d 113, 118, 469 N.E.2d 1324, 1327, 480 N.Y.S.2d 466, 469 (1984)*.

[14] Of course, in Part I of this Opinion we concluded that no reasonable jury could conclude that the defendants conspired to boycott Caldwell in violation of *§ 1* of the Sherman Act.

Consequently, an action for *prima facie* tort will not lie where the allegations fall within the scope of a traditional tort theory. **[**62]** *Id.*

The touchstone of *prima facie* tort is "disinterested malevolence," meaning that the plaintiff cannot recover unless the defendant's conduct was not only harmful, but done with the sole intent to harm. *Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 333, 451 N.E.2d 459, 468, 464 N.Y.S.2d 712, 721 (1983)*; *Twin Laboratories, 900 F.2d at 571*. Motives other than disinterested malevolence -- *e.g.,* profit, self-interest, or business advantage -- will defeat a *prima facie* tort claim. *Id.* Caldwell has, throughout these proceedings, ascribed motives to the defendants which cannot be described as "disinterested malevolence," but rather are properly characterized as for profit, self-interest, or business advantage. *See also Amodei v. New York State Chiropractic Ass'n, 160 A.D.2d 279, 553 N.Y.S.2d 713, 716* (3d Dep't 1990) (claim for *prima facie* tort barred where defendants' motivation for suspending plaintiff was the "maintenance of appropriate professional standards or the resolution of grievances"), *aff'd,* **[**63]** *77 N.Y.2d 891, 571 N.E.2d 70, 568 N.Y.S.2d 900 (1991)*. Although alternative pleading of *prima facie* tort is acceptable, and therefore alternative pleading of motives on the part of the defendants is also acceptable, nowhere in the complaint or in the papers responding to this motion does plaintiff claim, or offer evidence to support a claim, that the Spirits Defendants' sole motivation for acting as they did was disinterested malevolence rather than self-interest, profit, or business advantage. Accordingly, plaintiff's contention that the defendants are liable for *prima facie* tort is without merit.

In addition, it appears that Caldwell's complaint is insufficient to state a cause of action for *prima facie* or intentional tort insofar as it fails to plead special damages. *See, e.g., Curiano v. Suozzi, 63 N.Y.2d at 117, 480 N.Y.S.2d at 469*. This would provide alternative grounds for dismissing Caldwell's third claim. The Court denies Caldwell's belated request for leave to amend his complaint to remedy this omission. Caldwell did not seek leave to amend **[**64]** his complaint when he successfully moved to reinstate his claims in 1990, or when the defendants moved to dismiss this cause of action in 1991. More importantly, for eighteen years, the defendants had no notice that Caldwell's third claim was for *prima facie* or intentional tort. Indeed, in their initial moving papers defendants surmised that the plaintiff's pendent claim was for interference with prospective business advantage. Even the plaintiff characterizes this surmise under the circumstances **[*578]** as "understandable." Pl.'s Mem. at 75 n.36.

2. *Intentional Tort*

HN24[] To prove intentional tort under New York law, Caldwell must demonstrate, in the very least: "(1) the intentional infliction of harm, (2) resulting in special damages, and (3) without excuse or justification." *Chen v. United States, 854 F.2d 622, 627 (2d Cir. 1988)*; *see also Board of Education v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 406, 380 N.Y.S.2d 635, 644, 343 N.E.2d 278 (1975)* ("Whenever there is an intentional infliction of economic damage, without excuse or justification, we will eschew formalism and recognize the existence of a cause **[**65]** of action."). Caldwell argues that the defendants' conduct is actionable as an intentional tort "if the [defendants'] conduct did violate the antitrust laws or was otherwise unlawful." Pl.'s Mem. at 78. *See also Chen, 854 F.2d at 628* ("intentional tort involves means which are illegal and corrupt") (citation omitted). As we have already concluded in Parts I and II of this Opinion, Caldwell has failed to offer sufficient evidence to convince a reasonable jury that the defendants, individually or collectively, violated the antitrust laws. Nor has Caldwell offered evidence which tends to prove that the defendants used means which would otherwise be illegal or corrupt. Accordingly, summary judgment is granted to the defendants on plaintiff's claim for intentional tort. [15]

[66] CONCLUSION**

For the reasons set forth above, The Spirits of St. Louis, Donald Schupak, Daniel Silna, and Tedd Munchak are entitled to summary judgment on all remaining claims asserted against them by plaintiff, and the complaint should be dismissed as against them. Plaintiff contends that the other defendants -- American Basketball Association, Inc.,

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[15] It would appear that plaintiff's failure to plead special damages would also provide alternative grounds for dismissing Caldwell's intentional tort claim. *See Chen, 854 F.2d at 627* (noting that special damages is an element of *prima facie* tort and intentional tort).

Ozzie Silna, and Harry Weltman -- have failed to appear in this action and are therefore in default. *See* Pl.'s Mem. at 1 n.1. The plaintiff is hereby ordered to inform the Court in writing, no later than July 16, 1993, of the status of this case with regard to these other defendants.

SO ORDERED.

Dated: June 14, 1993

New York, New York

Leonard B. Sand

U.S.D.J.

New York v. Kraft Gen. Foods

United States District Court for the Southern District of New York

June 14, 1993, Decided ; June 14, 1993, Filed

93 Civ. 0811 (KMW)

Reporter

862 F. Supp. 1030 *; 1993 U.S. Dist. LEXIS 8108 **; 1993-1 Trade Cas. (CCH) P70,284

STATE OF NEW YORK, by ROBERT ABRAMS, ATTORNEY GENERAL, Plaintiff, v. KRAFT GENERAL FOODS, INC., NABISCO CEREALS, INC., NABISCO, INC., PHILIP-MORRIS COMPANIES, INC. RJR NABISCO HOLDINGS, CORP., and RJR NABISCO., INC., Defendants.

Core Terms

cereal, Wheat, Acquisition, brands, Shredded, products, marketing, trademark, consumers, injunctive relief, irreparable harm, preliminary injunction, market share

LexisNexis® Headnotes

Mergers & Acquisitions Law > Sales of Assets > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Remedies

HN1[] Mergers & Acquisitions Law, Sales of Assets

Under § 16 of the Clayton Act, a private plaintiff is entitled to injunctive relief against loss or damage threatened by a violation of § 7, *15 U.S.C.S. § 18*, under general equitable principles and upon a showing that the danger of irreparable loss or damage is immediate. *15 U.S.C.S. § 26*. Section 7 of the Clayton Act prohibits the acquisition of the assets of another corporation where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition. *15 U.S.C.S. § 18*. Where a state sues as parens patriae on behalf of its citizens of New York, and although the state is a governmental actor, it is considered a private party when seeking an injunction pursuant to the Clayton Act. The state, therefore, does not benefit from the presumption of irreparable harm enjoyed by the Federal Trade Commission or the Department of Justice when those agencies sue to stop a merger. Therefore, to obtain preliminary injunctive relief, the state must establish (1) irreparable harm; and (2) either (a) likelihood of success on the merits; or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] Clayton Act, Remedies

In an anti-trust action by a plaintiff-state on behalf of its citizens, to obtain an injunction under the Clayton Act before a defendant has had an opportunity to conduct full discovery and put on its case at trial, a court must find that plaintiff, or the consumers represented by plaintiff, will be irreparably harmed prior to the conclusion of the trial of plaintiff's claims. The danger to competition must be real, not fancied, actual not prospective, and threatened, not imagined.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN3[] Regulated Practices, Private Actions

Irreparable injury is the single most important prerequisite to the issuance of an interlocutory injunction.

Judges: **[**1]** Wood

Opinion by: KIMBA M. WOOD

Opinion

[*1031] OPINION AND ORDER

WOOD D.J.

Background

On February 10, 1993 the State of New York ("the State") sued Kraft General Foods, Inc. ("Kraft") and RJR Nabisco Holdings Corp. ("Nabisco"), attacking Kraft's acquisition of Nabisco's ready-to-eat ("RTE") cereal assets (the "Acquisition"). The State also seeks either to rescind the transaction or to divest Kraft of Nabisco's RTE cereal assets. The State claims that the Acquisition violates Section 7 of the Clayton Act, *15 U.S.C. § 18*; *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*; and *Section 340* of New York's Donnelly Act, *N.Y. Gen. Bus. L. § 340*.

Pending a final determination, the State sought to preliminarily enjoin Kraft from taking any action that would alter the status quo as of November 11, 1992, with respect to the RTE cereal assets purchased from Nabisco and any assets currently used by Nabisco for the production of RTE cereals. The order sought by the State would bar Kraft from altering the trade dress of the former Nabisco brands so that Kraft would be required to sell the newly acquired RTE cereals under the Nabisco trademark **[**2]** and trade dress pending the outcome of trial.

The court denied the motion for a preliminary injunction at the conclusion of a hearing conducted on May 5, 1993. The following constitutes the court's factual findings and conclusions of law with respect to plaintiff's motion, and supplements the court's May 5, 1993 oral ruling.

I. *The RTE Cereal Industry*

Sales of RTE cereals in 1991 totalled more than $ 7 billion. First Cotterill Aff. P 8. Before and after Kraft acquired Nabisco's RTE cereal assets, Kraft was the third largest RTE cereal producer in the United States. Kraft sells RTE cereals under the "Post" trademark, including Grape Nuts, Raisin Bran, Honeycomb, Pebbles, Honey Bunches of Oats, Alphabits and Cocoa Pebbles.

Prior to Nabisco's exit from the RTE cereal business after almost half a century, Nabisco was the sixth largest RTE cereal producer, making such products as Big Biscuit Shredded Wheat, Spoon Size Shredded Wheat, Shredded Wheat 'N Bran, Shredded Wheat with Oat Bran (collectively "Shredded Wheat"), 100% Bran, Frosted Wheat Squares, various Fruit Wheats and Team Flakes. Krash May 21, 1993 Letter, Schedule 1.1C. From 1988 to 1992, Nabisco adopted a short-term, **[**3]** profit maximization strategy of raising prices well above the industry average [1] and reducing marketing support for its RTE cereal products by 70%. First Cotterill Aff. P 30. Nabisco also did not introduce any new brands. The result of this strategy was a steady erosion in Nabisco's market share from 5.52% percent in 1988 to 2.94% in 1992. By April 1, 1992, Nabisco's core brands, Spoon Size Shredded Wheat and Big Biscuit Shredded Wheat, were in danger of being dropped from trade accounts if market share declined any further, because **[*1032]** their sales volume would not have justified their shelf space. Thomas Aff. P 3. [2] Such delisting

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[1] In 1988, Nabisco priced its Shredded Wheat products at 93% of the industry average. By 1992, the per pound price of $ 3.13 was 106% of the industry average. Hrg. Tr. at 97.

[2] As of April 1, 1992, the market share of Spoon Size Shredded Wheat and Big Biscuit Shredded Wheat was 1.1% and 0.7%, respectively. Thomas Aff. P 2.

occurred with respect to Nabisco's Frosted Wheat Squares, Fruit Wheats and Team Flakes, whose market share of less than 1% each led to their distribution in only limited geographic markets. *Id.*

[4]** Prior to the Acquisition, the United States market for RTE cereal sales in 1992 was shared by six major companies and private label and other firms as follows:

Kellogg	37.03%
General Mills	25.58
Kraft/Post	11.79
Quaker	7.13
Ralston	4.63
Nabisco	2.94
Private Label & Other	10.90

Following the Acquisition, Kraft remained in third place, increasing its market share to 14.73%. Cotterill Reply Aff. Ex. A.

II. *The Acquisition*

In the Spring of 1992, Nabisco decided to leave the cereal business. Thomas Aff. P 2; Marram Aff. P 7. Nabisco initially agreed to sell its cereal assets to General Mills, the second largest RTE cereal seller (in terms of market share); that transaction was abandoned on November 3, 1992. Weisberg Aff. PP 2-6; Thomas Aff. P 2. According to plaintiff, the sale to General Mills was abandoned due to antitrust concerns raised by the Federal Trade Commission ("FTC") and the New York Attorney General. Pl. Mem. Supp. at 8 n.15.

On November 12, 1992 Nabisco agreed to sell its U.S. and Canadian cereal assets to Kraft for $ 450 million. Of the total acquisition price, $ 388 million was allocated to the assets in the United States and $ 62 million **[**5]** was allocated to the Canadian assets. Hinkes Aff. P 32. Roughly three quarters of the total $ 450 million acquisition price was allocated to the good will associated with the Nabisco Shredded Wheat brand identity. Hinkes Aff. P 15. Under the terms of the Acquisition

1. Kraft acquired for four years the exclusive and nonassignable right to use the "Nabisco" trademarks on the Nabisco cereals;
2. Kraft acquired Nabisco's Naperville, Illinois plant;
3. Nabisco agreed to supply Kraft with as much RTE cereal product as Kraft requires from the Nabisco plant in Niagara Falls, New York for at least five years;
4. Nabisco agreed not to compete in the RTE cereal market for 15 years, and not to compete with a shredded wheat product for 25 years; and
5. Kraft agreed not to compete in the "Triscuit-type product" market for 15 years.

II. *Review by the FTC and New York Attorney General*

On November 18, 1992, Nabisco and Kraft notified the FTC and the Antitrust Division of the U.S. Department of Justice of their intent to consummate the transaction, in accordance with the terms of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, *15 U.S.C. § 18a* ***[**6]*** *et seq.* Kraft and Nabisco provided the FTC's lawyers and economists with documents and information about the transaction. The New York State Attorney General's Office received copies of the documents supplied by the defendants to the federal authorities in early December 1992 pursuant to the information sharing protocol between state and federal authorities. *See Program for Federal-State Cooperation in Merger Enforcement,* 4*Trade Reg. Rep.* (CCH) P 13,212 (May 27, 1992).

On December 15, 1992, the New York Attorney General's office asked defendants to produce additional information not requested by, and not produced to, the FTC. The additional information requested by the State centered on the price/cost ratios of defendants' RTE cereal brands over the past five years. Sampson Aff. P 10. On December 23, 1992 Kraft responded in part to the State's information request; the State issued a further request that same day. *Id.* P 8.

[*1033] On December 24, 1992, the Hart-Scott-Rodino waiting period expired. The FTC took no action with respect to the proposed asset sale, presumably finding insufficient reason to seek additional information or to sue **[**7]** to enjoin the transaction.

On December 30, 1992, Kraft responded in part to the State's December 23, 1992 information request. On January 4, 1993, defendants consummated the asset sale. On January 11, 1993, Nabisco responded to the State's December 23, 1992 information request and completed its response to the State's December 15, 1993 information request. On January 22, 1993, Kraft completed its response to the State's December 23, 1992 request.

Since the end of January 1993, Nabisco's RTE cereal operations have been thoroughly integrated with Kraft's operations with respect to production, marketing, pricing and promotion. Hinkes Aff. PP 24-30; Marram Aff. PP 2-3. On January 6, 1993 Kraft notified Nabisco's brokers, who distributed Nabisco's products to the retail trade, that they would be terminated as of February 12, 1993 and replaced with Kraft's sales force. Hinkes Aff. P 26. All of Nabisco's former salaried employees who were hired by Kraft are now participating in Kraft's benefit plans. The union contracts covering hourly employees at the Naperville plant were assigned to Kraft, which has assumed responsibility for the management of the hourly employees' benefit plans. **[**8]** *Id.* P 28.

As of January 25, 1993, Nabisco dissolved its RTE cereal marketing department. One member of Nabisco's former marketing staff joined Kraft; the others transferred to various positions within Nabisco or left the company entirely. Marram Aff. P 3. To date, Kraft has marketed the Nabisco cereal lines using only the Nabisco trademark under the four year license. May 18, 1993 Tr. at 5.

On February 10, 1993 the State commenced this action and moved for a preliminary injunction.

Discussion

I. *Standard for Preliminary Injunctive Relief*

HN1[] Under Section 16 of the Clayton Act, a private plaintiff is entitled to injunctive relief against loss or damage threatened by a violation of Section 7 under general equitable principles and upon "a showing that the danger of irreparable loss or damage is immediate. . . ." *15 U.S.C. § 26* (West's Supp. 1993). *See also R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 107* (2d Cir.), *cert. denied sub nom. Thomas J. Lipton, Inc. v. R.C. Bigelow, Inc., 493 U.S. 815, 107 L. Ed. 2d 31, 110 S. Ct. 64 (1989)*. Section 7 of the Clayton Act prohibits the acquisition of **[**9]** the assets of another corporation "where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition. . . ." *15 U.S.C. § 18* (West's Supp. 1993).

The State of New York sues as *parens patriae* on behalf of the citizens of New York. Although the State of New York is a governmental actor, it is considered a private party when seeking an injunction pursuant to the Clayton Act. *See California v. American Stores Co., 495 U.S. 271, 110 S. Ct. 1853, 1867, 109 L. Ed. 2d 240 (1990)*. The State, therefore, does not benefit from the presumption of irreparable harm enjoyed by the FTC or the Department of Justice when those agencies sue to stop a merger. *See FTC v. University Health, Inc., 938 F.2d 1206, 1218 (11th Cir. 1991)*. Therefore, to obtain preliminary injunctive relief, the State must establish "(1) irreparable harm *and* (2) either (a) likelihood of success on the merits *or* (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting **[**10]** the preliminary relief." *Consolidated Gold Fields, PLC v. Minorco, S.A., 871 F.2d 252, 256* (2d Cir.) (citation omitted) (emphasis added), *cert. dismissed, 492 U.S. 939 (1989)*.

Because the States has failed to establish irreparable harm, the court must deny its motion. ***HN2***[] To obtain an injunction before the defendant has had an opportunity to conduct full discovery and put on its case at trial, the court must find that the plaintiff, or here the consumers of RTE cereal, will be irreparably harmed prior to the conclusion of **[*1034]** the trial of plaintiff's claims, which is scheduled for March 1, 1994. *See, e.g., Reuters, Ltd v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990)*. The danger to competition "must be real, not fancied, actual not prospective, and threatened, not imagined." *Fein v. Security Banknote Co., 157 F. Supp. 146, 148 (S.D.N.Y. 1957)* (discussing criteria for injunctive relief under § 16).

II. *Application of Standard for Injunctive Relief*

In this case, much of the conduct that is typically viewed as constituting potentially "irreparable **[**11]** harm" in the merger context either took place prior to the commencement of this action, or has been dealt with by stipulation. This case thus poses a very different problem from that posed in *Consolidated Gold Fields, 871 F.2d at 261*, where difficulties in undoing the transaction after the operations are combined militated in favor of enjoining the merger before it was consummated. One of the most drastic changes was completed before the preliminary injunction motion was filed: Nabisco's RTE cereal operations were fully integrated into Kraft's operations. Hinkes Aff. PP 24-30; Marram Aff. PP 2-4. In addition, by operation of law, Kraft was required to state on the cereal boxes that it is the manufacturer of the cereal; this information now appears in small type on the cereal boxes. May 18, 1993 Tr. at 5-6. Kraft stipulated that it would maintain the current status quo regarding the packaging of the former Nabisco products until December 31, 1993 *id.,* and that the only change that will occur during the first few months of 1994 is that the Post name will be added to the cereal boxes; it will appear there along with the prominently displayed **[**12]** Nabisco mark and logo. June 9, 1993 Tr. at 3-5. The conduct sought to be enjoined at this stage is thus fairly finite: between January 1, 1994 and March 1994, when this case is due to be tried, Kraft expects to begin test marketing slightly altered cereal boxes, that will bear the Post logo along with the Nabisco logo.

The State ultimately seeks either (1) to rescind the Acquisition and to require Nabisco to return to the RTE cereal business [3] June 9, 1993 Tr. at 13, or (2) to divest Kraft of the former Nabisco assets by selling them to a new entrant and to order Nabisco, over any objections it may have, to license this new entrant to use the Nabisco trademark on the former Nabisco cereals. [4] *Id.* at 12-13; Hrg. Tr. at 246-47. The State asserts that the brand identity and good will associated with the former Nabisco brands represent an important source of competition in the RTE cereal industry. Pl. Reply Mem. at 29. The State's purpose in seeking to preserve the value of the Nabisco mark is to enable either Nabisco or a third party to capitalize on the good will Nabisco built up over many years. The court now considers what detrimental effect, if any, the actions contemplated **[**13]** by Kraft will have on the Nabisco mark on RTE cereals.

The State does not counter Kraft's assertion that Post is a good name in the cereal business and that mere association with the Post name will not devalue the Nabisco name or the products. June 9, 1993 Tr. at 9, 11. [5] **[**15]** **[*1035]** New York State nevertheless contends that consumers of these products will suffer irreparable harm from the addition of the Post logo, because consumers will be confused by (1) the simultaneous association of two **[**14]** brands with a product, and (2) a later un-coupling of the brands if the court orders divestiture. Sampson June 10, 1993 Letter at 3-7. [6] The State asserts that Kraft's conduct will diminish the demand for these Nabisco

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[3] A court should not order rescission unless the seller's return to the industry is feasible under the circumstances and the remedy is the most effective way to cure the antitrust violation. *See generally,* Earl W. Kintner, 5 *Federal* ***Antitrust Law****,* § 40.8 at 121, § 40.14 at 156-57 (1984 & Supp. 1993).

[4] A court may be reluctant to order this latter relief, given that Nabisco continues to use the Nabisco name and trademark to sell over $ 3 billion worth of cookies and crackers each year. Thomas Aff. P 4; Hrg. Tr. at 246.

[5] As the Business Director for Nabisco's RTE cereal business put it, Post is "in the long run, a better brand umbrella for RTE cereal products than 'Nabisco,' which most consumers identify primarily with cookies and crackers." Thomas Aff. P 7. The State concedes that Kraft will maintain the high quality of Shredded Wheat. Further, since acquiring Nabisco's RTE cereal assets, Kraft has increased marketing above Nabisco's low levels, and lowered the price of Shredded Wheat relative to competitive cereals. Hrg. Tr. at 72-73, 76, 101. Thus, association with Post may enhance the value of the former Nabisco cereals.

The State argues that courts have upheld trademark infringement claims where the infringer has a stronger reputation than the trademark holder, despite the "apparent lack of injury to [the trademark holder's] reputation," *Banff, Ltd. v. Federated Dep't Stores, Inc., 841 F.2d 486, 492 (2d Cir. 1988)*. The State's reliance on trademark infringement cases involving competing products is unavailing here. Sampson June 10, 1993 Letter at 3-7. *Banff* is distinguishable because the concerns of trademark law are avoiding confusion as to the source of the goods in question and preserving fair competition. Here, there are no competing goods at issue. The sole question is whether the addition of the Post name on products manufactured by Kraft will cause Shredded Wheat consumers nationwide not to buy the hypothetical new entrant's products because the Nabisco name appears on the box with the Post name for several months in a few test markets.

products and will diminish the value of the Nabisco mark as used on formerly Nabisco cereals. Cotterill Reply Aff. P 48. As the State puts it, Kraft's placing its own trademark on the products, either with the Nabisco trademark or by itself, "will place the integrity of that brand identity, and consequently the availability of any effective relief in this action, in jeopardy." Pl. Reply Mem. at 29.

The State offers little evidence that the small change contemplated by Kraft, in test markets, over a two-to-three month period, will diminish the value of the Nabisco mark on cereals. The State's expert opines that once the changeover from Nabisco to Post begins, "it would be at best extremely difficult for any other firm to obtain consumer acceptance of yet another switch in the trademark and firm name under which Shredded Wheat products are sold." Cotterill Reply Aff. P 48. He asserts that confusion, and therefore, an erosion of brand loyalty, will ensue, but offers no further support for that statement. *Id.*

Thus, the Court is left with the State's largely unsupported contention that the addition of the Post name will diminish the value of the Nabisco mark and product, simply because consumers will find that change confusing, **[**16]** when coupled with any post-divestiture change in mark. The Court views that contention as too speculative to support a finding of irreparable harm.

Because plaintiff has failed to show ***HN3***[] irreparable injury, the "single most important prerequisite" to the issuance of an interlocutory injunction, *Reuters, Ltd., 903 F.2d at 907*, the court need not reach the issue of State's likelihood of success on the merits. The court denies the motion for a preliminary injunction. If the State wishes to present additional evidence of the likelihood of consumer confusion and consequent detriment to consumers from a weaker Shredded Wheat brand, if Kraft alters its stated plans with respect to the former Nabisco RTE cereals, or if trial is delayed, the court retains the power to reconsider the need for injunctive relief.

Conclusion

For the reasons stated above, the court denies plaintiff's motion for a preliminary injunction.

SO ORDERED.

Dated: New York, NY

June 14, 1993

Kimba M. Wood

United States District Judge

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[6] The Court notes that the association with Kraft already exists on the cereal boxes by operation of law, in small type, and that the addition of the Post logo simply heightens the likelihood of a consumer becoming aware of that association. May 18, 1993 Tr. at 5-6.

[Greater Rockford Energy & Technology Corp. v. Shell Oil Co.]

United States Court of Appeals for the Seventh Circuit

December 1, 1992, Argued ; June 15, 1993, Decided

No. 92-2212

Reporter

998 F.2d 391 *; 1993 U.S. App. LEXIS 14221 **; 1993-1 Trade Cas. (CCH) P70,274

GREATER ROCKFORD ENERGY AND TECHNOLOGY CORP., SHEPHERD OIL, INC., VIDALIA ETHANOL, LTD., et al., Plaintiffs-Appellants, v. SHELL OIL COMPANY, MARATHON PETROLEUM COMPANY, AMOCO OIL COMPANY, INC., CHEVRON, U.S.A., INC., ATLANTIC RICHFIELD CO., B.P. AMERICA, EXXON COM- PANY, U.S.A. and MOBIL OIL CORPORATION, Defendants-Appellees.

Subsequent History: [1]** Petition for Rehearing with Suggestion for Rehearing en banc Denied September 2, 1993, Reported at: *1993 U.S. App. LEXIS 22560*.

Prior History: Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 90 C 3119. Richard Mills, Judge.

Disposition: AFFIRMED.

Core Terms

gasohol, ethanol, antitrust, anti trust law, fuels, motor fuel, antitrust violation, producers, alcohol, subsidy, summary judgment, gasoline, injuries, dealers, prices, signs, restraint of trade, plaintiffs', consumers, labeling, pumps, oil, Gasohol Competition Act, synthetic, sales, oil company, manufacturers, marketing, petroleum, damages

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[ ] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is warranted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] **Summary Judgment, Burdens of Proof**

To forestall a motion for summary judgment, a nonmovant plaintiff must present sufficient evidence to show the existence of each element of its case on which it will bear the burden of proof at trial.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN3[] **Standards of Review, De Novo Review**

The appellate court reviews the grant of summary judgment de novo, evaluating the evidence in the light most favorable to the non-moving party. The appellate court can affirm the grant of summary judgment on any ground, even one not relied on by the district court, if the record fairly supports that justification and it has not been waived by the appellee.

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Antitrust & Trade Law, Clayton Act**

See § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Clayton Act, Claims**

Section 4 plaintiffs under the Clayton Act, *15 U.S.C.S. § 15*, must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Justiciability > Standing > General Overview

Securities Law > RICO Actions > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN6[] **Remedies, Damages**

A plaintiff does not have standing to sue under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, if its injuries are indirect and speculative. The standing requirement similarly applies to treble-damage actions under the Racketeer Influenced and Corrupt Organizations Act.

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > ... > Elements > Causation > Causation in Fact

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Torts > ... > Causation > Proximate Cause > General Overview

HN7[] **Justiciability, Standing**

The elements a plaintiff must satisfy to bring a § 4 action under the Clayton Act, *15 U.S.C.S. § 15*, for treble damages are: (1) a duty recognized by the antitrust laws; (2) a violation of the antitrust laws; (3) injury to an interest protected by the antitrust laws and attributable to the antitrust violation--that is, antitrust injury; and (4) a direct link between the antitrust violation and the antitrust injury, that is to say, standing.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN8[] **Clayton Act, Claims**

"Standing" may be broadly construed to involve all the elements of the cause of action. That is, a plaintiff may not have "standing" unless he can satisfy each requirement of the § 4 action under the Clayton Act, *15 U.S.C.S. § 15*--antitrust violation, antitrust injury and proximate cause.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN9[] **Private Actions, Remedies**

Antitrust injury involves a causation requirement in order to define the class of potential plaintiffs eligible to bring suit--those injured by anything forbidden in the antitrust laws. In establishing antitrust injury, courts must first delineate the type of interests protected by the antitrust laws, and second, must determine whether the violation was the cause-in-fact of the injury: that "but for" the violation, the injury would not have occurred.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN10[] **Justiciability, Standing**

Standing examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN11[] **Justiciability, Standing**

Factors a court must consider in deciding whether a plaintiff has standing include: the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed. Standing involves a case-by-case analysis of the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Sherman Act, Claims**

With respect to *§ 1* claims under the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff, to show a violation, must establish a contract, conspiracy or combination intended to restrain competition and which actually has an anticompetitive effect.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Regulated Practices, Price Fixing & Restraints of Trade**

To show a conspiracy to restrain trade, a plaintiff must proffer evidence, either direct or circumstantial, that tends to exclude the possibility that the alleged conspirators acted independently.

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

The failure of a private, standard-setting body to certify a product is not, by itself, a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN15[] Exemptions & Immunities, Noerr-Pennington Doctrine

Under the Noerr-Pennington doctrine, lobbying that would arguably restrain trade is protected political activity and does not violate the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN16[] Exemptions & Immunities, Noerr-Pennington Doctrine

There is an exception from *First Amendment* protection for "sham lobbying," under the Noerr-Pennington doctrine. A sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action at all, not one who genuinely seeks to achieve his governmental result but does so through improper means.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN17[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

See the Gasohol Competition Act of 1980, *15 U.S.C.S. § 26a*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN18[] Clayton Act, Claims

To maintain a § 4 action under the Clayton Act, *15 U.S.C.S. § 15*, for treble damages, a plaintiff must show antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN19[] **Private Actions, Remedies**

In determining whether the injury alleged is the type the antitrust laws were intended to prevent, the court is directed to look at the type of loss that the claimed violations would be likely to cause, or, in other words, to consider whether the injuries fall squarely within the area of congressional concern.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN20[] **Clayton Act, Claims**

To satisfy the antitrust injury requirement, a § 4 plaintiff under the Clayton Act, *15 U.S.C.S. § 15*, must show that its injury flows from that which makes defendants' acts unlawful; that "but for" the alleged violation, the injuries would not have occurred.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN21[] **Private Actions, Remedies**

An antitrust violation need not be the sole cause of the alleged injuries, but the plaintiff must establish, with a fair degree of certainty, that the violation was a material element of, and substantial factor in producing, the injury. The proof required to show causation of damages is greater than that required to prove the amount of damages, where a plaintiff is afforded more latitude due to the "vagaries of the marketplace." In ascertaining the amount of damages, the plaintiff nonetheless must be able to trace its damages to the injury which was in fact caused by the violation.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN22[] **Clayton Act, Claims**

The lack of antitrust injury is fatal to the claim for injunctive relief under § 16 of the Clayton Act, *15 U.S.C.S. § 26*.

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Judges: Before CUDAHY and RIPPLE, Circuit Judges, and LAY, Senior Circuit Judge. *

Opinion by: CUDAHY

Opinion

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* The Honorable Donald P. Lay of the United States Court of Appeals for the Eighth Circuit is sitting by designation.

[*393] CUDAHY, *Circuit Judge.* Ethanol producers and gasohol blenders sued a number of oil companies for treble damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15*, *26 (1988)*, alleging that the companies violated, *inter alia,* the Gasohol Competition Act of 1980, *15 U.S.C. § 26a (1988)*. The district court granted summary judgment against the plaintiffs **[**6]** on the ground that they lacked antitrust standing. Because we find that the plaintiffs have failed to show antitrust injury, we affirm.

I.

Ethanol is an alcohol produced from the fermentation of grain, molasses and other agricultural products. When blended with gasoline (generally in a ratio of one part ethanol to nine parts gasoline), the motor fuel gasohol is formed. The plaintiffs, eleven ethanol manufacturers and/or sellers [1] and two gasohol blenders [2] (collectively, the plaintiffs), brought this action against eight integrated oil companies for treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act. [3] They alleged violations of *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2 (1988)*, *§ 26a* of the Clayton Act, otherwise known as the Gasohol Competition Act of 1980, *15 U.S.C. § 26a (1988)*, the Illinois ***Antitrust Law***, *740 ILCS 10/1 et seq.* (1992) (Ill. Rev. Stat. ch. 38 § 60-1 *et seq.* (1991)), and the Illinois Consumer Fraud and Deceptive Practices Act, *815 ILCS 505/1 et seq.* (1992) (Ill. Rev. Stat. ch. 121 1/2, P 261, *et seq.* (1991)). The plaintiffs assert that the defendants, **[**7]** individually and in combination, discriminated against and disparaged ethanol and gasohol to eliminate competition in the motor fuel market. In particular, the plaintiffs allege that the oil companies restricted the purchase and sale of gasohol by their dealers and jobbers, limited the use of their credit instruments in transactions involving gasohol, engaged in an anti-alcohol campaign by labeling their gasoline with signs indicating that the product contains "no alcohol" and, finally, communicated among themselves sensitive competitive information regarding ethanol and gasohol.

[8]** The district court held that the plaintiffs did not have standing to sue under § 4 and granted summary judgment for the defendants. *790 F. Supp. 804 (C.D. Ill. 1992)*. The court applied the factors discussed in *Associated* **[*394]** *General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 537-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, and found that the injuries which the plaintiffs alleged, namely, lost profits resulting in the plaintiffs' business failures, [4] were indirect, derivative, speculative and duplicative given that the plaintiffs were not competitors or consumers in the market allegedly restrained and that there was an abundance of other causes for the plaintiffs' economic troubles. [5]

[9]** II.

HN1[] Summary judgment is warranted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. ***HN2***[] To forestall a motion for summary judgment, a nonmovant plaintiff must present sufficient evidence to show the existence of each element of its case on which it will bear the

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[1] Namely, Greater Rockford Energy and Technology Corporation, Shepherd Oil, Inc., Vidalia Ethanol, Ltd., Alpebo, Inc., Shreveport Ethanol, Inc., Lakefield Ethanol, Inc., A.E. Montana, Inc., CEPO, Inc., High Plains Corp. and Texas Ethanol Producers. Wurster Oil Company is a gasohol blender, but has sued in its capacity as an ethanol seller.

[2] Cajun Energy, Inc. and Public Terminals, Inc.

[3] The State of Illinois intervened as a plaintiff before the district court, but its claims were dismissed without prejudice. The dismissal is not challenged in this appeal.

[4] All of the plaintiffs, with the exception of High Plains Corp., have since gone out of business.

[5] Having dismissed the federal claims for lack of antitrust standing, the district court dismissed the pendent claims under Illinois law for lack of jurisdiction. By failing to challenge the dismissal, the plaintiffs effectively concede that if summary judgment on the federal claims was appropriate, the dismissal of the pendent state claims was also appropriate.

burden of proof at trial. *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 48-49 (7th Cir. 1992)*. Of course, ***HN3***[] we review the grant of summary judgment *de novo,* evaluating the evidence in the light most favorable to the non-moving party. *Matsushita, 475 U.S. at 587*. We can affirm the grant of summary judgment on any ground, even one not relied on by the district court, if the record fairly supports that justification and it has not been waived by the appellee. *Martinez v. United Auto., etc., Local 1373, 772 F.2d 348, 353 (7th Cir. 1985)*.

Section 4 of the Clayton Act provides

> ***HN4***[] Any person who shall be injured in his business or property by reason **[**10]** of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

Although the language of this provision could be read to provide a treble-damage remedy to anyone who was injured in some way by an antitrust violation, the provision has not been construed so expansively. *Associated General Contractors, 459 U.S. at 535* ("'It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.'" (quoting *Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-77, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982))*). Given the potential scope of antitrust violations and the availability of treble damages, an over-broad reading of § 4 could result in "overdeterrence," imposing ruinous costs on antitrust defendants, severely burdening the judicial system and possibly chilling economically efficient competitive behavior. *See Matsushita, 475 U.S. at 594*; William H. Page, *The Scope* **[**11]** *of Liability for Antitrust Violations, 37 Stan. L. Rev. 1445, 1453 (1985)*. Accordingly, the Supreme Court has placed several limitations on the scope of antitrust liability. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* the Court held that § 4 ***HN5***[] plaintiffs must prove *"antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *429 U.S. 477, 487-88, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (emphasis in original). And in *Associated General Contractors,* it applied traditional common-law tort principles to read a proximate cause element into § 4 actions. Thus, the Court held that ***HN6***[] a plaintiff does not have standing to sue under § 4 if its injuries were indirect and speculative. [6]

[12]** A great deal of confusion has surrounded these two limitations. *See Local Beauty* **[*395]** *Supply, Inc. v. Lamaur Inc., 787 F.2d 1197, 1201 (7th Cir. 1986)* (noting confusion between antitrust injury and antitrust standing doctrines, and citing cases); Phillip Areeda & Herbert Hovencamp, ***Antitrust Law*** P 334.3 (Supp. 1991). Lack of standing and antitrust injury often have been invoked interchangeably against a plaintiff even though each concept involves a distinct element of the § 4 action. The elements of the § 4 action correspond to the components of a common-law action in tort. *See Associated General Contractors, 459 U.S. at 533* ("Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied to comparable litigation."). An action in tort has four elements: (1) a duty recognized by law requiring the defendant to conform to a standard of conduct; (2) a breach of the duty; (3) damage or injury to a legally recognized interest; and (4) causation, including both causation in fact, or "but for" cause, and legal, or proximate cause. *See* W. Page Keeton **[**13]** et al., Prosser and Keeton on the Law of Torts § 30, at 164-65 (5th ed. 1984) [hereinafter Prosser & Keeton]. Correspondingly, ***HN7***[] the elements a plaintiff must satisfy to bring a § 4 action for treble damages are: (1) a duty recognized by the antitrust laws; (2) a violation of the antitrust laws; (3) injury to an interest protected by the antitrust laws and attributable to the antitrust violation--that is, *antitrust injury;* and (4) a direct link between the antitrust violation and the antitrust injury, that is to say, *standing.* [7]

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[6] The standing requirement similarly has been applied to treble-damage actions under RICO. *See, e.g., Holmes v. Securities Investor Protection Corp., 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*; *Illinois v. Life of Mid-America Ins. Co., 805 F.2d 763 (7th Cir. 1986)*.

[7] ***HN8***[] "Standing" may be broadly construed to involve all the elements of the cause of action. That is, a plaintiff may not have "standing" unless he can satisfy each requirement of the § 4 action--antitrust violation, antitrust injury and proximate cause. There is some logic to this interpretation, for as we shall discuss, *infra,* "standing" limits access to the cause of action to those

[14]** Both antitrust injury and standing are, of course, necessary to proceed under § 4. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110* nn.5 & 6, *93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*; *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1377 (7th Cir. 1987)*. ***HN9***[] Antitrust injury involves a causation requirement in order to define the class of potential plaintiffs eligible to bring suit--those "injured . . . by anything forbidden in the antitrust laws." *See In re Indus. Gas Antitrust Litig., 681 F.2d at 516*; Page, *supra,* at 1484. In establishing antitrust injury, courts must first delineate the *type* of interests protected by the antitrust laws, *see Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1419 (7th Cir. 1989)*; *Local Beauty Supply,* 787 F.2d at 1202, and second, must determine whether the violation was the cause-in-fact of the injury: that "but for" the violation, the injury would not have occurred, *MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1161* **[**15]** (7th Cir.), *cert. denied, 464 U.S. 891, 78 L. Ed. 2d 226, 104 S. Ct. 234 (1983)*; *In re Indus. Gas Antitrust Litig., 681 F.2d at 515*; Page, *supra* at 1462-63.

HN10[] Standing, on the other hand, examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction. *See Cargill, 479 U.S. at 111 n.6*; *In re Indus. Gas Antitrust Litig., 681 F.2d at 516, 519*; Page, *supra,* at 1484. Antitrust standing, however, is primarily a matter of legal policy, namely: "Whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred." Prosser & Keeton, *supra,* § 42, at 273; cf. Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing,* 86 Yale L.J. 809 (1977) (proposing policy-oriented **[*396]** approach to standing analysis). In *Associated General Contractors,* the Court identified ***HN11***[] factors we must consider in deciding whether a plaintiff has standing, such as "the potential for **[**16]** duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed." *Cargill, 479 U.S. at 111 n.6* (citing *Associated General Contractors, 459 U.S. at 544-45*); *Southwest Suburban Board of Realtors, 830 F.2d at 1377*. Ultimately, standing involves a case-by-case analysis of "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated General Contractors, 459 U.S. at 535*.

A. *Violation of the Antitrust Laws*

1. *The Sherman Act Claims*

The plaintiffs allege that the defendants violated *§§ 1* and *2* of the Sherman Act and the Gasohol Competition Act (*section 26a* of the Clayton Act). The plaintiffs voluntarily withdrew their monopolization claim under *§ 2* of the Sherman Act, and the district court dismissed that claim with prejudice. Plaintiffs do not attempt to resuscitate the claim here. ***HN12***[] With respect to the *§ 1* claims, a plaintiff, to show a violation, must establish a contract, conspiracy or combination intended to restrain competition and which **[**17]** actually has an anticompetitive effect. *Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 553-54 (7th Cir. 1980)*; *City of Vernon v. Southern Cal. Edison Co., 955 F.2d 1361, 1365* (9th Cir.), *cert. denied, 121 L. Ed. 2d 228, 113 S. Ct. 305 (1992)*. ***HN13***[] To show a conspiracy to restrain trade, a plaintiff must proffer evidence, either direct or circumstantial, "'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita, 475 U.S. at 588* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984))*; *Reserve Supply, 971 F.2d at 48-49*.

Plaintiffs have failed to show a *§ 1* violation because they have not presented evidence tending to show an agreement to restrain trade. Indeed, the conspiracy claim is belied by the fact that four of the eight defendants--Amoco, Arco, Chevron and Mobil--sold alcohol-blended gasoline during the time of the alleged conspiracy to

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properly suited to vindicate the violation. A person cannot be the most effective plaintiff if he cannot satisfy all of the elements of § 4. For purposes of clarity and in accord with what seems to be the approach of this circuit, *see Local Beauty Supply,* 787 F.2d at 1201; *In re Indus. Gas Antitrust Litig. (Bicahn), 681 F.2d 514, 519-20 (7th Cir. 1982)*, *cert. denied, 460 U.S. 1016 (1983)*, and of the commentators, *see, e.g.,* Page, *supra,* at 1484-85, we prefer, however, to treat antitrust injury and standing separately. We will, therefore, refer to standing only when discussing the element of proximate cause. Of course, this is merely a matter of semantics and the essential elements of the § 4 action remain the same under either approach.

restrain trade in gasohol. [8] The only evidence suggesting concerted action among the defendants is their common **[**18]** membership in organizations such as the American Society for Testing and Materials (ASTM), a private group which sets standards and specifications for, among other things, motor fuels. The defendants also belong to the American Petroleum Institute (API), a trade association representing all sectors of the domestic oil industry. The plaintiffs allege that the defendants combined in these organizations to restrain trade (1) by delaying issue of an ASTM motor fuel specification that included gasohol and (2) by lobbying governmental authorities through the API to discourage the marketing and acceptance of gasohol. Neither of these claims, however, amounts to a *§ 1* violation.

First, ***HN14***[] the failure of a private, standard-setting body to certify a product is not, by itself, a violation of *§ 1*. In *Consolidated Metal Products, Inc. v. American Petroleum Institute, 846 F.2d 284 (5th Cir. 1988)*, **[**19]** a manufacturer of "sucker rods"--a steel rod used to pump oil from wells--argued that the API's delay in certifying its innovative product was an illegal restraint of trade in violation of *§ 1*. The Fifth Circuit disagreed and affirmed summary judgment against the plaintiff. It held that "a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate *section 1*, when for whatever reason, it fails to evaluate a product favorably to the manufacturer." *Id. at 292*; *see also Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 399-400 (7th Cir. 1989)*. The Fifth Circuit then found that the delay in certification did not violate *§ 1* under a rule-of-reason **[*397]** analysis. First, the plaintiff failed to show a conspiracy, for "a trade association is not by its nature a 'walking conspiracy.'" *Id. at 293-94*; *Wilk v. American Medical Ass'n, 895 F.2d 352, 374* (7th Cir.), *cert. denied, 498 U.S. 982, 112 L. Ed. 2d 524, 111 S. Ct. 513 (1990)*; *see also Moore v. Boating Indus. Ass'n, 819 F.2d 693, 712* **[**20]** (7th Cir.), *cert. denied, 484 U.S. 854, 108 S. Ct. 160, 98 L. Ed. 2d 115 (1987)* (membership in trade association alone not sufficient evidence of agreement to restrain trade). Second, there was no evidence of an intent to restrain trade, the court held, noting that the API followed its normal certification procedures. Finally, the court found no evidence of an anticompetitive effect because the certification, although influential, was not required to compete in the market. Reliance by oil pump buyers on the certification was voluntary, and the record indicated that the plaintiff had no problem selling its product without the API's certification.

The plaintiffs' *§ 1* claim fails here for analogous reasons. As we have noted, there is no evidence of concerted action. In addition, the plaintiffs have not proffered evidence of an unlawful purpose. The ASTM did not stray from its normal procedures. Indeed, the plaintiffs concede as much, but argue that "the defendants did not even adopt an emergency specification for gasohol, although ASTM procedures plainly provided that emergency specifications could be adopted to fill a pressing need while a proposal went through the normal ASTM standards-writing **[**21]** process and ballots." Pls.' and Intervs.' Mem. in Opp'n to Defs.' Mots. for Summ. J. at 62. The failure to take emergency steps to specify gasohol and proceeding through the normal specification process, however, is not evidence of an unlawful purpose. Finally, there is no evidence of an anticompetitive effect. The record indicates that in the period 1978-1987, during which the defendants, acting through the ASTM, allegedly restrained trade by not issuing a gasohol specification, ethanol fuel sales increased continuously from 20 million gallons per year to 825 million gallons per year--a 4000 percent increase. It would be difficult to show an anticompetitive effect on ethanol sales in the face of this increase.

Moreover, the API's lobbying efforts do not support a *§ 1* claim. ***HN15***[] Under the *Noerr-Pennington* doctrine, lobbying that would arguably restrain trade is protected political activity and does not violate the antitrust laws. *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*. Although ***HN16***[] there is an exception from *First Amendment* **[**22]** protection for "sham lobbying," *Noerr, 365 U.S. at 144*, the Supreme Court has recently explained that "a sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action at all, not one who genuinely seeks to achieve his governmental result but does so *through improper means."* *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344, 1354 (1991)* (citations and quotation marks omitted) (emphasis in

[8] Chevron also held an ownership interest in an ethanol production plant at the time it was allegedly conspiring against the sale of gasohol.

original). Here, the plaintiffs do not allege that the lobbying efforts were not intended to get legislative results. In fact, the plaintiffs assert that the efforts achieved their desired legislative effect. Hence, these activities are protected and do not violate the Sherman Act.

2. *The Gasohol Competition Act Claims*

The only remaining basis for a violation of the antitrust laws lies in the claims under the Gasohol Competition Act, which we duplicate in the margin. [9] The plaintiffs **[*398]** first assert that the oil companies engaged in an "anti-alcohol" campaign (1) by posting signs at their stations announcing that their products contain no alcohol, thus implying **[**23]** that there is something wrong with gasohol, and (2) by not including on such signs recognition of gasohol's quality. Initially, we doubt that the signs unreasonably discriminate against gasohol. In *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d at 400*, for example, we held that an ophthalmological academy did not commit an antitrust violation by labeling a particular surgery "experimental." We found that the

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[9] The Gasohol Competition Act of 1980 provides in full:

> ***HN17***[] **(a) Limitations on the use of credit instruments, sales, resales, and transfers**
>
> Except as provided in subsection (b) of this section, it shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that--
>
> > (1) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which there is no similar limitation on transactions concerning such person's conventional motor fuel; or
> >
> > (2) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States.
>
> **(b) Credit fees; equivalent conventional motor fuel sales; labeling of pumps; product liability disclaimers; advertising support; furnishing facilities**
>
> (1) Nothing in this section or in any other provision of law in effect on December 2, 1980, which is specifically applicable to the sale of petroleum products shall preclude any person referred to in subsection (a) of this section from imposing a reasonable fee for credit on the sale, resale, or transfer of the gasohol or other synthetic motor fuel referred to in subsection (a) of this section if such fee equals no more than the actual costs to such person of extending that credit.
>
> (2) The prohibitions in this section shall not apply to any person who makes available sufficient supplies of gasohol and other synthetic motor fuels of equivalent usability to satisfy his customers' needs for such products, if the gasohol and other synthetic fuels are made available on terms and conditions which are equivalent to the terms and conditions on which such person's conventional motor fuel products are made available.
>
> (3) Nothing in this section shall--
>
> > (A) preclude any person referred to in subsection (a) of this section from requiring reasonable labeling of pumps dispensing the gasohol or other synthetic motor fuel referred to in subsection (a) of this section to indicate, as appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person;
> >
> > (B) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or other synthetic motor fuel;
> >
> > (C) require such person to provide advertising support for the gasohol or other synthetic motor fuel; or
> >
> > (D) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel.
>
> **(c) Definition**
>
> As used in this section, "United States" includes the several States, the District of Columbia, any territory of the United States and any insular possession or other place under the jurisdiction of the United States.

speech did not "restrain trade" but simply affected demand for the surgery by informing patients of its nature. We held that the appropriate remedy was not antitrust litigation but "more speech."

[24]** Even assuming that the signs here discriminate against gasohol, subsection (b)(3)(A) of the Act permits petroleum companies to label pumps dispensing gasohol to distinguish that product from other products manufactured and distributed by the companies. In addition, subsection (b)(3)(B) authorizes petroleum companies to issue disclaimers of liability for any damage attributable to gasohol. The apparent intent of these provisions is to permit oil companies to distinguish petroleum products from gasohol and to disavow any adverse consequences from gasohol use. Signs stating "No alcohol" are not qualitatively different from those which the petroleum companies seem to be free under the Act to post--signs providing, in effect, that a product contains alcohol [10] and that the petroleum company did not manufacture the product and is not responsible for damage it may cause. Indeed, the signs posted by the defendants seem less likely to convey the message that gasohol is an inferior motor fuel than do signs which seem to be specifically permitted under the Act. With respect to the defendants' failure to include positive information about gasohol in its signs, subsection (b)(3)(C) explicitly **[**25]** provides that companies are not required to provide advertising support for gasohol.

The plaintiffs next argue that the defendants have refused to permit the use of existing tanks and pumps for storage and dispensing of gasohol and have done the **[*399]** same with respect to the storage and blending of ethanol. The plaintiffs maintain that this refusal is an unreasonable limitation on the sale of gasohol. They direct us to language in the House and Senate Reports on the gasohol legislation defining what an unreasonable limitation on the sale of gasohol includes. The House Report states

> Paragraph [(a)(2)] also prohibits unreasonable limitations on the sale of gasohol and other synthetic fuels. The phrase "unreasonably limits" was used to cover obstacles to the marketing of gasohol that were not necessarily discriminatory. For example, if an oil company forbids the use **[**26]** of its pumps and tanks for dispensing any noncompany product, gasohol is not singled out, but its sale is impeded. This limitation, although nondiscriminatory, should be prevented and will be reached under paragraph [(a)(2)] of this act.

H.R. Rep. No. 1464, 96th Cong., 2d Sess. 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5353, 5397-98; *accord* S. Rep. No. 868, 96th Cong., 2d Sess., at 10-11 (1980) (same). The plaintiffs also recognize, and the defendants rely upon, subsection (b)(3)(D), which provides that the Act does not "require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel." The plaintiffs, however, point to the word "additional" and argue that Congress only meant to relieve franchisors from the obligation of installing new equipment for gasohol distribution. Mindful that any exemptions from the antitrust laws are to be construed narrowly, "with beady eyes and green eyeshades," *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n, 961 F.2d 667, 672* (7th Cir.), *cert. denied,* **[**27]** *121 L. Ed. 2d 334, 113 S. Ct. 409 (1992)*, we agree with the plaintiffs that this is the only interpretation consistent with the Act's language and intent. In fact, the House and Senate Reports specifically state that the exemption from furnishing additional facilities does not permit franchisors to prohibit dealers from using existing tanks and pumps for the sale of gasohol. 1980 U.S.C.C.A.N. at 5398; S. Rep. No. 868 at 11. In addition, the plaintiffs have asserted that the defendants limited the use of credit instruments in the sale of gasohol. This is in direct violation of subsection (a)(1) of the Act, which makes it unlawful to limit the use of credit instruments in any gasohol transaction.

Viewing the record in the light most favorable to the plaintiffs, as we must on a motion for summary judgment, we find that there is a genuine issue of fact as to whether the defendants violated the Gasohol Act. Thus, for purposes of summary judgment, we assume the existence of a violation, and continue our review of the § 4 requirements to determine whether summary judgment against the plaintiffs was appropriate.

B. *Antitrust Injury*

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[10] As we discuss, *infra,* a number of states have enacted laws requiring dealers to post "gasohol" or "contains alcohol" labels on their gasohol pumps.

In *Brunswick,* the Supreme Court held that **[**28]** ***HN18***[] to maintain a § 4 action for treble damages, a plaintiff must show *"antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *429 U.S. at 489*. We will analyze both of these requirements in turn.

1. *Type of Injury*

HN19[] In determining whether the injury alleged is the type the antitrust laws were intended to prevent, the Supreme Court has directed us to look at " 'the type of loss that the claimed violations . . . would be likely to cause," *Id. at 489* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969))*, or, in other words, to consider whether the injuries "fall squarely within the area of congressional concern." *McCready, 457 U.S. at 485*. Thus, when defining the scope of antitrust injury for a violation of the Gasohol Competition Act, it is the purpose of that legislation, and the interests it seeks to protect, which is controlling. [11] Upon reviewing the purposes **[*400]** of the Gasohol Act, we believe that the plaintiffs have alleged **[**29]** the type of injury the Act was intended to avert.

[30]** The basic intent of the Gasohol Act, as gleaned from the House and Senate Reports, is "simply to promote generally the sale of gasohol and other synthetic fuels and not to affect the sale of specific brands of those products." 1980 U.S.C.C.A.N. at 5395. The House Report provides

> In recent months, there has been increasing recognition of the need for rapid and effective development of alternative energy sources to offset this nation's dependence on the ever-dwindling supply of foreign and domestic oil. One program that will help to decrease America's reliance on foreign energy sources is the production and use of gasohol. Should the consuming public be denied the opportunity to purchase such alternative fuels, public and private efforts to encourage alternative fuel development will be frustrated.

Id.; accord S. Rep. No. 868 at 5. The second, more specific purpose of the Act is to "ensure that retailers and distributors of synthetic fuels, including gasohol, will not be discriminated against by their suppliers and/or owners of their retail stations because of sales of synthetic fuels." 1980 U.S.C.C.A.N. at 5393; *accord* S. Rep. No. 868 at 2 ("Moreover, the committee **[**31]** wants to insure that dealers will be permitted to market newly developed alternative fuels when those fuels reach gasohol's level of quality and acceptability."). Therefore, the congressional purpose in enacting the Gasohol Competition Act transcends the short-term economic interests of consumers. The Gasohol Act was intended to promote the development of alternative motor fuels. It did this not only by protecting *competition* generally, but went further by protecting, in a limited way, *competitors*--those who develop, produce and market alternative motor fuels. Unlike the Sherman Act, the Gasohol Competition Act imposes affirmative obligations on companies to promote the growth of gasohol, such as requiring companies to permit dealers to use

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[11] This comports with the approach taken by courts in defining antitrust injury for § 4 suits predicated upon a violation of the Robinson-Patman Act. These courts have recognized that the interests Congress sought to protect in enacting the Sherman Act and the Robinson-Patman Act "do not mirror one another," *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1540 n.17 (3d Cir. 1990)*; *see also United States v. United States Gypsum Co., 438 U.S. 422, 450-51, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)* (noting distinction and potential tension between Sherman Act and RobinsonPatman Act). Thus, courts have relied on the purposes of the Robinson-Patman Act to determine whether the plaintiffs have satisfied the antitrust injury requirement for a Robinson-Patman violation. *See, e.g., J.F. Feeser, 909 F.2d at 1533-35, 1539-41* & n.17 (secondary-line plaintiff need only show injury to competitor to satisfy competitive injury requirement, and correspondingly, the antitrust injury requirement; injury to consumers unnecessary); *Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6, 1426-28 (11th Cir. 1990)* (same); *Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir. 1987)* (noting that "in order for a plaintiff to prove competitive injury under Robinson-Patman, he need only show that a substantial price discrimination existed as between himself and his competitors over a period of time."), *aff'd on other grounds, 496 U.S. 543, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990)*; Areeda & Hovencamp, supra, P 340.5 (citing with approval finding of antitrust injury in favor of injured competitor in *Hasbrouck).* Indeed, even the courts which have held the interpretation of "competitive injury" under the Robinson-Patman Act to be analogous to that applied under the Sherman Act have done so by reviewing the intent and legislative history of the Robinson-Patman Act, concluding only then that the two acts have similar purposes. *See, e.g., Boise Cascade Corp. v. FTC, 267 U.S. App. D.C. 124, 837 F.2d 1127, 1138-39, 1143-48 (D.C. Cir. 1988)* (reviewing purpose of Robinson-Patman Act and concluding that, as in the case of the Sherman Act, absence of consumer injury is evidence in rebuttal of showing of competitive injury).

company tanks and pumps for the sale of gasohol and to extend credit for gasohol purchases on terms equal to those offered for non-gasohol purchases.

The defendants argue that the interests protected by the Act are solely those of the dealers and distributors, and thus maintain that only dealers and distributors may suffer antitrust injury from a violation of the Gasohol Act. They rely on *Rebel Oil Co., Inc. v. Atlantic Richfield Co.,* **[**32]** *1991 U.S. Dist. LEXIS 21056*, No. CV-S-90-076-PMP (D. Nev. Dec. 27, 1991), where the court held that two marketers of gasohol did not have standing to sue under the Gasohol Act because the Act "confers standing only upon franchisees or those who have directly acquired petroleum products from the supplier accused of the discriminatory or limiting behavior." *Id.* [slip op.] at 4, *1991 U.S. Dist. LEXIS 21056* at *5. But *Rebel Oil* cites only those portions of the House Report that refer to franchisees **[*401]** and distributors. It is true that the Act was enacted to protect dealers and distributors, but that was not the only, or even the most central, purpose of the Act.

In that connection, the Senate Report, in summarizing the purposes of the Act, states: "In order to relieve our tenuous energy supply, the committee believes that domestically available alternatives to conventional oil and gas resources are necessary. It is to this effort that [the Gasohol Competition Act] is addressed." As this and other provisions demonstrate, the protection of dealers is simply a *means* to the end of promoting the sale of gasohol and other synthetic motor fuels. *See, e.g.,* 1980 U.S.C.C.A.N. at 5393 (the Act "will promote the sale of gasohol and other synthetic motor fuels **[**33]** by ensuring that franchisees of existing major oil companies can utilize the company's credit arrangements and marketing facilities to promote these alternative sources of energy and to preclude unreasonable discrimination against dealers desiring to market these synthetic fuels."). Confining the interests protected by the Act to those of dealers and consumers so that only they are capable of suffering antitrust injury, is belied by the overall purposes of the Act. Indeed, we believe that the interests protected by the Act extend beyond the simple sale and marketing of gasohol--and therefore the interests of gasohol blenders and dealers--and include the development and production of alcohol-blended motor fuels. *Id.* at 5395; *see also* S. Rep. No. 868 at 1 (emphasizing "urgent need for rapid and effective development of viable alternative fuels to offset . . . dependence on . . . foreign oil"). [12] Hence, the interests of ethanol manufacturers and sellers, integral to the promotion and development of gasohol, "fall squarely within the area of congressional concern." *McCready, 457 U.S. at 485*. Accordingly, we believe that these blenders, manufacturers **[**34]** and sellers all may suffer the type of injury that Congress meant to preclude. [13]

2. *"But for" Cause*

HN20[] To satisfy the antitrust injury requirement, a § 4 plaintiff must **[**35]** show that its injury "flows from that which makes defendants' acts unlawful," *Brunswick,* 429 U.S. at 489--that "but for" the alleged violation, the injuries would not have occurred. *MCI, 708 F.2d at 1161*; Areeda & Hovencamp, *supra,* P 334.3a; Page, *supra,* at 1461. ***HN21***[] An antitrust violation need not be the sole cause of the alleged injuries, but the plaintiff must establish, with a fair degree of certainty, that the violation was a material element of, and substantial factor in producing, the injury. *See* *Zenith Radio Corp., 395 U.S. at 114 n.9*; *Tire Sales Corp. v. Cities Serv. Oil Co., 637 F.2d 467, 474-75 (7th Cir. 1980)*, *cert. denied, 451 U.S. 920, 68 L. Ed. 2d 312, 101 S. Ct. 1999 (1981)*. The proof required to show *causation* of damages is greater than that required to prove the *amount* of damages, where a plaintiff is afforded

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[12] Although these purposes may transcend to a degree the accustomed, consumer-oriented purposes of the "antitrust" laws, we do not think that Congress's concern for fostering new products and new competitors in this context in any way marks the Gasohol Act as something other than an ***antitrust law***, or the injury resulting from its violation as something other than an antitrust injury.

[13] The mere showing that gasohol blenders and ethanol manufacturers and sellers may suffer the type of injury protected against by the Gasohol Act does not mean that these categories of interests necessarily have *standing* to sue for a violation of the Act. As noted, antitrust *injury* and antitrust *standing* involve two separate inquiries. The crux of the standing analysis is whether the plaintiff is the proper party to vindicate the antitrust interest.

more latitude due to the "vagaries of the marketplace." J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981); MCI, 708 F.2d at 1168. [14]

[36]** In Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 44 (2d Cir. 1986), *cert. denied, 479 U.S. 1088, 94 L. Ed. 2d 151, 107 S. Ct. 1295 (1987)*, for example, a wholesaler of photography equipment and a licensor of camera equipment sued Kodak for damages resulting from Kodak's Sherman Act violation in signing a confidentiality agreement with the developer **[*402]** of a new and improved flash unit. The Second Circuit affirmed the grant of summary judgment against the plaintiff on the ground that the plaintiffs failed to show that, but for the antitrust violation, they would not have suffered the losses they alleged. The plaintiffs had been suffering economic hardship before the antitrust violation, had recently lost the supplier of their lead line of camera and had lacked a supplier for a projected leading product. *See also* Southwestern Sheet Metal Works, Inc. v. Semco Mfg., Inc., 788 F.2d 1144, 1145-47 (5th Cir. 1986) (holding that plaintiff failed to show, given the existence of other competitive bidders, that but for the violation granting a competitor a bidding advantage, plaintiff would have been awarded the projects at issue), *cert.* **[**37]** *denied, 480 U.S. 917 (1987)*; Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n, 214 U.S. App. D.C. 76, 663 F.2d 253, 268-72 (D.C. Cir. 1981) (holding that mail-order prescription service failed to show that, but for the American Pharmaceutical Association's attempt to restrain mail-order competition, it would not have undertaken the expense of identifying forged prescriptions), *cert. denied, 455 U.S. 928, 71 L. Ed. 2d 472, 102 S. Ct. 1293 (1982)*.

Defendants identify numerous intervening economic and market factors which they argue may have been the actual cause of the plaintiffs' injuries. They contend that the alleged antitrust violations played an insignificant role (or none at all) in the plaintiffs' economic woes, and that therefore no reasonable trier of fact could find that the violation *caused* the plaintiffs' injuries. We agree and find that as a matter of law, plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries. Hence, the plaintiffs did not suffer antitrust injury.

There are many alternative explanations for the **[**38]** injuries which the plaintiffs allege. First, many automobile owner's manuals warned consumers against the use of motor fuels containing alcohol. For example, the owner's manual for the 1986 Chrysler LeBaron GTS stated that "Chrysler does not recommend using fuels containing alcohol because some gasoline/alcohol blends may degrade the starting, driveability and fuel efficiency of your vehicle." Numerous other owner's manuals of record suggested precautions owners should take when using gasoline containing alcohol. These precautions involve, among other things, verifying the amount and type of alcohol blended with the gasoline. [15] These cautionary counsels likely dissuaded some owners from using gasohol.

[39]** Second, reports in the media criticized alcohol-blended motor fuels and discouraged the use of gasohol by consumers. In particular, the April, 1987, issue of *Consumer Reports* suggested that consumers "avoid gasoline/alcohol blends altogether--if you can."

Third, a number of state laws hurt gasohol sales by requiring retailers to post pump labels disclosing that a motor fuel contained alcohol. A Louisiana law adopted in 1986 was particularly damaging to gasohol sales. This labeling law required a black and gold label with three-inch letters stating that the fuel was "gasohol" or "contains ethanol." After enactment of the law, gasohol sales in Louisiana--where seven of the thirteen plaintiffs operated--"dropped anywhere from approximately 66 to 72 percent" according to Robert Love, the general manager of one of the plaintiffs, Cajun Energy. Representatives of other plaintiff companies also acknowledged the negative effect of the labeling law, reflected in reduced sales and lost clients. One of the plaintiffs' experts, J.B. Smith, for example, acknowledged that the labeling law "killed ethanol in the marketplace." Mr. Smith further maintained that a Florida labeling law reduced sales **[**40]** by 33 percent.

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[14] In ascertaining the amount of damages, the plaintiff nonetheless must be able to trace its damages to the injury which was in fact caused by the violation. MCI, 708 F.2d at 1168.

[15] The record contains owner's manuals from the 1991 Honda Accord, 1990 Mitsubishi Eclipse, 1986 Nissan Stanza Wagon, 1986 Porsche Audi, 1984 Saab 900, 1986 Subaru, 1984 Toyota Tercel, 1984 Volkswagen Rabbit, 1987 AMC, 1989 Eagle Summit, 1989 Dodge Ram, 1985 Ford Tempo, 1984 Buick Regal, 1986 Buick Riviera and 1986 Chevrolet.

Fourth, states that had exempted gasohol in whole or in part from state fuel taxes eliminated or reduced those exemptions. Since 1986, twenty-seven of the thirty-three states that had enacted exemptions eliminated **[*403]** or reduced them. [16] This increase in taxes made gasohol more expensive, effectively reducing the price gasohol marketers would pay for gasohol and gasohol blenders would pay for ethanol.

[41]** Fifth, the drop in gasoline prices in 1986 caused a corresponding drop in ethanol prices which inflicted serious financial consequences on the plaintiffs. Wendall Harris, president of plaintiff CEPO, summarized the result of the drop in gas prices:

> The past several months have witnessed a drastic decline in gasoline prices which, in turn, leads to a corresponding decline in ethanol prices. In January [1986], the price was $ 1.56, by March it fell to $ 1.20, and by May it sank to $ .97. Our company has undergone serious financial loss for the past several months due, in substantial part, to those price declines.

Representatives of other plaintiff companies echoed these views about the effect of the decline in gas prices on gasohol and ethanol prices.

Sixth, the United States Department of Agriculture in 1986 instituted a program to subsidize grain-based ethanol producers. The subsidy effectively reduced the raw material costs of grain-based ethanol producers by forty percent by giving them one free bushel of grain for every two and one-half used. Most of the present plaintiffs could not take advantage of the subsidy because they relied on other, non-grain feedstocks, such as **[**42]** molasses. Two of the current plaintiffs--Alpebo and Shepherd--being molasses-based producers, sued the Secretary of Agriculture in an attempt to defeat the subsidy, arguing that the subsidy would "give grain-based producers a competitive advantage over plaintiffs, which they will use to drive the price of ethanol down to a point at which plaintiffs are unable to compete." Richard Dodd, vice-president of plaintiff Shepherd Oil, related that the subsidy would permit its grain-based competitors to drive down prices to a point where Shepherd would not have the financial strength to compete very long. He noted that this was true especially given that the price of Shepherd's feedstock, molasses, had nearly doubled in one year. Similarly, Mr. Harris of CEPO candidly stated that unless CEPO was eligible for the same or a similar subsidy, "I strongly doubt whether CEPO would stay in the ethanol market for any length of time. We cannot sell into a market at prices which guarantee losses."

Seventh, in 1987 Louisiana terminated its state subsidy providing $ 1.40 for each gallon of ethanol produced and sold in Louisiana. Four of the current plaintiffs--Alpebo, Shepherd, Shreveport and Vidalia--were **[**43]** ethanol producers in Louisiana, [17] and were seriously hurt by the loss of the subsidy. Instead of collecting the price of a gallon of ethanol plus the subsidy of $ 1.40 for every gallon of ethanol produced, Louisiana ethanol producers were suddenly collecting only the price per gallon the market would allow. Matthew Kling, former director of marketing and commodities for Shepherd Oil, conceded that "Shepherd was not a profitable business because its ethanol production was reliant on state subsidies. It is simple economics to determine that, if ethanol is priced competitive with the price of gasoline, it simply cannot be sold at a consistent profit by small producers without a state subsidy." Representatives from other plaintiffs also acknowledged that once the subsidy stopped, the ethanol industry in Louisiana all but shut down.

Finally, the plaintiffs conceded that they did not enjoy **[**44]** sufficient economies of scale to compete effectively against larger, grain-based ethanol producers, like Archer Daniels **[*404]** Midland (ADM), a midwestern grain-based producer with approximately 60 percent of the U.S. ethanol market. [18] Kling testified that the large

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[16] The states exempting gasohol in whole or in part from state fuel taxes in 1985 were Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. Of these, only Alaska, Connecticut, Hawaii, Idaho, Washington and Wyoming have not since eliminated or reduced the exemption. Only Missouri and South Carolina have begun to exempt gasohol since 1985 without any subsequent reduction or elimination of the exemption.

[17] Three other plaintiffs--Wurster, Cajun Energy and Public Terminals--were Louisiana-based wholesale marketers of ethanol and gasohol.

midwestern ethanol producers were able to achieve economies of scale, were more reliable and could compete more effectively due to their direct rail access, location near the grain supply and ability to sell some of their by-products. Representatives of High Plains, Greater Rockford, Lakefield Ethanol and Shepherd recognized that ADM had significant economies of scale, and was able to produce more ethanol, of better quality and at a lower price per gallon than any of the plaintiffs.

Standing alone one of these alternative causes of the plaintiffs' injuries might be insufficient to put causation-in-fact in question. Taken together, **[**45]** however, the plaintiffs have failed to show with a fair degree of certainty that "but for" the alleged antitrust violation, the plaintiffs would not have suffered the injuries of which they complain. Consequently, as a matter of law the plaintiffs have failed to show antitrust injury, and summary judgment was, therefore, appropriate.

III.

Because a showing of both antitrust injury and antitrust standing are necessary to proceed under § 4, the plaintiffs' inability to show antitrust injury is a sufficient basis for dismissing their case; we need not address the other issues raised on appeal. ***HN22***[] The lack of antitrust injury, moreover, is fatal to their claim for injunctive relief under § 16 of the Clayton Act. *See Cargill, 479 U.S. at 113*. This conclusion is buttressed by the fact that all but one of the plaintiffs have gone out of business, and thus, cannot show threatened loss or damage by the defendants' conduct. Accordingly, the judgment of the district court is

AFFIRMED.

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[18] In 1985, eight grain-based ethanol producers controlled approximately 90 percent of all ethanol production in the United States.

Great Clips v. Levine

United States District Court for the District of Minnesota, Third Division

June 16, 1993, Decided ; June 16, 1993, Filed

Civil No. 3-90-211

Reporter
1993 U.S. Dist. LEXIS 19945 *; 1993-2 Trade Cas. (CCH) P70,390

Great Clips, Inc., Plaintiff, v. Robert Levine; Penco Challenge; and Penco Leasing Corp., Inc., Defendants.

Core Terms

franchisee, prices, even-dollar, discount, restrictions, coupon, anti-competitive, franchise, haircuts, sales

Judges: [*1] CUDD

Opinion by: J. EARL CUDD

Opinion

ORDER

Before the Court is Defendants' motion for reconsideration and relief from judgment pursuant to *Fed. R. Civ. P. 60(b)*. Also before the Court is Plaintiff's motion for attorneys fees.

IT IS HEREBY ORDERED that:

1. Defendants' motion for reconsideration and relief from judgment pursuant to *Fed. R. Civ. P. 60(b)* is **DENIED;** and

2. Plaintiff's motion for attorneys fees is **DENIED.**

HON. J. EARL CUDD

UNITED STATES MAGISTRATE JUDGE

Dated: June 16, 1993

MEMORANDUM ATTACHED

ATTACHMENT

MEMORANDUM

[1]

BACKGROUND

By order dated September 30, 1991, this Court found that Plaintiff's pricing policies were not violative of *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*, or the Minnesota ***Antitrust Law***, **[*2]** *Minn. Stat. § 325D.53*. *See* Order, Docket No. 11. This Court also enjoined Defendant Penco from violating the franchise agreement with Plaintiff. In part this Court found that:

> On their face, Great Clips' even-dollar and single price restrictions create the appearance of restricting franchisee's prices. If a franchisee may only choose between one or two prices (e.g. $ 8.00 or $ 9.00) out of a possible one hundred (prices lying between and including $ 8.00 and $ 9.00), the franchisee has only one-fiftieth the options he would have without the even-dollar restriction. The market effectively determines the parameters of a minimum and maximum price within several dollars. However, Great Clips does not restrict discounts by duration or price. The record shows that discounting is a regularly conducted activity, with widely varying prices determined by market pressures. Thus, the effect is that a franchisee is free to set whatever price the market will bear. The potential anti-competitive effect of Great Clips policy is nonexistent.
>
> Penco is only required to post on its price board even-dollar prices and a single price for haircuts. Whatever price it decides to charge in order to **[*3]** maximize its profits and attain maximum competition may be achieved by discounting, sales, special events, couponing, or whatever other marketing devices it may choose to utilize and which the market will allow.

Order, Docket No. 11 at pp. 13-14.

At the time of this Court's initial order, Plaintiff imposed no restrictions on a franchisee's ability to run discounts from even-dollar prices. Defendants are correct in noting that this fact formed an important part in this Court's finding that Plaintiff's policies were not anti-competitive. However, it goes too far to say that such freedom formed the lynch-pin in the Court's opinion. As the above excerpt from this Court's opinion demonstrates, other factors also informed this Court's opinion, particularly the franchisee's freedom to substantially set his or her own prices by whatever means.

Since this Court's initial order, Plaintiff has instituted substantial restrictions on a franchisee's ability to discount prices. Under the new policies discounts or sales may only be conducted for 21 days out of every three months. Defendants are correct in arguing that this is a marked departure from previous policy. Plaintiff represents that this **[*4]** new policy was instituted to insure compliance with various consumer protection laws that involve false advertising and consumer fraud in connection with permanent sale situations. It is not contested that Defendants have engaged in such permanent sales, discounting from a posted even-dollar price that in actual practice is never charged.

Franchisees remain free to coupon. [2] Couponing is a wide-ranging form of advertising that can include direct mail promotions, return customer coupons, newspaper advertisements with or without coupons that may be redeemed for a discount, flyer distributions, radio offers, and business discounts through paycheck stuffers. *See* Affidavit of Olsen. This list is not exhaustive.

[*5] *DISCUSSION*

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[1] This Court notes that there is no motion before the Court to compel compliance with this Court's previous order enjoining Defendant Penco from violating the franchise agreement. This Court rules only on those motions properly before it.

[2] During oral argument, this Court inquired into exactly hat couponing could amount to and a franchisee's freedom to engage in such activity. Plaintiff's counsel was unable to answer authoritatively and has submitted the affidavit of Rhoda Olsen in this regard. Defendants object to this affidavit as an untimely brief. Defendants are in error.

As an initial matter, the pricing restrictions under which a franchisee operated at the time of this Court's prior order must be kept in mind. [3] First, Plaintiff, while requiring franchisees to post even-dollar prices, makes no attempt to tell franchisees what those even-dollar prices must be. Second, franchisees may only charge a single even-dollar price for a haircut, however Plaintiff again makes no attempt to tell franchisees what this single price must be. Thus, while Plaintiff's do not attempt to set a franchisee's prices, a franchisee's freedom to adopt a particular pricing structure is restricted. This Court reiterates that the combination of these two restrictions is not in and of itself anti-competitive.

However, Plaintiff's have now added a third restriction; franchisees may only conduct sales for 21 days out of every three months. Defendant's argue that in combination with the previous two restrictions, **[*6]** even-dollar pricing and single price haircuts, Plaintiff's polices now cross over the anti-competitive line. This Court does not agree and finds no reason to alter or modify this Court's previous judgment. [4]

Defendants now labor under greater restrictions and while this Court has some concern over the appearance of a policy of creeping anti-competitive restrictions, Plaintiff's policy has as its reasonable genesis concern about consumer protection laws and compliance therewith as regards the practice of permanent sales. [5] This Court is not persuaded that these concerns are chimerical or a smoke screen behind which Plaintiff is attempting to fix prices. However, good intentions aside, this Court must still examine the practical effect of the new restriction in combination with the pre-existing restrictions to determine if the facts underlying this Court's prior order have **[*7]** so changed as to merit a different result. This Court finds that they have not.

Franchisees retain substantial freedom to set prices. First, a franchisee may adopt *any* even-dollar price for haircuts. Second, within any three month period a franchisee may run a sale or offer a discount for *any* amount for 21 days. During these 21 days, a franchisee's discretion to discount prices to *any* figure is entirely unfettered. During the remaining approximately two months, the franchisee is free to adopt *any* even-dollar price for haircuts. Extrapolating these figures, over the course of a year a franchisee may freely discount for a total of approximately 84 days and may charge any even-dollar figure the remainder of **[*8]** the time. [6]

Third, at *all* times and separately or in conjunction with other promotions a franchisee may freely coupon. The variety of techniques available through couponing as discussed, *supra,* allows considerable pricing freedom.

In short, there remains myriad ways in which a franchisee may legitimately set a price he or she may choose and still not run afoul of the franchise agreement. While a franchisee may be heard to complain, legitimate restrictions are the price franchisees pay for the benefits of the franchise. It is important to remember that the franchisor has legitimate and important interests in how the franchise is run, marketability of further franchises not the least among them.

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[3] These restrictions are still in place and are unaffected by this Court's instant ruling.

[4] However, this Court finds that Defendants have a colorable argument and for this reason this Court declines to award Plaintiff attorneys fees.

[5] Defendants argument that no conflicts with consumer protection laws have thus far developed is spurious. The law is the law. Not having been found to have broken any laws, yet, is not synonymous with adhering to the law. This Court will not endorse a catch-me-if-you-can theory of legal reasoning.

[6] The 84 days of free discounting could not be consecutive. The discounting is limited to 21 days *in any three month period.*

Storer Cable Communications v. City of Montgomery

United States District Court for the Middle District of Alabama, Northern Division

June 17, 1993, Decided ; June 17, 1993, Filed

CIVIL ACTION NO. 90-T-958-N

Reporter

826 F. Supp. 1338 *; 1993 U.S. Dist. LEXIS 9197 **; 1993-2 Trade Cas. (CCH) P70,474

STORER CABLE COMMUNICATIONS, INC., et al., Plaintiffs, v. THE CITY OF MONTGOMERY, ALABAMA, et al., Defendants.

Subsequent History: The Motions to Dismiss Filed by the Counterclaim Defendants, is Vacated, September 27, 1993, Reported at: *1993 U.S. Dist. LEXIS 19577*.

Core Terms

Cable, counterclaim, programming, cable television, Network, supplier, intrabrand, interbrand, sales, monopolization, market power, business relationship, alleges, retail, exclusive contract, subscribers, monopoly, relevant market, antitrust, consumer, Sherman Act, anti trust law, distributors, intentional interference, program services, anti-competitive, conspiracy, football, dealer, restraint of trade

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Motions to Dismiss, Failure to State Claim**

In evaluating a claim to determine whether it adequately states a claim for relief, the court must accept the facts pleaded as true and construe them in a light most favorable to the claimant. *Fed. R. Civ. P. 12(b)*. A motion to dismiss may not be granted unless it appears beyond a reasonable doubt that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] Heightened Pleading Requirements, Fraud Claims

Notice pleading is all that is necessary for a valid claim. The system of notice pleading set up by the Federal Rules of Civil Procedure requires that a claim include only a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)* means that a claimant need only give the defendant fair notice of what the claim is and the grounds upon which it rests. The rule does not require a claimant to set out in detail the facts upon which he bases his claim. Moreover, this liberal system of notice pleading applies to all causes of action unless otherwise specified in the rules, such as the particularity requirement imposed by *Fed. R. Civ. P. 9(b)* for averments of fraud or mistake.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] Antitrust & Trade Law, Sherman Act

It is no longer open to question that *Fed. R. Civ. P. 8(a)(2)* applies in full force to antitrust actions. Courts may no longer demand as they did in the past, out of a perceived danger of abuse of the antitrust laws, that a claimant provide a detailed pleading beyond the general notice requirements of *Rule 8(a)(2)*. Nevertheless, the liberal pleading requirements of the federal rules do not negate the need to plead sufficient facts so that each element of the alleged antitrust violation can be identified. An antitrust complaint must comprehend a so-called prima facie case. Moreover, conclusory allegations of antitrust violations will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. The alleged facts, however, need not be spelled out with exactitude, nor must recovery appear imminent.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] Antitrust & Trade Law, Sherman Act

In testing an antitrust claim under *Fed. R. Civ. P. 12(b)(6)*, a court should be very circumspect in applying substantive legal rules to market conditions based on a factually undeveloped record. Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. Courts should resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record, that is, after the court has examined closely the economic reality of the market at issue. Generally, unless the court can conclude beyond a doubt--after applying an economic approach which is not subject to serious question and which, if possible, has a sound empirical basis--that the complainant's underlying theory is economically senseless, the complainant should be allowed to proceed with factual development, including expert testimony regarding the economic reality of the market at issue.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Antitrust & Trade Law, Clayton Act**

See 15 U.S.C.S. § 15(a).

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Torts > Business Torts > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Evidence > Burdens of Proof > General Overview

HN7[] **Remedies, Damages**

To recover under § 1 of the Sherman Act, 15 U.S.C.S. § 1, a plaintiff must establish three elements. It must show that the defendants (1) entered into a contract, combination or conspiracy, which was (2) in restraint of trade or commerce. The plaintiff must further show (3) that it was damaged by the violation, thereby entitling it to treble damages under § 4 of the Clayton Act, 15 U.S.C.S. § 15(a). To invoke the jurisdiction of the Sherman Act, a claimant must show (1) that the local activity has a (2) substantial effect on (3) interstate commerce. Because the antitrust laws are concerned primarily with the integrity of interstate markets, the United States Court of Appeals for the Eleventh Circuit requires that a determination of Sherman Act jurisdiction focus on the interstate markets involved in the defendant's business activities.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1*, does not prohibit independent business decisions and actions; it addresses concerted action and therefore requires some agreement, express or implied, between two or more persons. The first inquiry in any *§ 1* claim, then, is to locate the agreement that restrains trade.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Higher Education & Professional Associations, Colleges & Universities**

The Sherman Act, *15 U.S.C.S. § 1*, does not prohibit all agreements that restrain trade or commerce. The section is understood to prohibit only those that impose "unreasonable restraints" on trade. Certain agreements subject to *§ 1* have been held to be per se illegal, meaning that no demonstration of an unreasonable restraint on competition is required. Other types of agreements, such as "exclusive dealing" arrangements, are subject to a "rule of reason" analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Under the rule of reason, a restraint is considered unreasonable if it has an adverse impact on competition and cannot be justified as a procompetitive measure. Thus, proof of actual competitive injury or anti-competitive effect is required to establish an unreasonable restraint of trade. This sort of arrangement, referred to as exclusive dealing, does not give rise to antitrust liability without proof of actual competitive injury. Implicit in the freedom to deal exclusively with one merchant, of course, is the freedom to refuse to deal with a competitor of that merchant.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In determining whether there has been an unreasonable restraint of trade, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The circumstances to be considered include the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable, they also include the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN12[] Exclusive & Reciprocal Dealing, Exclusive Dealing

In determining whether a vertical exclusive dealing arrangement between a supplier and an operator has resulted in an impermissible restraint of trade among cable operators in a local market, the focus of the court should be on "consumer welfare." The court must determine whether the restraint has had a substantial adverse effect on consumer welfare by eliminating an important source of competitive pressure on price. To do this, the court must examine competition and market power in not only the local market of cable operators--called the "intrabrand" market--but also in the broader market of cable program suppliers--called the "interbrand" market. This is true because, without market power at the interbrand level, a supplier's refusal to deal with a distributor or operator in the intrabrand market would not allow either the supplier or operator to set prices unaffected by a competitive market and thus create an overall anti-competitive effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN13[] Exclusive & Reciprocal Dealing, Exclusive Dealing

To mount a successful challenge to an exclusive dealing agreement between a program supplier and a cable television operator, a claimant must establish not only that there is a diminution or elimination of competition in the intrabrand market but also that the supplier has sufficient power to restrain trade in the interbrand market.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN14[] **Regulated Industries, Communications**

The first step in determining whether competition has been foreclosed at the intrabrand level and whether a supplier has sufficient market power to restrain trade in the interbrand market is to identify the relevant markets, both the interbrand and intrabrand. An antitrust policy divorced from market considerations would lack any objective benchmarks. A relevant market is defined generally as the area of effective competition. The outer boundaries of a relevant market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. Within a broad market, there may also exist well-defined submarkets, which in, themselves, constitute markets for antitrust exclusive dealing purposes.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN15[] **Regulated Practices, Market Definition**

In exclusive dealing questions, the boundaries of a submarket are determined by a number of factors. These include: industry or public recognition of the submarket as a separate economic entity; the product's peculiar characteristics and uses; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors. Thus, if a product is specially designed for a distinct group of purchasers, and there is an almost exclusive concentration of efforts on those purchasers, the relevant market for antitrust purposes may be limited to the sale of that product to those purchasers. Similarly, where one product is distinct from another because of its salability to customers, the relevant market can consist solely of that product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN16[] **Regulated Practices, Market Definition**

Market power is the ability to raise price significantly above the competitive level without losing a substantial portion of one's business. Because market power is conceptually difficult to define in any given case, two criteria are used to measure it: (1) market share and (2) product differentiation. Market share is used as an indicator of market power because it relates directly to a supplier's ability to affect competition. Product differentiation is examined because where it exists, a company will have additional freedom to raise the price of its product above that of competing brands while still retaining a substantial portion of its business. Thus, where there is strong product differentiation, significant market power may exist without market dominance.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN17[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

After it is shown that competition in the intrabrand market has been reduced or eliminated and that a supplier has interbrand market power, it is then necessary to determine whether the vertical restraint or exclusive dealing agreement has an overall actual anti-competitive effect or purpose, that is, has eliminated or significantly diminished an important source of competitive pressure on price and thus has had a substantial adverse effect on consumer welfare. This determination is accomplished through a systematic comparison of any negative effects with any positive effects, that is, the negative effects of the restraint on both intrabrand and interbrand competition with any positive, that is, pro-competitive, effects on the interbrand market stemming from the restraint.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN18[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Under some circumstances a trade restriction has the potential simultaneously to reduce intrabrand competition and to stimulate interbrand competition. Possible pro-competitive effects on interbrand competition that might stem from an intrabrand restriction include increased market access for the cable supplier, increased consumer services by the distributor, and enhanced product safety and quality. When the sellers of services are numerous and mobile, and the number of buyers is large, exclusive-dealing arrangements of narrow scope pose no threat of adverse economic consequences. To the contrary, they may be substantially pro-competitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN19[] **Regulated Industries, Communications**

Where a cable supplier has considerable market power in the interbrand market, a distribution restriction may reduce intrabrand competition without stimulating interbrand competition. If a particular brand or product is powerful because of a lack of adequate alternative brands, the imposition of a trade restraint may serve to increase a supplier's and an operator's market power and competitive advantage. In such situations, interbrand competition--or the absence thereof--fails to act as a significant check on the exploitation of intrabrand market power. The supplier and the operator may set prices and provide services in the intrabrand market unaffected by market competition and thus adverse to consumer welfare.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN20[] **Regulated Industries, Communications**

Under the law of the United States Court of Appeals for the Eleventh Circuit, if a supplier has considerable market power, a reduction or elimination of intrabrand competition alone may be sufficient to show that a trade restraint has an anti-competitive effect.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN21[] **Sherman Act, Claims**

In determining whether a vertical restraint on trade--that is, a exclusive dealing arrangement--is unreasonable in the cable television industry, it is necessary to analyze first the effect of the intrabrand restraints on consumer welfare, in light of the interbrand market structure, and then look to any possible pro-competitive effects on interbrand competition. A complainant need not show, however, an actual restraint on competition at the interbrand level to establish a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. Rather, in the Eleventh Circuit, the focus for the court is whether competition at the interbrand level adequately checks the exploitation of intrabrand market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Conspiracy to Monopolize, Sherman Act**

There is no magic unique to the terms "contract, combination, or conspiracy" as used in the Sherman Act, *15 U.S.C.S. § 1*. Rather, the terms are used interchangeably to describe the requisite agreement between two or more persons to restrain trade, and courts sometimes simply refer instead to an "agreement."

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] **Sales of Goods, Output, Exclusive & Requirements Agreements**

For purposes of ***antitrust law***, a parent company and its subsidiaries are considered a single enterprise, with a unity of interest and purpose. Moreover, although a parent company cannot conspire or combine with its wholly-owned subsidiaries for antitrust purposes, a parent company and its subsidiaries can certainly conspire or agree with other parties for purposes of the antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN24[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The right to refuse to deal with those whom a company chooses is not absolute and exists only if there are legitimate competitive reasons for refusal. Sellers do not have an antitrust carte blanche to select those with whom they will deal, a refusal to deal becomes unlawful when it produces an unreasonable restraint on trade, i.e., if there is an anticompetitive purpose or effect in selecting those with whom one will deal. A refusal to deal, may not be used as a device to achieve some anticompetitive goal such as to acquire a monopoly or to establish market dominance and drive out existing competitors or to increase the seller's own market dominance.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN25[] **Market Definition, Relevant Market**

In some instances, one brand of a product can constitute a separate market for antitrust purposes. That is, a company's own particular product can be a relevant market under the Sherman Act, *15 U.S.C.S. § 1*. The relevant market for antitrust purposes is determined by the choices available to consumers. If there are no substitutes available, then a single brand of a product can be a proper market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN26[] **Monopolies & Monopolization, Actual Monopolization**

When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN27[] Price Fixing & Restraints of Trade, Vertical Restraints

Although intrabrand restraints are often imposed by and for the benefit of suppliers or manufacturers, in some instances, distributors or dealers seek to have restraints imposed upon them by their supplier or manufacturer. Such arrangements are desired to restrict intrabrand competition and enhance distributor power by promoting excess prices and profits. In such cases, the supplier or manufacturer participates merely as the enforcement agent in furthering the distributor's anti-competitive conduct. Suppliers will agree to such restraints to appease dealer interests in excess profits or the quiet life. Although a supplier is often induced to accommodate distributor interests where a dealer cartel has been formed, an individually powerful dealer or distributor may also be able to coerce a supplier to restrict distribution. Because distribution restrictions are coerced from suppliers to further the monopolistic desires of a dealer, it is widely agreed that such restraints are anti-competitive and illegal.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN28[] Regulated Practices, Market Definition

The most obvious circumstance in which an individual dealer is able to coerce a limitation on intrabrand competition is where the dealer possesses something approaching monopoly power in the relevant market. But a "dominant" dealer's request for a restraint might coerce a manufacturer in the same way. Dominance for this purpose is generally indicated by a distributor who has 30-50 percent of a manufacturer's local or total sales.

Antitrust & Trade Law > Sherman Act > General Overview

HN29[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 2.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN30[] Monopolies & Monopolization, Actual Monopolization

The offense of monopoly under § 2 of the Sherman Act, 15 U.S.C.S. § 2, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business, acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Evidence > Burdens of Proof > General Overview

HN31[] **Scope, Monopolization Offenses**

To establish the offense of attempted monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, it is necessary to prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Furthermore, as with the offense of monopolization, the attempt must occur in a defined relevant market. Thus, to demonstrate the dangerous probability of monopolization in an attempt case, it is also necessary to inquire into the relevant market and the defendant's economic power in that market.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Burdens of Proof > General Overview

HN32[] **Scope, Monopolization Offenses**

The offense of conspiracy to monopolize under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, requires: (1) concerted action deliberately entered into with the specific intent of achieving a monopoly; and (2) the commission of at least one overt act in furtherance of the conspiracy. Thus, a *§ 1* Sherman Act claim, *15 U.S.C.S. § 1*, and a *§ 2* conspiracy to monopolize claim require the same threshold showing--the existence of an agreement to restrain trade. Once this showing is made, then it must be established that the conspiracy was formed with the specific intent to obtain or maintain a monopoly.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN33[] **Motions to Dismiss, Failure to State Claim**

To prevail on a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, it is not enough for a defendant to articulate any economic motive--or absence thereof--in support of its behavior, regardless of its accuracy in reflecting what actually happened. A claimant who posits a reasonable motive, even if there are other reasonable but contrary motives, should be allowed to survive a motion to dismiss and produce evidence of the true motive.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN34[] **Monopolies & Monopolization, Actual Monopolization**

See *Ala. Code § 6-5-60* (1975).

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN35[] **Antitrust & Trade Law, Sherman Act**

Alabama's antitrust laws, both statutory and common law, are analytically identical to federal antitrust laws and are interpreted by Alabama courts in accordance with federal law.

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN36[] **Sherman Act, Remedies**

In construing the terms and provisions of Alabama statutes derived from federal statutes, such terms and provisions will usually be considered as having the meaning given by the federal courts.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN37[] **Regulated Industries, Communications**

See Montgomery, Ala., Ordinance 48-90, § 3.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > ... > Regulated Entities > Cable Systems > General Overview

HN38[] **Regulated Industries, Communications**

See Montgomery, Ala., Ordinance 48-90, § 4.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN39[] **Defenses, Demurrers & Objections, Affirmative Defenses**

The elements of a cause of action for intentional interference with business relations under Alabama law are: (1) the existence of a contract or business relation; (2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the contract or business relation; and (4) damage to the plaintiff as a result of the defendant's interference. Justification for the interference is an affirmative defense that has to be pleaded and proved by the defendant.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Torts > Intentional Torts > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN40[] **Pleadings, Counterclaims**

Because interference with business relations is an intentional tort, punitive damages may be awarded if the act of interference was carried out wantonly, or spitefully, or maliciously.

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Judges: Thompson

Opinion by: MYRON H. THOMPSON

Opinion

[*1344] *ORDER*

Several cable television companies initially brought this lawsuit against defendant City of Montgomery, Alabama, challenging the legality of two municipal ordinances. The plaintiffs -- Storer Cable Communications, Inc., ESPN, Inc., Satellite Services, Inc., and Turner Network Television, Inc. -- contended that the ordinances violated a number of federal constitutional provisions and statutes, as well as Alabama law. Montgomery Cablevision Entertainment, Inc., a new local cable television operator in Montgomery, intervened as a defendant and filed a counterclaim against the plaintiffs and Tele-Communications, Inc., Turner Broadcasting Systems, Inc., and Turner Cable Network Sales, Inc. As the counterclaim plaintiff, Montgomery Cablevision charges these counterclaim defendants with violating the following **[**2]** federal, state, and municipal antitrust laws: *§§ 1* & *2* of the Sherman Act, *15 U.S.C.A. §§ 1*, *2*; 1975 *Ala. Code § 6-5-60*; Alabama state common law governing monopolies; and City of Montgomery Ordinance 48-90 §§ 3, 4. The cable company also charges the counterclaim defendants with the state-law tort of intentional interference with business relations. Montgomery Cablevision seeks declaratory and injunctive relief and treble damages pursuant **[*1345]** to § 4 of the Clayton Act, *15 U.S.C.A. § 15(a)*. [1]

On October 9, 1992, this court entered an order regarding the validity of the two municipal ordinances. The court found that federal law preempted certain aspects of the ordinances, but declared **[**3]** the ordinances to be valid in other respects. *See Storer Cable Communications, Inc. v. City of Montgomery, 806 F. Supp. 1518 (M.D. Ala. 1992)* (Thompson, J.). This cause is again before the court, this time on motions to dismiss filed pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* by the counterclaim defendants. They contend that Montgomery Cablevision has failed "to state a claim upon which relief can be granted" in its counterclaim. *Fed. R. Civ. P. 12(b)(6)*. For the reasons that follow, the court concludes that the motions to dismiss should be denied.

I. BACKGROUND

The allegations of Montgomery Cablevision's counterclaim are as follows. The production, transmission, distribution, and sale of cable television programming is a major industry in the United States, grossing billions of dollars in annual sales. This industry affects interstate commerce, and the parties involved in this litigation transact business in interstate commerce.

Cable television programming is produced by "program suppliers" or "programming services," such as Turner Network and ESPN, who develop and produce a variety of television programs. Program suppliers **[**4]** contract with distributors, such as Satellite Services, to distribute their programs to cable television "exhibitors" or "operators," who own local cable television systems. Cable television operators, such as Storer Cable, Montgomery Cablevision, and Tele-Communications, receive the programming by satellite and exhibit the programming to subscribers on local cable television systems for a monthly fee in particular service areas. The provision of programming to subscribers is often referred to as "retail cable sales."

According to Montgomery Cablevision, most local markets for cable television service in the United States are de facto monopolies. Because the market for retail sales of cable television is a capital intensive industry, there are substantial barriers to entry into the market. Moreover, "overbuilders," or new entrants into local cable services markets, have had to face a variety of anti-competitive practices by incumbent monopolists intent on foreclosing markets to the newly franchised cable operators. [2] For example, existing local operators secure exclusive dealing contracts with program suppliers to shut new competitors out of programming critical to their ability **[**5]** to compete with the incumbent cable franchise. In some cases, these exclusive dealing contracts are carried out by a program supplier who is vertically integrated with a local cable system operator or who has ownership or managerial interests in it.

In 1990, Montgomery Cablevision was awarded a new franchise by the City of Montgomery to provide cable television services to subscribers in the Montgomery area. It is currently in the start-up phase of providing such

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[1] Jurisdiction is premised on the following: *15 U.S.C.A. §§ 15*, *26*; *28 U.S.C.A. §§ 1331*, *1337*; and the doctrine of supplemental jurisdiction, *28 U.S.C.A. § 1367*.

[2] The term "overbuilder" refers to a cable television operator who enters an area already served by an existing local cable operator and who must build over the operations of the incumbent franchisee.

services and intends to compete directly with Storer Cable, which has been providing cable television services to subscribers in the Montgomery area since 1976. Montgomery Cablevision plans to offer consumers more channels, superior picture quality, more responsive customer service, and competitive prices in the retail cable television services market. [3] **[**6]** Before Montgomery Cablevision received its franchise in 1990, Storer Cable was the only cable television company operating in the Montgomery area. Storer Cable currently provides service to 92% of the homes in the Montgomery area that subscribe to cable television.

[*1346] To begin providing competitive cable services, Montgomery Cablevision has acquired property and equipment, built and installed a receiving station, contracted for system mapping, design, and engineering, hired and trained sales people, placed advertisements, and begun selling subscriptions in certain areas of Montgomery. It has also attempted to secure long-term contracts with suppliers of attractive and competitive cable programs. For example, in May 1990, Montgomery Cablevision approached Turner Cable Network Sales, a company engaged in the business of programming sales, to request an affiliation contract to carry the Turner Network program **[**7]** service. Turner Network, a cable television program supplier, produces a television program service consisting of Metro-Goldwyn-Mayer ("MGM") movies, dramatic shows, situation comedies, game shows, special children's programming, entertainment programming, and sports programs, including National Football League ("NFL") games and National Basketball Association ("NBA") playoff games. [4] **[**8]** Later that month, Turner Cable Network Sales informed Montgomery Cablevision that it would not sell the Turner Network program service to the cable company. In August 1990, Montgomery Cablevision made a second request for a contract to carry the Turner Network program service, which was again denied. On or about the time that Montgomery Cablevision requested a contract to carry the Turner Network program service, Storer Cable entered into an exclusive contract for it. The Turner companies are allegedly vertically integrated with Storer Cable or otherwise financially or managerially related or affiliated with it. [5]

In May 1990, Montgomery Cablevision requested an affiliation contract also from ESPN to carry ESPN's NFL Football Package. This package consists of three preseason NFL games, eight regular season Sunday night NFL games, and the post-season Pro Bowl. ESPN refused to sell its NFL package to Montgomery Cablevision. In August 1990, Montgomery Cablevision again requested the NFL package from ESPN, which was again denied. At the same time, Storer Cable received an affiliate contract for the NFL package from ESPN. Moreover, Storer Cable entered into an exclusive contract with ESPN, which provided that none of Storer Cable's competitors in the Montgomery area would receive ESPN's football package.

According to Montgomery Cablevision, ESPN's football programming and the Turner Network program service -- in particular, **[**9]** the Sunday night NFL games -- are demanded or desired by a substantial number of current and potential cable subscribers in the Montgomery area. Moreover, this particular programming is not available from any other cable programming source. Montgomery Cablevision maintains that, because of the exclusive contracts, it has been placed at a competitive disadvantage with regard to Storer Cable, which is able to offer this highly desirable programming to its customers. It has encountered substantial difficulty in signing up subscribers and obtaining financing; it has also suffered a reduction in the value of its business exceeding three million dollars. [6]

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[3] This market is also referred to as the "retail cable sales market" or the "multi-channel video services market."

[4] Montgomery Cablevision alleges that both Turner Cable Network Sales and Turner Network are wholly-owned subsidiaries of Turner Broadcasting Systems, Inc., which is engaged in the business of producing and distributing cable television programming.

[5] Montgomery Cablevision also alleges that Tele-Communications, the largest cable television operator in the United States, and Satellite Services, a cable television program distributor, are vertically integrated with Storer Cable or otherwise financially or managerially related to it.

[6] Montgomery Cablevision also alleges that its franchise from the City of Montgomery requires it to build over 200 miles per year over a five-year period with penalties of $ 250,000 per year for failure to meet that goal. The denial of the Turner Network program service and ESPN's football package jeopardizes its ability to meet its franchise requirements.

Montgomery **[**10]** Cablevision contends that not only has it suffered injuries but the exclusive dealing arrangements among the counterclaim defendants have hindered and restrained competition among cable operators in the Montgomery market in price, service, quality of transmission and facilities, and cable programming, in violation of federal, state, and municipal ***antitrust law***. Montgomery **[*1347]** Cablevision also maintains that Storer Cable entered into the exclusive contracts with Turner Network and ESPN with the specific intent and purpose of protecting its monopoly on the provision of cable television services in the Montgomery area and of foreclosing competition in this area, also in violation of federal, state, and municipal ***antitrust law***. Montgomery Cablevision further contends that, by agreeing to these exclusive contracts for programming, the counterclaim defendants who are cable television program suppliers and distributors -- that is, Tele-Communications, Satellite Services, the Turner companies, and ESPN -- have assisted Storer Cable in its efforts to monopolize the Montgomery market for cable television services and to restrain competition. Finally, Montgomery Cablevision charges the counterclaim **[**11]** defendants with intentional interference with business relations; it contends that it has "initiated or commenced business relationships both with individuals who have subscribed or wish to subscribe" to Montgomery Cablevision's services and that the exclusive dealing arrangements among the counterclaim defendants were "intended to disrupt and did disrupt these relationships."

II. STANDARD FOR MOTION TO DISMISS

The counterclaim defendants contend that Montgomery Cablevision's counterclaim fails to allege sufficient facts to state a claim under federal, state, or municipal ***antitrust law***. They also maintain that Montgomery Cablevision has failed to state a claim for intentional interference with business relations. Consequently, they contend that Montgomery Cablevision's entire counterclaim should be dismissed pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*.

HN1[] In evaluating a claim to determine whether it adequately states a claim for relief, the court must accept the facts pleaded as true and construe them in a light most favorable to the claimant. *Brower v. County of Inyo, 489 U.S. 593, 598, 109 S. Ct. 1378, 1382, 103 L. Ed. 2d 628 (1989)*; **[**12]** *Fed. R. Civ. P. 12(b)*. A motion to dismiss may not be granted unless it appears beyond a reasonable doubt that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984))*; *accord* *Luckey v. Harris, 860 F.2d 1012, 1016 (11th Cir. 1988)*, *cert. denied,* *495 U.S. 957, 110 S. Ct. 2562, 109 L. Ed. 2d 744 (1990)*.

It is also well-settled that ***HN2***[] notice pleading is all that is necessary for a valid claim. The system of notice pleading set up by the Federal Rules of Civil Procedure requires that a claim include only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. As the Supreme Court recently reaffirmed, this rule means that a claimant need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* U.S. , *, 113 S. Ct. 1160, 1163, 122 L. Ed. 2d 517 (1993)* (quoting **[**13]** *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957))*. The rule "does not require a claimant to set out in detail the facts upon which he bases his claim." *Id.* Moreover, this "liberal system of 'notice pleading'" applies to all causes of action unless otherwise specified in the rules, such as the particularity requirement imposed by *Rule 9(b)* for averments of fraud or mistake. *Id.* The Supreme Court explained that "Perhaps if *Rules 8* and *9* were rewritten today, [other] claims . . . might be subjected to the added specificity requirement of *Rule 9(b)*." *Id.* "But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation," the Court continued. *Id.* "In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.*

In the wake of the Supreme Court's reaffirmation and admonition in *Leatherman* that the liberal pleading requirements of the Federal Rules apply to all causes of action unless otherwise specified in the rules, ***HN3***[] it is no longer **[**14]** open to question that *Rule 8(a)(2)* applies in full force to antitrust **[*1348]** actions. Courts may no longer demand as they did in the past, out of a perceived "danger of abuse of the antitrust laws," that a claimant provide a "detailed pleading beyond the general notice requirements of *rule 8(a)(2)*." *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp., 711 F.2d 989, 995 (11th Cir. 1983)*. Nevertheless, the liberal pleading requirements of the Federal Rules do not negate the need to plead sufficient facts so that each element of the alleged antitrust violation can be identified. Municipal Util. Bd. v. Alabama Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991). An antitrust complaint "must comprehend a so-called prima facie case." Quality Foods, 711 F.2d at 995 (citation omitted). Moreover, conclusory allegations of antitrust violations will not survive a motion to dismiss "if not supported by facts constituting a legitimate claim for relief." Municipal Util. Bd., 934 F.2d at 1501 (citation omitted). The alleged facts, however, "need not be spelled **[**15]** out with exactitude, nor must recovery appear imminent." *Id.*

Finally, ***HN4***[] in testing an antitrust under Rule 12(b)(6), a court should be very circumspect in applying "substantive legal rules" to market conditions based on a factually undeveloped record. *Eastman Kodak Co. v. Image Technical Serv., Inc., 498 U.S. 1080, , 112 L. Ed. 2d 1037, 111 S. Ct. 949, (1992)*. As the Supreme Court recently cautioned, "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***." *Id.* Courts should "resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record,'" *id.* (quoting Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 579, 45 S. Ct. 578, 583, 69 L. Ed. 1093 (1925)), that is, after the court "has examined closely the economic reality of the market at issue." Eastman Kodak, U.S. at , 112 S. Ct. at 2082. Generally, unless the court can conclude beyond a doubt -- after applying an economic approach which is not subject to serious question and which, if possible, has a sound empirical basis **[**16]** -- that the complainant's underlying theory is "economically senseless," *id.* at *,* 112 S. Ct. at 2083, the complainant should be allowed to proceed with factual development, including expert testimony regarding the "economic reality of the market at issue."

III. SECTION ONE OF THE SHERMAN ACT

As stated, Montgomery Cablevision claims that the exclusive dealing arrangements among the counterclaim defendants have hindered and restrained competition among cable operators in the Montgomery area market. The cable company charges the counterclaim defendants with violating § 1 of the Sherman Act, 15 U.S.C.A. § 1, and seeks treble damages under § 4 of the Clayton Act, 15 U.S.C.A. § 15(a). [7]

[17]** 15 U.S.C.A. § 1. Section 4 of the Clayton Act provides in pertinent part:

> ***HN6***[] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained."

15 U.S.C.A. § 15(a).

A. Elements

HN7[] To recover under § 1 of the Sherman Act, Montgomery Cablevision must establish three elements. It must show that the counterclaim defendants (1) entered into "a contract, combination or conspiracy," which was (2) "in restraint of trade or commerce." 15 U.S.C.A. § 1. The cable company must further show (3) that it was damaged by the violation, thereby entitling it to treble damages under § 4 of the Clayton Act. Orval Sheppard Real Estate Co., Inc. v. Valinda Freed & Assoc., Inc., 608 F. Supp. 354, 357 (M.D. Ala. 1985) (Thompson, J.), *aff'd 800 F.2d 265 (11th Cir. 1986)* (Table). [8]

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[7] Section 1 of the Sherman Act provides in pertinent part:

> ***HN5***[] "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."

[8] To invoke the jurisdiction of the Sherman Act, a claimant must show "(1) that the local activity has a (2) substantial effect on (3) interstate commerce." El Shahawy v. Harrison, 778 F.2d 636, 639 (11th Cir. 1985). Because "the antitrust laws are concerned primarily with the integrity of interstate markets," the Eleventh Circuit Court of Appeals requires that a determination of Sherman Act Jurisdiction "focus on the interstate markets involved in the defendant's business activities." Id. at 640 (citation omitted). In this case, Montgomery Cablevision has sufficiently alleged that the counterclaim defendants are substantially involved in interstate commerce to meet the jurisdictional requirement of the Sherman Act. *See* id. at 641.

[18]** **[*1349]** As to the first element, § 1 of the Sherman Act **HN8**[] does not prohibit independent business decisions and actions. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984); Tidmore Oil Co., Inc. v. BP Oil Co./Gulf Prod. Div., 932 F.2d 1384, 1388 (11th Cir.), *cert. denied, 116 L. Ed. 2d 279, U.S. , 112 S. Ct. 339 (1991)*. Section 1 addresses concerted action and therefore requires some agreement, express or implied, between two or more persons. Monsanto Co., 465 U.S. at 761, 104 S. Ct. at 1469. The first inquiry in any § 1 claim, then, is to locate the agreement that restrains trade. Tidmore Oil, 932 F.2d at 1388.

As to the second element, § 1 of the Sherman Act **HN9**[] does not prohibit all agreements that restrain trade or commerce. The section is understood to prohibit only those that impose "unreasonable restraints" on trade. NCAA v. Bd. of Regents, 468 U.S. 85, 98, 104 S. Ct. 2948, 2959, 82 L. Ed. 2d 70 (1984). *Accord* Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1455 (11th Cir. 1991). **[**19]** Certain agreements subject to § 1 have been held to be per se illegal, meaning that no demonstration of an unreasonable restraint on competition is required. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984). [9] Other types of agreements, such as "exclusive dealing" arrangements, are subject to a "rule of reason" analysis. *Id.; see also* Graphic Prod. Distrib., Inc. v. Itek Corp., 717 F.2d 1560, 1566 n. 7 (11th Cir. 1983).

HN10[] Under the rule of reason, a restraint is considered unreasonable "if it has an adverse impact on competition and cannot be justified as a procompetitive measure." Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1569 (11th Cir. 1991). **[**20]** Thus, proof of actual competitive injury or anti-competitive effect is required to establish an unreasonable restraint of trade. Constr. Aggregate Transp., Inc. v. Florida Rock Ind., Inc., 710 F.2d 752, 773 (11th Cir. 1983); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 295 (5th Cir. Unit A July 1981). [10] As the court of appeals explained in *Constr. Aggregate Transp.:*

> "This sort of arrangement, referred to as 'exclusive dealing,' does not give rise to antitrust liability without proof of actual competitive injury. Implicit in the freedom to deal exclusively with one merchant, of course, is the freedom to refuse to deal with a competitor of that merchant."

710 F.2d at 773.

[21]** **HN11**[] In determining whether there has been an unreasonable restraint of trade, the factfinder "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977). The circumstances to be considered include "the facts peculiar to the business to which the restraint is applied[,] its condition before and after the restraint was imposed[,] the nature of the restraint and its effect, actual or probable," Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918); they also include "the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained." *Id.*

HN12[] In determining whether a vertical exclusive dealing arrangement between a supplier and an operator has resulted in an impermissible restraint of trade among cable operators in a local market, the focus of the court should be on "consumer welfare." **[*1350]** Graphic Prod. Distrib., 717 F.2d at 1572 n. 20. **[**22]** The court must determine whether the restraint has had "a substantial adverse effect on consumer welfare by eliminating an important source of competitive pressure on price." *Id.* To do this, the court must examine competition and market power in not only the local market of cable operators -- called the "intrabrand" market -- but also in the broader market of cable program suppliers -- called the "interbrand" market. *See, e.g.,* Continental T.V., 433 U.S. at 51-57, 97 S. Ct. 2558-2561, 53 L. Ed. 2d 568 ; Graphic Prod. Distrib., 717 F.2d at 1571-73. [11] This is true because, without

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[9] Examples of per se prohibited combinations are price fixing, group boycotts, and market division agreements. Copperweld Corp., 467 U.S. at 768, 104 S. Ct. at 2740.

[10] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

market power at the interbrand level, a supplier's refusal to deal with a distributor or operator in the intrabrand market would not allow either the supplier or operator to set prices unaffected by a competitive market and thus create an overall anti-competitive effect. *Id.* As then Professor, now Judge, Richard Posner has explained, the rationale for assessing the market power of a supplier in antitrust analysis is that:

> "The absence of market power in the interbrand market implies that the defendant is in competition with firms that **[**23]** sell products regarded by the consumer as close substitutes for the defendant's. The defendant therefore will lose most or all of its sales if its retail price exceeds its competitors' retail price for any reason, including a lack of intrabrand competition that drives its costs of distribution up . . . . If a firm lacks market power, it cannot affect the price of its product; that price is determined by the market."

Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. Chi. L. Rev. 6, 16 (1981). Or to put it another way, "when interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Continental T.V., 433 U.S. at 52 n.19, 97 S. Ct. at 2558 n.19*. Therefore, ***HN13***[] to mount a successful challenge to an exclusive dealing agreement between a program supplier and a cable television operator, a claimant must establish not only that there is a diminution or elimination of competition in the intrabrand market but also **[**24]** that the supplier has sufficient power to restrain trade in the interbrand market.

HN14[] The first step in determining whether competition has been foreclosed at the intrabrand level and whether a supplier has sufficient market power to restrain trade in the interbrand market is to identify the relevant markets, both the interbrand and intrabrand. As the Supreme Court explained in *Continental T.V.,* "an antitrust policy divorced from market considerations would lack **[**25]** any objective benchmarks." *433 U.S. at 53 n.21, 97 S. Ct. at 2559 n.21*. A relevant market is defined generally as "the area of effective competition," *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 1523, 8 L. Ed. 2d 510 (1962)* (citation omitted). The outer boundaries of a relevant market are determined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id.* (quoting *Brown Shoe Co., 370 U.S. at 325-26, 82 S. Ct. at 1523-24*). [12] Within a broad market, there may also exist well-defined submarkets, which in, themselves, constitute markets for antitrust purposes. *Brown Shoe Co., 370 U.S. at 325, 82 S. Ct. at 1524*. *See also Fineman v. Armstrong World Indus. Inc., 980 F.2d 171, 199 (3rd Cir. 1992)*, *cert. denied, 122 L. Ed. 2d 677, U.S. , 113 S. Ct. 1285 (1993)*; *T. Harris Young, 931 F.2d at 824*; *L.A. Draper & Son, 735 F.2d at 423.* **[**26]** ***HN15***[] The boundaries of a submarket are determined by a number of factors. **[*1351]** These include: industry or public recognition of the submarket as a separate economic entity; the product's peculiar characteristics and uses; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors. *Brown Shoe Co., 370 U.S. at 325, 82 S. Ct. at 1524*; *T. Harris Young, 931 F.2d at 824*. Thus, if a product is specially designed for a distinct group of purchasers, and there is an almost exclusive concentration of efforts on those purchasers, the relevant market for antitrust purposes may be limited to the sale of that product to those purchasers. *See, e.g., Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 980-81 (5th Cir. 1977)* (relevant market consisted of sale of air conditioners for only Volkswagen, Porsche, and Audi automobiles, rather than sale of air conditioners for all automobiles), *cert. denied, 434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978)*. Similarly, where one product is distinct from another **[**27]** because of its salability to customers, the relevant market can consist solely of that product. *See, e.g., Int'l Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 250-52, 79 S. Ct. 245, 250-51, 3 L. Ed. 2d 270 (1959)* (because of high salability of championship boxing contests, as opposed to non-championship fights, relevant market consisted of only championship boxing contests).

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[11] Generally, interbrand competition is defined as competition among suppliers or manufacturers of the same generic product, while intrabrand competition is the competition between distributors -- wholesale or retail -- of the product of a particular supplier or manufacturer. *Continental T.V., 433 U.S. at 52 n.19, 97 S. Ct. at 2558 n.19*. In the cable industry, interbrand competition would include competition among program suppliers, while intrabrand competition would occur among cable television operators.

[12] *See also L.A. Draper & Son, 735 F.2d at 423* (the product dimension is determined by "the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output").

Once the relevant markets are defined, a court then must determine whether there is a diminution or elimination of competition in the intrabrand market and whether the supplier has sufficient power to restrain trade in the interbrand market. The counterclaim alleges that Storer Cable provides cable television services to **[**28]** 92% of the homes in the Montgomery area. With this allegation, the counterclaim raises a substantial factual allegation as to whether competition in the intrabrand market has been substantially reduced if not completely foreclosed. [13] Indeed, a 92% market share would be considered an indicator of monopoly power. *See* *Eastman Kodak Co., U.S. at , 112 S. Ct. at 2090* (80-95% of market is a monopoly); *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)* (87% of the market is a monopoly). The critical question for the court, therefore, is whether Montgomery Cablevision has sufficiently alleged that the program suppliers have interbrand market power.

Market power is "the ability to raise price significantly above the competitive **[**29]** level" without losing a substantial portion of one's business. *Graphic Prod. Distrib., 717 F.2d at 1570*. [14] **[**30]** Because market power is conceptually difficult to define in any given case, two criteria are used to measure it: (1) market share and (2) product differentiation. *Id. See also* *MHB Distrib., Inc. v. Parker Hannifin Corp., 800 F. Supp. 1265, 1270-71 (E.D. Pa. 1992)*. Market share is used as an indicator of market power because it relates directly to a supplier's ability to affect competition. *Graphic Prod. Distrib., 717 F.2d at 1570*. Product differentiation is examined because where it exists, "a company will have additional freedom to raise the price of its product above that of competing brands while still retaining a substantial portion of its business." *Id. at 1570 n.15*. [15] Thus, where there is strong product differentiation, significant market power may exist without market dominance. *See* 8 Phillip E. Areeda, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* § 1604f at 60 (1989).

HN17[] After it is shown that competition in the intrabrand market has been reduced or eliminated and that a supplier has interbrand market power, it is then necessary to determine **[*1352]** whether the vertical restraint -- in this case, the exclusive dealing agreements -- has an overall actual anti-competitive effect or purpose, that is, has eliminated or significantly diminished an important source of competitive pressure on price and thus has had a substantial adverse effect on consumer welfare. This determination is accomplished through a systematic comparison of any negative effects with any positive effects, that is, the negative effects of the restraint on both intrabrand and interbrand competition with any positive, that is, pro-competitive, effects on the interbrand market stemming from the restraint. *Graphic Prod. Distrib., 717 F.2d at 1571-1573*. *See also* *Muenster Butane, 651 F.2d at 296* **[**31]** ("Comparison of the effects of any vertical restriction on intrabrand and interbrand competition is the critical analysis required"). This comparison is necessary because, as the Supreme Court explained in *Continental T.V.*, ***HN18***[] under some circumstances a trade restriction has the potential simultaneously to reduce intrabrand competition and to stimulate interbrand competition. *433 U.S. at 51-52, 97 S. Ct. at 2558*. Possible pro-competitive effects on interbrand competition that might stem from an intrabrand restriction include increased market access for the supplier, increased consumer services by the distributor, and enhanced product safety and quality. *See* *Continental T.V., 433 U.S. at 54-55, 97 S. Ct. at 2560*; 8 Areeda, ***Antitrust Law*** § 1601 at 12-22. As Justice O'Connor has explained:

> "When the sellers of services are numerous and mobile, and the number of buyers is large, exclusive-dealing arrangements of narrow scope pose no threat of adverse economic consequences. To the contrary, they may

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[13] The counterclaim defendants have raised no real dispute that the relevant market at the intrabrand level of competition in this case is the retail cable television sales market in the Montgomery area.

HN16[] -

[14] Market power has also been defined as the power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 14, 104 S. Ct. 1551, 1559, 80 L. Ed. 2d 2 (1984)*. Market power, however, differs from monopoly power. The former requires less market influence. *Eastman Kodak, U.S. at , 112 S. Ct. at 2090*.

[15] Product differentiation may be based on styling, packaging, advertising, service and other non-price competition. *See* *Graphic Prod. Distrib., 717 F.2d at 1570 n.15*.

> be substantially pro-competitive by ensuring stable markets and encouraging long-term, mutually **[**32]** advantageous business relationships."

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 1575-76, 80 L. Ed. 2d 2 (1984), (O'Connor, J. with whom Burger, C.J., and Powell and Rehnquist, JJ. join, concurring in judgment) (citation omitted).

On the other hand, ***HN19***[] where, for example, a supplier has considerable market power in the interbrand market, a distribution restrict ion may reduce intrabrand competition without stimulating interbrand competition. If a particular brand or product is powerful because of a lack of adequate alternative brands, the imposition of a trade restraint may serve to increase a supplier's and an operator's market power and competitive advantage. *See* *Graphic Prod. Distrib., 717 F.2d at 1571-73* & n.20. *See also* Peter M. Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis,* 1981 Duke L.J. 417, 426-29 (1981). In such situations, interbrand competition -- or the absence thereof --fails to act as a significant check on the exploitation of intrabrand market power. *Graphic Prod. Distrib., 717 F.2d at 1572* & n.20. **[**33]** The supplier and the operator may set prices and provide services in the intrabrand market unaffected by market competition and thus adverse to consumer welfare.

The required systematic comparison of negative and positive effects of the distribution restraint on intrabrand and interbrand competition should not be understood, as suggested by the counterclaim defendants, to require the claimant to show that the restraint has had an actual anti-competitive effect on interbrand competition. As Judge Tjoflat has explained, "The argument, pressed . . . at length here, that the reduction or elimination of intrabrand competition is, by itself, never sufficient to show that a trade restraint is anti-competitive must rest, at bottom, on the view that intrabrand competition -- regardless of the circumstances -- is never a significant source of consumer welfare." *Graphic Prod. Distrib., 717 F.2d at 1572 n.20*. He responded that "This view is simply not supported by economic analysis, or by the cases." *Id.* He then explained that:

> "A seller with considerable market power in the interbrand market -- whether stemming from its dominant position in the market **[**34]** structure or from the successful differentiation of its products -- will necessarily have some power over price. In that situation, intrabrand competition will be a significant source of consumer welfare because it alone can exert downward pressure **[*1353]** on the retail price at which the good is sold. Dealers, by competing against each other and bidding the retail price down, will in turn exert downward pressure on the seller's wholesale price in order to maintain their profit margins. Thus, in situations of manufacturer market power, intrabrand restrictions on distributor competition can have a substantial adverse effect on consumer welfare by eliminating an important source of competitive pressure on price. Rather than promoting nonprice competition, vertical restraints in this context may enable a manufacturer to retain monopoly profits arising from an interbrand competitive advantage."

Id. ***HN20***[] Under the law of the Eleventh Circuit, therefore, if a supplier has considerable market power, a reduction or elimination of intrabrand competition alone may be sufficient to show that a trade restraint has an anti-competitive effect. *Graphic Prod. Distrib., 717 F.2d at 1572* & n.20. **[**35]** [16]

To summarize, ***HN21***[] in determining whether a vertical restraint on trade -- that is, a exclusive dealing arrangement -- is unreasonable, it is necessary to analyze first the effect of the intrabrand restraints on consumer welfare, in light of the interbrand market structure, and then look to any possible pro-competitive effects on interbrand competition. *Graphic Prod. Distrib., 717 F.2d at 1573*. A complainant need not show, however, an actual restraint on competition at the interbrand level to establish a violation of *§ 1* of the Sherman Act. Rather, in this

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[16] This court therefore disagrees with the comment in *Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp., 789 F. Supp. 760, 768 (S.D. Miss. 1992)*, *aff'd*, ***986 F.2d 1418 (5th Cir. 1993)*** (Table), that a complainant "must allege anti-competitive effect at the interbrand level of competition" to establish *§ 1* Sherman Act violation.

circuit, the focus for **[**36]** the court is whether competition at the interbrand level adequately checks the exploitation of intrabrand market power. [17]

[37]** B. Application of Elements

The counterclaim defendants contend that the *§ 1* Sherman Act claim against them should be dismissed for several reasons. First, they maintain that Montgomery Cablevision has not properly alleged the existence of a contract, combination, or conspiracy. Second, they contend that the counterclaim does not sufficiently allege relevant markets. Finally, they maintain that the counterclaim fails to allege the requisite anti-competitive effect on trade.

i.

First, the court finds that Montgomery Cablevision has sufficiently alleged the existence of "a contract, combination . . ., or conspiracy" in restraint of trade. *15 U.S.C.A. § 1*. Montgomery Cablevision contends that the conspiracy in this case centers on the exclusive dealing agreements between Storer Cable and Turner Network and between Storer Cable and ESPN. [18] Admittedly, **[*1354]** the counterclaim generally uses the terms "contract" or "agreement," rather than "conspiracy," to refer to the exclusive dealings arrangements among the counterclaim defendants. But as the Eleventh Circuit Court of Appeals has stated, ***HN22***[] "there is no magic unique to each term." *Tidmore Oil Co., Inc. v. BP Oil Co./Gulf Prod. Div., 932 F.2d 1384, 1388* ***[**38]*** *(11th Cir.)*, *cert. denied, 116 L. Ed. 2d 279, U.S. , 112 S. Ct. 339 (1991)*. Rather, the terms are used interchangeably to describe the requisite agreement between two or more persons to restrain trade, *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1455 (11th Cir. 1991)*, and courts sometimes simply refer instead to an "agreement." *Tidmore Oil, 932 F.2d at 1388*.

There are numerous references to the exclusive dealing agreements throughout the counterclaim. Montgomery Cablevision alleges that "exclusive dealing contracts between programmers and existing local operators" are one **[**39]** tactic that is used to shut out new competitors in the local cable services markets from programming critical to their ability to compete and offer comparable services. The cable company also states that Storer Cable is being provided "affiliate contracts" for the Turner Network program service and ESPN's football package, while Montgomery Cablevision has been denied these program services. Moreover, Montgomery Cablevision alleges that "Storer Cable agreed with ESPN to exclude competitors to Storer" from receiving the football programming and that there was an "agreement" to deny the Turner Network program service to Montgomery Cablevision. Finally, the cable company avers that the "exclusive agreements at issue" have caused injury to the competition.

As to the participants in the conspiracy, Montgomery Cablevision's counterclaim charges that Tele-Communications, Satellite Services, Turner Broadcasting Systems, Turner Network, Turner Cable Network Sales, and Storer Cable have "combined, agreed or conspired" to refuse to enter into a contract with Montgomery

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[17] The Supreme Court's 1992 decision in *Eastman Kodak* does not undermine, and indeed could be said to support, this economic approach. There, the court was similarly confronted with the economic relationship between a "primary" market and a "derivative" market or "aftermarket," albeit within the context of an alleged tying arrangement. *U.S. at , 112 S. Ct. at 2076*. The primary market was for a company's equipment and the aftermarkets were for that company's services and parts. The Court stated a economic truth equally applicable here, that "The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., 'cross-elasticity of demand.'" *Id. at , 112 S. Ct. at 2083*. The court observed that "there is no immutable physical law -- no 'basic economic reality' -- insisting that competition in the equipment market cannot coexist with market power in the aftermarkets." *Id. at , 112 S. Ct. at 2084*. The court then concluded, after engaging in a complex economic analysis, that there could conceivably be an impermissible restraint on trade in the aftermarket even in the absence of market power in the primary market. In reaching this conclusion, the Court admonished courts to rely on "actual market realities" rather than "legal presumptions that rest on formalistic distinctions." *Id. at , 112 S. Ct. at 2082*.

[18] Although the counterclaim alleges that several of the counterclaim defendants "contracted, combined or acted alone" to refuse to sell the Turner Network program service to Montgomery Cablevision, Montgomery Cablevision does not intend to pursue a *§ 1* claim against any unilateral behavior. Nor does it intend to pursue a group boycott theory at this time.

Cablevision for the Turner Network program service. In support of this claim, Montgomery Cablevision alleges that it contacted **[**40]** Turner Cable Network Sales about an affiliation contract for Turner Network and that Turner Cable Network Sales communicated the refusal to sell the program service to Montgomery Cablevision. Shortly after this communication, Storer Cable received an exclusive contract with the Turner Network. Montgomery Cablevision further contends that Turner Network and Turner Cable Network Sales are wholly-owned subsidiaries of Turner Broadcasting Systems. ***HN23***[] For purposes of ***antitrust law***, therefore, they are considered a single enterprise, with a unity of interest and purpose. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-72* & n.18, *104 S. Ct. 2731, 2741-42* & n. 18, *81 L. Ed. 2d 628*. Moreover, although a parent company cannot conspire or combine with its wholly-owned subsidiaries for antitrust purposes, *id. at 769-71, 104 S. Ct. at 2740-41*, a parent company and its subsidiaries can certainly conspire or agree with other parties for purposes of the antitrust laws. Based on the facts alleged in this case, it is plausible to infer that either Turner Network or Turner Cable Network Sales agreed with Storer Cable **[**41]** to enter into an exclusive contract in restraint of trade. As to the participation of Tele-Communications and Satellite Services, they are alleged to be "vertically integrated or otherwise financially or managerially related or affiliated corporations" with Storer Cable.

The court thus finds that these facts and allegations provide sufficient and fair notice to the counterclaim defendants as to the nature of Montgomery Cablevision's claim that they have "combined, agreed or conspired" in restraint of trade and as to the basis upon which it relies.

ii.

The court further finds that Montgomery Cablevision has sufficiently identified relevant markets. Because there are two levels of competition at issue this case -- that is, the intrabrand and interbrand levels -- two relevant markets must be considered.

With regard to the intrabrand level of competition in this case, as noted previously, the counterclaim defendants have not put forward any serious dispute that the relevant **[*1355]** market is the retail cable television sales market in the Montgomery area. However, the parties hotly dispute how the market for interbrand competition should be defined.

Montgomery Cablevision contends that the **[**42]** broadest relevant market at the interbrand level is the cable programming market. However, because of the highly differentiated content of cable programs, Montgomery Cablevision also suggests that there are a number of economically significant submarkets within the cable television programming market. Given the structure of the cable television industry, it maintains that the relevant markets at the interbrand level of competition might be as narrow as the markets for Sunday night NFL games, telecast exclusively on ESPN and the Turner Network, [19] and for the other "major television" or "cream" events to which the Turner Network holds exclusive rights. [20]

In response, the counterclaim defendants who operate at the interbrand level **[**43]** of competition in this case -- that is, the program suppliers and distributors -- maintain that Montgomery Cablevision has alleged only that they have market power over their own products. They argue that the market cannot be defined by a defendant company's own product. The court, however, disagrees with this argument for two reasons. First, the counterclaim defendants appear to base this contention on the argument that a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product and that it has a right to refuse to deal with those whom it chooses. But in *Eastman Kodak,* the Court noted that ***HN24***[] this "right is not absolute" and "exists only if there are legitimate competitive reasons for refusal." *U.S. at n. 32, 112 S. Ct. at 2091 n.32*. Similarly, the former Fifth Circuit has written that "sellers do not have an antitrust *carte blanche* to select those with whom they will deal," *Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1115 (5th Cir. 1979)*; "a refusal to deal becomes unlawful when it

[19] The rights to televise Sunday night NFL games are divided between Turner Network and ESPN. Each telecasts 8 games per season.

[20] These major television events include telecasts of certain NBA playoffs games and MGM movies that are carried exclusively on the Turner Network.

produces an unreasonable restraint on trade, i.e., if there is an anticompetitive purpose or effect in **[**44]** selecting those with whom one will deal." *Id.* "A refusal to deal," the court continued, "may not be used as a device to achieve some anticompetitive goal such as to acquire a monopoly . . . or to establish market dominance and drive out existing competitors . . . or to increase the seller's own market dominance." *Id. at 1115-16* (footnotes omitted).

But second and more importantly, the Supreme Court recently held that, ***HN25***[] in some instances, "one brand of a product can constitute a separate market" for antitrust purposes. *Eastman Kodak, U.S. at , 112 S. Ct. at 2090*. That is, a company's own particular product can be a relevant market under the Sherman Act. As the Court explained, "The relevant market for antitrust purposes is determined by the choices available to [consumers]." *Id.* If there are no substitutes available, then a single brand of a product can be a proper market. *Id.* Here, Montgomery Cablevision has alleged that there are no substitutes for the programming at issue in this suit. The counterclaim clearly states that ESPN's NFL football package and the Turner Network program service, consisting of major television **[**45]** events such as NBA playoff games and MGM movies, "are not available from any other cable programming source and are widely demanded by cable consumers."

The counterclaim defendants, however, also contest Montgomery Cablevision's characterization of the relevant market at the interbrand level of competition in this case. They contend that it is neither the market of cable television programming nor the narrower markets of Sunday night NFL football and the special events programming available on the Turner Network. According to the counterclaim defendants, the proper market is the much broader market of passive visual entertainment, which includes programming for satellite television, video cassette recordings, and free over-the-air television. They further maintain that when this **[*1356]** broader market is considered, it is impossible for Montgomery Cablevision to prove that they have sufficient market power to foreclose market alternatives and to create an unreasonable restraint on trade.

The court, however, agrees with Montgomery Cablevision that, if the structure of the cable television industry is taken into account and the factors relating to submarkets are considered, *see* *Brown Shoe Co., 370 U.S. at 325, 82 S. Ct. at 1524,* **[**46]** it might be possible to establish that the relevant market at the interbrand level of competition is no broader than the market for cable programming and might be as narrow as the markets for Sunday night NFL football and for the Turner Network. For example, in *NCAA v. Bd. of Regents, 468 U.S. 85, 112 n.49, 104 S. Ct. 2948, 2966 n.49, 82 L. Ed. 2d 70 (1984)*, the Supreme Court concluded that there was "no doubt that college football constitutes a separate market for which there is no reasonable substitute." This separate market was based on "generic qualities differentiating viewers," and on the "unique appeal of NCAA football telecasts" for consumers. *Id. at 112* & n.49, *104 S. Ct. at 2966* & n.49 (citation omitted). Similarly, in *Int'l Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 249-252, 79 S. Ct. 245, 249-251, 3 L. Ed. 2d 270 (1959)*, the Court found that championship boxing events were uniquely attractive to fans; hence, they constituted a market separate from that for non-championship events. [21] *See also* *United States v. Paramount Pictures, Inc., 334 U.S. 131, 172-73, 68 S. Ct. 915, 936, 92 L. Ed. 1260 (1948)* **[**47]** (first-run movies, the "cream" of the exhibition business, constituted distinct market for antitrust analysis); *Syufy Enter. v. Am. Multicinema, Inc., 793 F.2d 990, 994-95 (9th Cir. 1986)* (evidence supported finding that industry anticipated top-grossing films constituted market separate from exhibition of all other films), *cert. denied, 479 U.S. 1031, 107 S. Ct. 876, 93 L. Ed. 2d 830 (1987)*.

It is plausible to infer that factors similar to those **[**48]** in *NCAA v. Bd. of Regents* and *Int'l Boxing Club of New York* could be established in this case. As noted above, the counterclaim alleges that ESPN's football programming and the Turner Network program service -- in particular, the Sunday night NFL games -- are "demanded or desired by a substantial number of current or potential cable subscribers in Montgomery," and that this particular

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[21] The Court also noted:

> "Numerous representatives of the broadcasting, motion picture and advertising industries testified to the general effect that a 'particular and special demand exists among radio broadcasting and telecasting [and motion picture] companies for the rights to broadcast and telecast [and make and distribute films of] championship contests in contradistinction to similar rights to non-championship contests."

358 U.S. at 251, 79 S. Ct. at 250.

programming is "not available from any other cable programming source." Moreover, Montgomery Cablevision contends that it has "encountered substantial difficulty in signing up subscribers and obtaining financing" without this programming. These allegations indicate that Montgomery Cablevision may be able to prove that from the consumer's perspective -- whose interests the antitrust statutes were especially intended to serve [22] -- these highly popular programs are not interchangeable with other cable programs and that they are without substitutes. In other words, for consumers of these programs, there may be no comparable alternative programming available and thus no "cross-elasticity of demand between the product itself and substitutes for it." *T. Harris Young & Assoc., Inc. v. Marquette Elec., 931 F.2d 816, 824 [**49] (11th Cir.)* (quoting *Brown Shoe Co., 370 U.S. at 325-36, 82 S. Ct. at 1523-24*), *cert. denied, 116 L. Ed. 2d 749, U.S. , 112 S. Ct. 658 (1991)*. [23] **[**50]** Of course, the proper market definition in this case may be determined only after there has been a factual **[*1357]** inquiry into the "commercial realities" faced by consumers. *Eastman Kodak, U.S. at , 112 S. Ct. at 2072* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 572, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966))*. At this time, however, the court is satisfied that Montgomery Cablevision has pled sufficient facts indicating plausible relevant markets and has provided fair notice to the counterclaim defendants as to the nature of the markets at issue in this case. [24]

[51]** Furthermore, if there are separate markets for Sunday night NFL football and for the major television events broadcast on the Turner Network, as Montgomery Cablevision contends, then it appears that Turner Network and ESPN would possess sufficient market power to foreclose market alternatives. Turner Network and ESPN between them control all the NFL games broadcast on Sunday night. Turner Network also has complete control over the major television events broadcast on its network, including certain NBA playoff games and MGM movies. ***HN26***[] "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *NCAA v. Bd. of Regents, 468 U.S. at 112, 104 S. Ct. at 2966* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394, 76 S. Ct. 994, 1006, 100 L. Ed. 1264 (1956))*. [25] **[**52]** Thus, when submarkets and product differentiation are considered, it cannot be said that there is no set of facts that would show that the

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[22] *See Jefferson Parish Hosp. Dist. No. 2. v. Hyde, 466 U.S. at 15, 104 S. Ct. at 1559-60*.

[23] In its brief in opposition to the motions to dismiss, Montgomery Cablevision also points out that the nature of the cable television industry, with its high channel capacity, is to reach a broad spectrum of targeted, specialized audiences through targeted, specialized programming. Consequently, there are numerous narrow programming submarkets that have "peculiar characteristics and uses," "distinct customers," and "specialized vendors." *See Brown Shoe Co., 370 U.S. at 325, 82 S. Ct. at 1524*.

[24] The cases cited by the counterclaim defendants to support their contention that the appropriate market for cable television services is the broader market of passive visual entertainment are not to the contrary. In those cases, the appropriate market for antitrust purposes was determined only after extensive fact-finding had been conducted. For example, in *Cable Holdings of Georgia, Inc. v. Home Video, Inc., 825 F.2d 1559 (11th Cir. 1987)*, a *jury,* at the end of a trial, determined that the appropriate market for cable television services was passive visual entertainment, which included cable television, satellite television, video cassette recordings, and free over-the-air television. The appellate court upheld this finding as "not clearly erroneous." *Id. at 1563*. Similarly, in *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc., 714 F.2d 351 (4th Cir. 1983)*, *cert. denied, 465 U.S. 1027, 104 S. Ct. 1285, 79 L. Ed. 2d 688 (1984)*, a district court defined the relevant market in ruling on a motion for summary Judgment. The court concluded that the provision of cable television services in that particular case was part of the broader market of "cinema, broadcast television, video disks and cassettes, and other types of leisure and entertainment-related businesses." *Id. at 355*. This determination, however, was reached only after the parties stipulated that customers perceived cable television services to be "reasonably interchangeable" with the offerings of movie theaters and that the cable companies were in competition with the wide variety of entertainment services enumerated above.

[25] As the Court explained:

> "It inexorably follows that if college football broadcasts be defined as a separate market -- and we are convinced they are -- then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts."

NCAA v. Bd. of Regents, 468 U.S. at 112, 104 S. Ct. at 2966.

counterclaim defendants have sufficient market power in the relevant markets so as to foreclose market alternatives. [26]

iii.

Finally, the court concludes that Montgomery Cablevision's counterclaim sufficiently alleges an anti-competitive effect as a result of the exclusive **[**53]** dealing arrangements among the counterclaim defendants. First, Montgomery Cablevision has alleged that competition in the intrabrand market -- that is, the market for cable television services -- is all but eliminated. The counterclaim states that Storer Cable provides cable television services to 92% of the homes in the Montgomery area. As previously indicated, a 92% market share would be considered an **[*1358]** indicator of monopoly power, not merely of market power. *See* Eastman Kodak, U.S. at , 112 S. Ct. at 2090. Montgomery Cablevision further alleges that the exclusive contracts granted to Storer Cable have had a negative effect on the intrabrand market in that they have reinforced Storer Cable's almost total market power. [27] The counter-claim specifically states that the denial of the Turner Network program service and ESPN's NFL package has unreasonably restrained competition in the Montgomery area market for retail cable television sales "by injuring the business and threatening the viability as a going concern of Storer Cable's only competitor": Montgomery Cablevision. The counterclaim goes on to allege that not only does this restraint harm Montgomery Cablevision, **[**54]** but it also "threatens, hinders and restrains competition in price, service, quality of transmission and facilities, and cable programming in the Montgomery area market for multi-channel video services." In other words, Montgomery Cablevision contends that the exclusive agreements act as "overbuild protection." They ensure that a new cable television operator in a given franchise area cannot compete effectively and successfully with the incumbent cable franchisee. Consequently, they discourage and foreclose competition in the provision of cable television services and deny to consumers "intrabrand choices that are sources of consumer welfare." Graphic Prod. Distrib., 717 F.2d at 1571. *See also* Peter M. Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis,* 1981 Duke L.J. 417, 439 (1981). [28]

[55]** In fact, the counterclaim further alleges that, because "competition among programmers in the provision of programming content at issue is limited," the elimination of intrabrand competition has particularly pernicious effects on consumer welfare. Montgomery Cablevision maintains that, because of the market power of some of the counterclaim defendants at the interbrand level of competition -- that is, at the level of programming -- interbrand competition in this case "does not act as a significant check on the exploitation of intrabrand market power among providers of cable services in Montgomery." In other words, consumers are unable to substitute other products for the products that are unavailable to them. In instances where a supplier has considerable market power in the interbrand market, as Montgomery Cablevision alleges is the case here, substantial reduction or elimination of intrabrand competition alone may be sufficient to show that a trade restraint is anti-competitive and therefore unreasonable. Graphic Prod. Distrib., 717 F.2d at 1572 n.20. [29]

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[26] This case therefore differs markedly from Futurevision Cable Systems of Wiggins, Inc. v. Multivision Cable TV Corp., 789 F. Supp. 760 (S.D. Miss. 1992), *aff'd, 986 F.2d 1418 (5th Cir. 1993)* (Table). There, the court dismissed a complaint brought by a new cable television company alleging that exclusive dealing arrangements between cable television programmers and an existing cable television operator violated the antitrust laws. However, no allegations were made regarding the market power of the programmers to foreclose market alternatives. Id. at 766-75. Moreover, comparable and competitive alternative programming appears to have been available. Id. at 769-70. It is also noteworthy, that in reaching its conclusions, the court in *Futurevision* did not consider the issue of submarkets nor product differentiation.

[27] This market is alternatively referred to as the market for "multi-channel video services."

[28] This litigation, therefore differs from Futurevision, 789 F. Supp. at 770, where the district court dismissed an anti-trust claim because of an absence of allegations that competition in provision of cable television services was adversely affected by exclusive contracts among programmers and incumbent franchisee.

[29] *Contrast with* Futurevision, 789 F. Supp. at 769, where the court found that interbrand competition acted as a check on the exploitation of intrabrand market power *and* that the effect of exclusive licenses on intrabrand competition was "insignificant."

[56]** Montgomery Cablevision also contends that the exclusive contracts not only reduce intrabrand competition but they also have negative effects at the interbrand level of competition. The counterclaim alleges that, by discouraging and foreclosing competition among cable television operators, the contracts eliminate precisely those sources who "otherwise could support alternative programming competitive with that supplied exclusively to the incumbents." That is, Montgomery Cablevision contends that, because the programming offered by Turner Network and ESPN is so highly desirable and non-interchangeable, the exclusive contracts threaten its very existence. [30] **[**57]** If Montgomery Cablevision is unable to survive, any support it could offer for alternative programming **[*1359]** would be eliminated. Moreover, it is reasonable to infer from the counterclaim that even if Montgomery Cablevision is able to survive, the pro-competitive effects that could result from the exclusive contracts might be quite limited. Only a limited number of customers would take advantage of its enhanced services, such as superior service technology and channel capacity. [31]

Finally, it is possible that Montgomery Cablevision will also be able to establish that the exclusive dealing arrangements in this case were entered into for the benefit of and at the behest of the counterclaim defendants who operate at the retail level in this case -- that is, the cable television exhibitors or operators. ***HN27***[] Although intrabrand restraints are often imposed by and for the benefit of suppliers or manufacturers, in some instances, distributors or dealers seek to have restraints imposed upon them by their supplier or manufacturer. Such arrangements are desired to restrict intrabrand competition and enhance distributor power by promoting excess prices and profits. In such cases, the supplier or manufacturer participates merely as the enforcement agent in furthering the distributor's anti-competitive conduct. *See Constr. Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 774-76* & nn.38-43. **[**58]** *See also* Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the "Sylvania" Decision,* 45 U. Chi. L. Rev. 1, 17-18 (1977); 8 Areeda, ***Antitrust Law*** § 1604 at 37-54. Suppliers will agree to such restraints to "appease dealer interests in excess profits or the quiet life." 8 Areeda, ***Antitrust Law*** § 1604 at 37. Although a supplier is often induced to accommodate distributor interests where a dealer cartel has been formed, an individually powerful dealer or distributor may also be able to coerce a supplier to restrict distribution. Because distribution restrictions are coerced from suppliers to further the monopolistic desires of a dealer, it is widely agreed that such restraints are anti-competitive and illegal. *Id.* at 38 ("a competition-limiting restraint extracted from [a manufacturer] by dealer power is generally understood to be anticompetitive"); Posner, *Reflections on "Sylvania"* at 17 ("The goal is to isolate, and condemn, restrictions that are posed nominally by the manufacturer but are in fact desired for monopolistic purposes by dealers using the manufacturer as their enforcement **[**59]** agent").

HN28[] The most obvious circumstance in which an individual dealer is able to coerce a limitation on intrabrand competition is where the dealer possesses something approaching monopoly power in the relevant market. 8 Areeda, ***Antitrust Law*** § 1604 at 38. But a "dominant" dealer's request for a restraint might coerce a manufacturer in the same way. Dominance for this purpose is generally indicated by a distributor who has 30-50% of a manufacturer's local or total sales. *Id. at 60-61, 70*.

From the facts alleged in the counterclaim, it is plausible to infer that Storer Cable initiated the exclusive dealing arrangements with Turner Network and ESPN. Storer Cable allegedly provides cable television service to 92% of the homes in the Montgomery area. If this is true, it would undoubtedly qualify as a dominant dealer. The counterclaim also alleges that Tele-Communications is vertically integrated or otherwise financially or managerially related or affiliated with Storer Cable and that it represents itself as the largest provider of cable television services in America. It is therefore possible that Tele-Communications also has sufficient dealer power **[**60]** to demand exclusive contracts from Turner Network and ESPN. Furthermore, if, based on these facts, Montgomery

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[30] The elimination of Montgomery Cablevision as a competitor to Storer Cable would alone not constitute a violation of *§ 1* of the Sherman Act. But when considered in conjunction with the overall effects on the intrabrand and interbrand markets, the elimination of Montgomery Cablevision as a provider of retail cable television services could be the basis of an antitrust injury.

[31] *Contrast with Futurevision, 789 F. Supp. at 778* (exclusive contracts had pro-competitive effects on interbrand competition because comparable alternative programming was available).

Cablevision is able to prove that Storer Cable or Tele-Communications demanded the exclusive contracts, then the anticompetitive effects of the contracts could easily be established. As stated above, such a restriction is considered clearly anticompetitive because it diminishes consumer welfare by promoting the monopoly powers of the distributors. 8 Areeda, ***Antitrust Law*** § 1648 at 528. Moreover, where an exclusive dealing arrangement involves a product that itself has significant market power, as alleged here, the anti-competitive **[*1360]** effects are recognized as especially pernicious. *Id.* at § 1651 at 568.

In sum, the court concludes that Montgomery Cablevision has alleged sufficient facts to state a claim against the counterclaim defendants for a violation of *§ 1* of the Sherman Act. The necessary elements of a *§ 1* Sherman Act violation -- that the counterclaim defendants entered into a conspiracy or combination that imposes an unreasonable restraint on trade -- can be identified from the counterclaim.

IV. SECTION TWO OF THE SHERMAN ACT

Montgomery Cablevision also charges **[**61]** the counterclaim defendants with monopolization, attempted monopolization, and conspiracy to monopolize in violation of *§ 2* of the Sherman Act, *15 U.S.C.A. § 2*. [32]

A. Monopolization

HN30[] The offense of monopoly under *§ 2* of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business, acumen, or historic accident." *Eastman Kodak, U.S. at , 112 S. Ct. at 2089* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1705, 16 L. Ed. 2d 778 (1966)).* **[**62]**

Montgomery Cablevision states in its brief in opposition to the motions to dismiss that its claim of monopolization is directed primarily at Storer Cable and its monopoly over the retail cable sales market in the Montgomery area. The other counterclaim defendants are implicated only insofar as they are financially or managerially related to Storer Cable. In support of the monopoly claim against Storer Cable, the counterclaim alleges that Storer Cable serves 92% of all cable television subscribers in the Montgomery area. As previously indicated, if this contention is accepted as true, Storer Cable's control over the retail cable sales market in the Montgomery area would satisfy the first element of a *§ 2* claim of monopolization. *See Eastman Kodak, U.S. at , 112 S. Ct. at 2090* (80-95% of market is a monopoly); *United States v. Grinnell Corp., 384 U.S. at 571, 86 S. Ct. at 1704* (87% of the market is a monopoly).

The second element of a *§ 2* claim is the use of monopoly power to "foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak, U.S. at , 112 S. Ct. at 2090* **[**63]** (citation omitted). Montgomery Cablevision alleges that Storer Cable entered into exclusive contracts for the Turner Network program service and ESPN's football package with the specific "purpose and intent to inhibit competition" and to "protect itself against overbuilders." Moreover, the factual allegations surrounding the formation of the contracts indicate that it is entirely plausible to infer that Storer Cable entered the contracts with the specific intent to maintain its monopoly over the Montgomery area market for retail cable television sales. Storer Cable secured its exclusive rights to carry the Turner Network program service and ESPN's football package on or about the time that Montgomery Cablevision requested affiliation contracts for this programming. Storer Cable's actions, therefore, could be seen as part of a scheme of willful acquisition or maintenance of its in violation of *§ 2* of Sherman Act. *See id.* at , *112 S.*

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[32] *Section 2* of the Sherman Act provides in pertinent part:

> ***HN29***[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony."

15 U.S.C.A. § 2.

Ct. at 2090-91. Accordingly, the court finds that Montgomery Cablevision has adequately stated a claim of monopolization against Storer Cable.

B. Attempted Monopolization

HN31[] To establish the offense of attempted monopolization, it is necessary to **[**64]** prove "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly **[*1361]** power." *Spectrum Sports, Inc. v. McQuillan, U.S. , , 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-91 (1993)*; *see also* *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc., 931 F.2d 816, 823 (11th Cir.)*, *cert. denied, 116 L. Ed. 2d 749, U.S. , 112 S. Ct. 658 (1991)*. Furthermore, as with the offense of monopolization, the attempt must occur in a defined relevant market. Thus, to demonstrate the dangerous probability of monopolization in an attempt case, it is also necessary to inquire into the relevant market and the defendant's economic power in that market. *Spectrum Sports, U.S. at , 113 S. Ct. at 892*; *accord* *T. Harris Young & Assoc., 931 F.2d at 823*.

As with its monopolization claim, Montgomery Cablevision maintains that the *§ 2* claim for attempted monopolization is directed toward only Storer Cable and those counterclaim defendants who are financially or managerially related **[**65]** to Storer Cable. The court finds that the allegations of the counterclaim, if accepted as true, sufficiently support a claim of attempted monopolization in violation of *§ 2* of the Sherman Act. First, with regard to the element of specific intent, as noted above, the counterclaim states that Storer Cable entered into the exclusive contracts with Turner Network and ESPN "with the purpose and intent to inhibit competition" and that Storer Cable "specifically intended to protect itself against overbuilders" in furtherance of its attempt to monopolize. Moreover, as noted previously, the facts relating to Storer Cable's actions in securing the exclusive contracts support the allegations regarding its intent.

Second, the counterclaim's factual allegations indicate that Storer Cable has a dangerous probability of success in achieving and preserving its monopoly over the retail cable sales market in the Montgomery area. According to Montgomery Cablevision, Storer Cable already has a tremendous share of the retail cable sales market in the Montgomery area. Moreover, the injuries alleged to the competition in the market of cable television services as a result of the exclusive contracts indicate **[**66]** that Storer Cable will likely succeed in its attempt to monopolize the retail cable sales market in the Montgomery area. If it is true that consumers in the Montgomery area widely demand the Turner Network program service and ESPN's football package and that there is no comparable alternative programming, then it is plausible to infer that the exclusive contracts will hinder the ability of any other cable television company to compete effectively with Storer Cable in the retail cable sales market. The court thus finds that Montgomery Cablevision has sufficiently stated a claim for relief against Storer Cable for attempting to monopolize the retail cable sales market in the Montgomery area in violation of *§ 2* of the Sherman Act.

C. Conspiracy to Monopolize

HN32[] The offense of conspiracy to monopolize under *§ 2* of the Sherman Act requires: "(1) concerted action deliberately entered into with the specific intent of achieving a monopoly; and (2) the commission of at least one overt act in furtherance of the conspiracy." *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1576 (11th Cir. 1991)*. Thus, a *§ 1* Sherman Act claim and a *§ 2* conspiracy to monopolize **[**67]** claim require the same threshold showing -- the existence of an agreement to restrain trade. Once this showing is made, then it must be established that the conspiracy was formed with the specific intent to obtain or maintain a monopoly. *Id. See also* *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1460 n.35 (11th Cir. 1991)*.

Montgomery Cablevision maintains that its claim for conspiracy to monopolize is based on Storer Cable's monopolization or attempted monopolization of the retail cable television sales market in the Montgomery area and the assistance of the other counterclaim defendants in Storer Cable's efforts to attain or preserve this monopoly. According to Montgomery Cablevision, the conspiracy centers on the exclusive contracts entered into among the counterclaim defendants. The counterclaim defendants, however, contend that it is implausible to infer that the counterclaim defendants in this case who are cable program suppliers and distributors -- that is, Tele-Communications, Satellite Services, the Turner Companies, and ESPN -- would conspire with Storer Cable to assist it **[*1362]** in its efforts to monopolize the retail cable sales market. They maintain **[**68]** that there is no rational economic motive for them to enter such an alleged conspiracy and that Montgomery Cablevision has thus failed to provide an inference of specific intent to conspire to achieve the stated goal of the conspiracy. For the reasons that follow, the court finds that Montgomery Cablevision has alleged sufficient facts to support its claim of conspiracy to monopolize based on Storer Cable's monopolization or attempted monopolization of the retail cable sales market in the Montgomery area and the assistance of the other counterclaim defendants in this effort.

First, for the reasons discussed previously with regard to the *§ 1* Sherman Act claim, the court finds that Montgomery Cablevision has sufficiently alleged the existence of an agreement to restrain trade. In this case, the conspiracy to monopolize centers on the exclusive contracts between Storer Cable and Turner Network and between Storer Cable and ESPN. Second, in support of its claim that the exclusive contracts are part of a conspiracy to monopolize the retail cable sales market, Montgomery Cablevision specifically alleges that the cable television program suppliers and distributors who are counterclaim defendants **[**69]** in this case "have sufficient market power over the . . . programming at issue in this suit to aid Storer Cable in its efforts to monopolize" the retail cable sales market. Moreover, as discussed previously, these allegations of market power are supported by claims regarding the high desirability of the programming offered by Turner Network and ESPN and the lack of comparable alternative programming. [33] From these allegations, it is possible to infer that the cable television program suppliers and distributors involved in this case are in a position to help Storer Cable monopolize the retail cable sales market.

[70]** Third, the counterclaim alleges that Tele-Communications, Satellite Services, and the Turner companies "knew or should have known" that the exclusive contract for the Turner Network program service would be used for monopolistic reasons. To support this conclusion, the counterclaim states that Tele-Communications, Satellite Services, the Turner companies, and Storer Cable are "vertically integrated or otherwise financially or managerially related or affiliated corporations." In other words, Montgomery Cablevision suggests that because of their corporate relationship with Storer Cable, Tele-Communications, Satellite Services, and the Turner companies should have been aware of Storer Cable's intent regarding the exclusive contract. Similarly, the counterclaim alleges that ESPN "knew or should have known" that the exclusive contract for ESPN's NFL football package would be used by Storer Cable for monopolistic purposes. In support of this claim, the counterclaim specifically states that ESPN "promoted its exclusive contracts as 'overbuild protection.'" That is, ESPN marketed its exclusive contract as a means through which an incumbent cable franchise could protect itself against overbuilders **[**71]** and thereby monopolize the market for retail cable sales. Sufficient facts, therefore, have been alleged to support the claims that the counterclaim defendants charged with aiding Storer Cable in its attempt to monopolize knew or should been aware of Storer Cable's intent to monopolize. [34]

[72]** **[*1363]** Finally, the court finds that the counterclaim contains sufficient facts to support an inference that the counterclaim defendants were intentional parties to the alleged conspiracy to monopolize. Admittedly, although the counterclaim makes specific allegations regarding the intent of Storer Cable to monopolize the market for retail cable television sales, it does not explicitly allege that the other counterclaim defendants entered the conspiracy

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[33] *Contrast with Futurevision, 789 F. Supp. at 777 and Northeastern Educ. Television of Ohio, Inc. v. Educ. Television Ass'n, 758 F. Supp. 1568, 1579 (N.D. Ohio 1990)*, where claims of conspiracy to monopolize were dismissed because of the failure to allege that the defendants possessed sufficient market power to assist in establishing a monopoly in the relevant market.

[34] *Contrast with Syufy Enter. v. Am. Multicinema, Inc., 793 F.2d 990, 1000-1001 (9th Cir. 1986), cert. denied, 479 U.S. 1031, 107 S. Ct. 876, 93 L. Ed. 2d 830 (1987) and Futurevision, 789 F. Supp. at 777-78*. In *Syufy,* the court of appeals found there was no conspiracy to monopolize where there was no evidence indicating that certain film distributors, who were alleged co-conspirators, knew or should have known that their licensee intended to exploit its exclusive film licensing rights for its own monopolistic purposes. Similarly, in *Futurevision,* the district court dismissed a claim for conspiracy to monopolize where there were no allegations that cable television programmers knew or should have known that certain cable television operators were using their exclusive rights to monopolize the cable services markets nor any facts to support such an inference. In this case, in contrast, there are specific allegations concerning the knowledge of the counterclaim defendants regarding Storer Cable's intentions to monopolize the retail cable sales market in Montgomery and facts to support these contentions.

with the intent to monopolize. However, the counterclaim provides a sufficient basis to infer that the other counterclaim defendants intentionally aided Storer Cable in its attempt to monopolize the retail cable sales market. For example, the alleged vertical integration of Tele-Communications, Satellite Services, the Turner companies, and Storer Cable indicates that these counterclaim defendants had a financial interest in assisting Storer Cable's attempt to monopolize. ESPN's marketing technique with regard to the exclusive contracts also points to an intent to aid Storer Cable in its monopoly effort. Furthermore, the counterclaim specifically alleges that the cable program suppliers and distributors had "no valid business reason" for their **[**73]** refusal to deal with Montgomery Cablevision other than the attempt to monopolize. [35] Finally, contrary to the contentions of the counterclaim defendants, it is plausible that the counterclaim defendants had a rational motive to enter the alleged conspiracy, which would provide an inference of specific intent to conspire. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 595, 106 S. Ct. 1348, 1360, 89 L. Ed. 2d 538 (1986)* (discussing need to establish motive to enter conspiracy in antitrust cases).

The counterclaim defendants contend that the program suppliers and distributors have no rational economic motive to conspire with Storer Cable to monopolize the cable television services market in the Montgomery area because such a conspiracy **[**74]** would be against their interests. They maintain that the creation of a monopoly at the level of retail cable sales would enable Storer Cable, the cable system operator, to drive down the price that it pays to the programmers for their programming. Thus, according to the counterclaim defendants, the cable programmers and distributors have every incentive not to engage in a conspiracy to monopolize. This is essentially the same position as taken by the court in *Futurevision, 789 F. Supp. at 779*. There, the district court held that it would be contrary to the program suppliers' interest to aid cable system operators in achieving monopoly power. Moreover, the court was persuaded that the cable program suppliers had no rational economic motive to conspire against their own interests. [36]

[75]** Where there is significant intrabrand competition, the counterclaim defendants and the court in *Futurevision* may be correct that it would be against the interests of the cable program suppliers to assist a cable television operator in achieving a monopoly in the cable television services market. However, they both overlook the situation where a local cable operator already possesses significant market power in the retail cable sales market and is in the position to coerce the program suppliers into exclusive dealing arrangements. As discussed above in the context of the *§ 1* Sherman Act claim, it is possible that Storer Cable and Tele-Communications, as dominant dealers in the market of cable television **[*1364]** services, had sufficient power to coerce the Turner companies and ESPN into offering them exclusive contracts for their programming. Thus, in this case, there may well be plausible reasons why the cable programmers and distributors would conspire with Storer Cable. Furthermore, contrary to the assertion that a monopoly at the retail cable sales level would necessarily enable Storer Cable to drive down the price paid for programming, in some instances, intrabrand restrictions enable **[**76]** a supplier to keep prices to dealers higher than would otherwise be possible. *See* Peter M. Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis,* 1981 Duke L.J. 417, 447-448 (1981). For example, where there is active intrabrand competition, a dealer's profitability on a particular brand decreases and the supplier or manufacturer can be forced to lower his wholesale price to compensate for his brand's lower profitability in the retail market. However, without active intrabrand competition, the supplier can maintain higher wholesale prices, and hence, retain more profits for itself. *Id.; see also* 8 Areeda, ***Antitrust Law*** § 1603 at 34.

[35] *Contrast with Futurevision, 789 F. Supp. at 778*, where complaint failed to allege that there were no valid business reasons for cable programmers to refuse to supply programming to a new cable franchise.

[36] The counterclaim defendants also point to *TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022 (10th Cir. 1992)*, to support their contention that the program suppliers and distributors in this case had no rational economic motive to aid Storer Cable in its efforts to achieve a monopoly over the retail cable sales market. However, that case is inapposite. There, the court was faced with allegations that cable television operators had conspired with program suppliers *to aid the program suppliers* in maintaining their monopolies over the cable programming market. The court concluded that the cable operators would have no rational motive to create such an environment. In this case, in contrast, Montgomery Cablevision has alleged that the program suppliers conspired with a cable television operator, Storer Cable, *to aid the cable operator* in its efforts to monopolize the retail cable sales market.

Finally, the allegations regarding the vertical integration of the Turner companies and Storer Cable indicate that to some extent the economic interests of the programmers in this case coincide with those of the cable operator.

It is also important to emphasize that, ***HN33***[] to prevail on a motion to dismiss, it is not enough for a defendant to articulate *any* economic motive -- or absence thereof -- in support of its behavior, regardless of its accuracy in reflecting what **[**77]** actually happened. *Cf.* *Eastman Kodak, U.S. at , 112 S. Ct. at 2083* ("The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment") (emphasis in original). A claimant who posits a reasonable motive, even if there are other reasonable but contrary motives, should be allowed to survive a motion to dismiss and produce evidence of the true motive.

In sum, the court concludes that Montgomery Cablevision's counterclaim sufficiently states a claim for conspiracy to monopolize. [37]

V. STATE ANTITRUST CLAIMS

Montgomery Cablevision **[**78]** also charges that the exclusive contracts among the counterclaim defendants have resulted in the creation and operation of an unlawful monopoly in violation of 1975 *Ala. Code § 6-5-60* (1975). [38] It further alleges that the counterclaim defendants have monopolized or attempted to monopolize "both cable programming and the market for cable television services in Montgomery" in violation of state colon law prohibiting monopolies.

HN35[] Alabama's antitrust laws, both statutory and common law, are analytically identical to federal antitrust laws and are interpreted by Alabama courts in accordance with federal law. *Ex parte Rice, 259 Ala. 570, 67 So. 2d 825, 829 (Ala. 1953)* **[**79]** (per curiam) ("The federal statutes . . . prescribe the terms of unlawful monopolies and restraints of trade as they should also be administered in Alabama"). *See also* *Avery Freight Lines, Inc. v. Alabama Pub. Serv. Comm'n, 267 Ala. 646, 104 So. 2d 705, 709 (Ala. 1958)* ***HN36***[] ("In construing the terms and provisions of Alabama statutes derived from federal statutes, such terms and provisions will usually be considered as having the meaning given by the federal courts"). For the reasons given above regarding the claims for relief under *§§ 1* & *2* of the Sherman Act, the court thus concludes that Montgomery Cablevision has sufficiently stated claims for relief under 1975 *Ala. Code § 6-5-60* and Alabama state common law **[*1365]** prohibiting monopolies, to the extent that the claims under state law parallel the claims under federal law. [39]

[80]** VI. ORDINANCE 48-90

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[37] Because the court finds that Montgomery Cablevision has adequately stated a cause of action under *§ 2* of the Sherman Act, the court need not address whether the "essential facilities" doctrine also provides a basis for a *§ 2* claim in this case. *See, e.g.,* *McKenzie v. Mercy Hosp., 854 F.2d 365, 369 (10th Cir. 1988)*.

[38] *Section 6-5-60* provides in pertinent part:

> ***HN34***[] "Any person, firm or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $ 500.00 and all actual damages from any person, firm or corporation creating, operating, aiding or abetting such trust, combine or monopoly."

[39] Montgomery Cablevision alleges that the counterclaim defendants have monopolized or attempted to monopolize the *cable programming market* in violation of state common law, in addition to monopolizing the cable television services market. However, monopolization of the cable programming market is not alleged in the *§ 2* Sherman Act claim against the counterclaim defendants. Nor has Montgomery Cablevision presented any facts to support such a claim. The court thus concludes that although Montgomery Cablevision has sufficiently alleged a claim to monopolize or attempt to monopolize the cable television services market, it has not stated a claim to monopolize or attempt to monopolize the cable programming market.

Montgomery Cablevision charges the counterclaim defendants with restraining or attempting to restrain trade, or monopolizing or attempting to monopolize the production, control, or sale of program material or program services used in the provision of cable television service in violation of § 3 of the City of Montgomery, Ordinance 48-90. [40] **[**81]** The counterclaim also alleges that the counterclaim defendants have contracted or combined to refuse to provide program material or program services used in the provision of cable service, with the purpose or effect of creating a monopoly or injuring competition in the provision of cable television service in Montgomery, in violation of § 4 of Ordinance 48-90. [41]

In an order entered earlier in this litigation, this court noted that the language and structure of Ordinance 48-90 appears to be modeled on federal antitrust laws. *See* *Storer Cable Communications, Inc. v. City of Montgomery, 806 F. Supp. 1518, 1537 (M.D. Ala. 1992)* (Thompson, J.). Moreover, the court assumed that the city, by borrowing language and phrases from federal antitrust laws, meant also to import the accumulated case **[**82]** law interpreting that language. *Id. at 1538*. Because the court finds that Montgomery Cablevision has adequately stated claims for relief under *§§ 1* & *2* of the Sherman Act, the court thus concludes that it has also stated claims for relief under Ordinance 48-90. [42]

VII. INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS

Montgomery Cablevision also charges the counterclaim defendants with the state-law tort of intentional interference with business relations. It contends that it has "initiated or commenced business relationships both with individuals who have subscribed or wish to subscribe" to Montgomery Cablevision's services, and that the exclusive dealing arrangements among the counterclaim defendants **[**83]** were "intended to disrupt and did disrupt these relationships." The counterclaim defendants maintain that Montgomery Cablevision has failed to state a claim for intentional interference with business relations, particularly with regard to potential subscribers **[*1366]** of Montgomery Cablevision's services.

HN39[] The elements of a cause of action for intentional interference with business relations under Alabama law are: (1) the existence of a contract or business relation; (2) the defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the contract or business relation; and (4) damage to the plaintiff as a result of the defendant's interference. *Utah Foam Prod. Inc. v. Polytec, Inc., 584 So. 2d 1345, 1353 (Ala. 1991)*; *Gross v. Lowder Realty Better Homes & Gardens, 494 So. 2d 590, 597 (Ala. 1986)*. Justification for the

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[40] Section 3 of Ordinance 48-90 provides:

> ***HN37***[] "It shall be unlawful for a cable television exhibitor providing or intending to provide cable service within the City to restrain, or attempt to restrain the freedom of trade or production, or to monopolize, or attempt to monopolize the production, control or sale of program material or program services used in the provision of cable television service within the City.
>
> "It shall be unlawful for a cable television distributor or cable television program supplier to restrain, or attempt to restrain the freedom of trade or production, or to monopolize, or attempt to monopolize the production, control or sale of program material or program services used in the provision of cable television service within the City."

[41] Section 4 of Ordinance 48-90 provides in pertinent part:

> ***HN38***[] "It shall be unlawful for a cable television exhibitor providing or intending to provide cable television service within the City to contract or combine with any other person to fix or limit the lease, license, sale or exchange . . . of program material or program services used in the provision of cable television service where the purpose or effect of such contract [or] combination is or may be to tend to create a monopoly or to injure, destroy, inhibit, prevent or lessen substantially competition with respect to the provision of cable television service within the City."

[42] Because the court finds that Montgomery Cablevision has stated claims under *§§ 1* & *2* of the Sherman Act, the court need not reach the question whether a particular set of facts could give rise to a valid cause of action under Ordinance 48-90 but not fall under the federal antitrust laws.

interference is an affirmative defense that has to be pleaded and proved by the defendant. *Utah Foam Prod., 584 So. 2d at 1353*; *Century 21 Academy Realty, Inc. v. Breland, 571 So. 2d 296, 297-98 (Ala. 1990).* [43] **[**84]**

[85]** For the following reasons, the court finds that Montgomery Cablevision has stated a claim of intentional interference with business relations with regard to those individuals who have subscribed to its services. First, the relationships between Montgomery Cablevision and its subscribers qualify as business relations protected under the tort of intentional interference in Alabama. *See* *Gross v. Lowder, 494 So. 2d at 597* (tort covers interference with business relations non necessarily involving a contract). Second, as the counterclaim states, Montgomery Cablevision is in direct competition with Storer Cable; therefore, it is reasonable to infer that the counterclaim defendants were aware of Montgomery Cablevision's business relations with its subscribers. Third, the factual allegations of the counterclaim support the contention that the counterclaim defendants interfered with these relations by entering into exclusive contracts that were intended to deprive Montgomery Cablevision of programming that is in high demand by its subscribers. And finally, the allegations of the counterclaim, if true, indicate that Montgomery Cablevision has suffered damage as **[**86]** a result of this interference -- that is, it has lost subscribers because of its inability to provide the programming at issue in this case. Of course, the justification for the interference is an affirmative defense that has to be pleaded and proved by the counterclaim defendants.

Moreover, the court finds that Montgomery Cablevision has alleged sufficient facts to state a claim for punitive damages in relation to the intentional interference with its subscribers. As the Alabama Supreme Court explained in *Gross v. Lowder Realty, 494 So. 2d 590 (Ala. 1986)*, ***HN40***[] because interference with business relations is an intentional tort, punitive damages may be awarded if the act of interference was carried out wantonly, or spitefully, or maliciously. *Id. at 597 n.4*. *See also* *Sparks v. McCrary, 156 Ala. 382, 47 So. 332, 334 (1908)*. As noted previously, the counterclaim states that by entering into the exclusive contracts at issue in this case, the counterclaim defendants "began a course of conduct which was intended to disrupt and did disrupt" Montgomery Cablevision's business relations with its subscribers and that **[**87]** this conduct was "intentional, unfair and improper." Moreover, it is plausible to infer from the factual allegations of the counterclaim that the conduct of the counterclaim defendants was committed with the intent to injure the property of Montgomery Cablevision. *See* 1975 *Ala. Code § 6-11-20(b)(2)* (1975 & Supp. 1992) ("malice" required for punitive damages defined as "the intentional doing of a wrongful act without just cause or excuse . . . With an intent to injure the person or property of another person or entity"). As discussed above, there is support for the contention **[*1367]** that Storer Cable entered into the contracts with the intent to inhibit competition and to protect itself against overbuilders, such as Montgomery Cablevision, and that the other counterclaim defendants assisted Storer Cable in its efforts to monopolize the cable television services market in the Montgomery area.

The court, however, declines to decide at this time whether Montgomery Cablevision has stated a claim of intentional interference with business relations in relation to its potential subscribers. This claim presents novel and close issues of first impression under state law, which the Alabama Supreme **[**88]** Court has not yet resolved. Although the tort of intentional interference under Alabama law covers relationships not necessarily evidenced by an enforceable contract -- that is, business relations among parties that are not founded in a contract -- it is not clear whether an action may be maintained for interference with business relations which are prospective or potential, in other words, expected business relations. In developing the tort of intentional interference with contractual and business relations, the Alabama Supreme Court relied on *45 Am. Jur. 2d, Interference §§ 49-50* (1969) and James O. Pearson, Jr., Annotation, *Liability for Interference with At Will Business Relationship,* 5 A.L.R. 4t (1981), both of which explicitly recognize a cause of action for interference with existing *and* prospective

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[43] In the past, the Alabama Supreme Court has listed absence of justification for the defendant's interference as one of the elements of the plaintiff's cause of action. *See, e.g., Caine v. Am. Life Assurance Corp.,* 554 So. 2d 962, 964 (Ala. 1989); *Lowder Realty, Inc. v. Odom,* 495 So. 2d 23, 25 (Ala. 1986); *Gross v. Lowder Realty,* 494 So. 2d at 597. However, in *Century 21 Academy Realty, Inc. v. Breland,* 571 So. 2d 296 (Ala. 1990), the court recognized that it was illogical to continue to list absence of justification as one of the elements of the plaintiff's cause of action and then to place the burden on the defendant to disprove it. The court, therefore, eliminated absence of justification from the elements and held that justification is an affirmative defense that must be pleaded and proved by the defendant. *Id.* at 297-98. *See also Underwood v. S. Cent. Bell Tel. Co.,* 590 So. 2d 170, 176 n.4 (Ala. 1991).

business relations. *See* *Gross v. Lowder Realty Better Homes Gardens, 494 So. 2d 590, 597 (Ala. 1986)*. [44] However, in establishing the elements of the tort of intentional interference with business or contractual relations, the Alabama Supreme Court required that the plaintiff prove "the *existence* of a contract **[**89]** or business relation." *Gross v. Lowder Realty, 494 So. 2d at 597* (emphasis added). Moreover, it did not incorporate into its definition of the tort the language regarding "prospective" or "potential" or "expectant" business relations that is found in *45 Am. Jur. 2d, Interference §§ 49-50* and Annotation, 5 A.L.R.4th 9 . This absence may indicate that the Alabama Supreme Court intended to define the tort as narrowly as possible and to exclude from its definition a cause of action for interference with potential business relations. On the other hand, it may be that the court did not want to address this issue at that time and that such an action is not entirely precluded. As the court stated, "We have set forth above what we consider to be the broad framework of the cause of action, but defer to future cases a determination of the more detailed questions that undoubtedly will be raised as the cause of action moves from its formative stages and develops into a solidified body of law." *Gross v. Lowder Realty, 494 So. 2d at 597*.

[90]** Unfortunately, subsequent cases have shed little light on the scope of the tort and the type of "business relations" that are covered. They also provide little indication as to whether the Alabama Supreme Court would recognize an action for interference with prospective business relations. The most extensive recent discussion of the tort is found in *Utah Foam Products, Inc. v. Polytec, Inc., 584 So. 2d 1345 (Ala. 1991)*. There, the Alabama Supreme Court provided some insight into the reasons underlying the tort of interference with a business relation. The Court stated that it is "designed to protect property interests in business and to compensate for the damage caused by that interference," and that "it is the right to do business in a fair setting that is protected." *Id. at 1353*. Based on these principles, the Court held that it was not necessary for a plaintiff to prove that it would have received a particular contract but for the tortious interference with business relations. It is unclear, however, whether this holding indicates that the Court includes prospective business advantage or relations within the tort of **[**91]** intentional interference. In *Utah Foam,* there was substantial contact between the plaintiff and the prospective client in an attempt to attain a contract. Thus, the Court may have considered this contact as establishing the existence of a business relation between the parties. Unfortunately, however, the Court did **[*1368]** not discuss or elaborate on this aspect of the tort.

Because Montgomery Cablevision's claim of intentional interference with potential subscribers is a minor one and will not entail additional discovery, the court believes that the issues raised should be resolved later in this litigation. Indeed, it is possible that after further factual development, the court will not have to reach the difficult issues raised by the claim. At this time, it is difficult to characterize the exact nature of the relations between Montgomery Cablevision and its potential subscribers. The counterclaim does not indicate the nature and extent of Montgomery Cablevision's contact with potential subscribers. Further factual development, however, may reveal that there was substantial and significant contact between Montgomery Cablevision and its potential subscribers -- for example, through advertising **[**92]** or phone calls or inquiries on the part of potential subscribers. Therefore, it is possible that Montgomery Cablevision established business relations with its potential subscribers that are protected by the tort of intentional interference. It may also be that the claim is resolved on other than *Rule 12(b)(6)* grounds. For these reasons, the court declines to decide at this time whether Montgomery Cablevision has stated a claim for intentional interference with business relations with regard to its potential subscribers.

Accordingly, for the reasons discussed above, it is the ORDER, JUDGMENT, and DECREE of the court that the motions to dismiss filed by the counterclaim defendants on January 27 and February 5, 1993, are denied.

DONE, this the 17th day of June, 1993.

Myron H. Thompson

UNITED STATES DISTRICT JUDGE

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[44] The Restatement (Second) of Torts also recognizes an action for interference with prospective business relations. *See* § 766B & cmt. c (1979).

Brooke Group v. Brown & Williamson Tobacco Corp.

Supreme Court of the United States

March 29, 1993, Argued ; June 21, 1993, Decided

No. 92-466

Reporter

509 U.S. 209 *; 113 S. Ct. 2578 **; 125 L. Ed. 2d 168 ***; 1993 U.S. LEXIS 4245 ****; 61 U.S.L.W. 4699; 1993-1 Trade Cas. (CCH) P70,277; 93 Cal. Daily Op. Service 4562; 93 Daily Journal DAR 7770; 7 Fla. L. Weekly Fed. S 469

BROOKE GROUP LTD., PETITIONER v. BROWN & WILLIAMSON TOBACCO CORPORATION

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Disposition: *964 F.2d 335*, affirmed.

Core Terms

prices, cigarettes, generic, segment, branded, black and white, list price, predatory, consumer, supracompetitive, coordination, recoupment, rebates, losses, wholesalers, predation, oligopoly, oligopolistic, Robinson-Patman Act, profits, volume, anti trust law, discounts, tacit, firms, price discrimination, below-cost, competitor, output, injure

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN1[] **Price Discrimination, Competitive Injuries**

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN2[] **Price Discrimination, Competitive Injuries**

Although price discrimination within the meaning of *15 U.S.C.S. § 13(a)* is merely a price difference, the statute as a practical matter could not, and does not, ban all price differences charged to different purchasers of commodities of like grade and quality.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN3[] **Robinson-Patman Act, Claims**

By its terms, the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, condemns price discrimination only to the extent that it threatens to injure competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN4[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, should be construed consistently with broader policies of the antitrust laws.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN5[] **Robinson-Patman Act, Claims**

Primary-line competitive injury under the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, is of the same general character as the injury inflicted by predatory pricing schemes actionable under *§ 2* of the Sherman Act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

HN6[] **Robinson-Patman Act, Claims**

A plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN7[] **Price Discrimination, Competitive Injuries**

Above-cost prices that are below general market levels or the costs of a firm's competitors do not inflict injury to competition cognizable under the antitrust laws.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Price Discrimination, Competitive Injuries**

A prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > Remedies

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN10[] **Price Discrimination, Competitive Injuries**

Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN11[] **Price Discrimination, Competitive Injuries**

Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN12[] **Robinson-Patman Act, Claims**

The normal rule of statutory construction is that identical words used in different parts of the same act are intended to have the same meaning.

Civil Procedure > US Supreme Court Review > General Overview

HN13[] **Civil Procedure, US Supreme Court Review**

It is not customary for the United States Supreme Court to review the sufficiency of the evidence, but it will do so when the issue is properly before it and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN14[] **Price Discrimination, Competitive Injuries**

The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN15[] **Price Discrimination, Competitive Injuries**

Because relying on tacit coordination among oligopolists as a means of recouping losses from predatory pricing is highly speculative, competent evidence is necessary to allow a reasonable inference that it poses an authentic threat to competition.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN16[] **Testimony, Expert Witnesses**

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.

Lawyers' Edition Display

Decision

Evidence presented in action against cigarette manufacturer held insufficient as matter of law to sustain claim of price discrimination injuring competition in violation of Robinson-Patman Act.

Summary

The plaintiff, a cigarette manufacturer which was one of six firms which dominated the cigarette manufacturing industry, increased its declining share of the market by introducing a line of unbranded "black and white" generic cigarettes at a list price about 30 percent below those of branded cigarettes, as to which there had been no significant price competition. A large part of the plaintiff's market gains came at the expense of the defendant, another cigarette manufacturer, which responded by introducing its own black and whites and other discounted cigarettes, beating the first manufacturer's prices and volume discounts and by giving wholesalers larger rebates than the plaintiff gave, both initially and throughout an ensuing rebate war. The plaintiff, alleging trademark infringement and unfair competition, filed suit against the defendant in the United States District Court for the Middle District of North Carolina. The complaint was later amended to allege that the defendant's rebates to wholesalers violated 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), because the rebates were integral to a supposed scheme of predatory price discrimination. The plaintiff's theory of competitive injury was that (1) the defendant entered the generic market with list prices matching the plaintiff's but with massive discriminatory rebates directed at the plaintiff's biggest wholesalers, (2) the net price paid by wholesalers for the defendant's generic cigarettes would drop below the defendant's cost, (3) the plaintiff would suffer losses trying to defend its market share and wholesale customer base by matching the defendant's rebates, (4) to avoid further losses, the plaintiff would raise its list prices on generics or acquiesce in price leadership by the defendant, (5) higher list prices to consumers would shrink the percentage gap in retail price between generic and branded cigarettes, and (6) this narrowing of the gap would make generics less appealing to consumers, thus slowing the growth of the economy cigarette market and reducing loss of sales of branded cigarettes and their associated supracompetitive prices. A jury returned a verdict in favor of the plaintiff on the price discrimination claim; but the District Court, after reviewing the record, ruled that the defendant was entitled to judgment notwithstanding the verdict, partly because (1) no slowing of the growth rate of generics, and thus no injury to competition, was possible unless there had been tacit coordination of prices among the various manufacturers in the economy cigarette market, and (2) a reasonable jury could only have found that there was no such coordination (*748 F Supp 344*). The United States Court of Appeals for the Fourth Circuit affirmed (*964 F2d 335*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Kennedy, J., joined by Rehnquist, Ch. J., and O'Connor, Scalia, Souter, and Thomas, JJ., it was held that the defendant was entitled to judgment as a matter of law--even though the record contained sufficient evidence from which a reasonable jury could conclude that the defendant envisioned or intended the anticompetitive course of events alleged by the plaintiff, that the net prices charged to wholesalers by the defendant for generic cigarettes were below the defendant's cost for a period of 18 months, and that this imposed losses on the plaintiff which the plaintiff was unwilling to sustain--because the evidence was inadequate to show that the defendant had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics and producing sustained supracompetitive pricing in the generic market, as the evidence neither (1) supported a reasonable inference that the defendant and the other cigarette manufacturers actually elevated prices for generic cigarettes above a competitive level, nor (2) demonstrated that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in the generic cigarette market.

Stevens, J., joined by White and Blackmun, JJ., dissented, expressing the view that the evidence presented was sufficient to support a finding that the defendant's price discrimination plan, in which the defendant invested millions of dollars for the purpose of achieving an admittedly anticompetitive result, had a reasonable possibility of injuring competition.

Headnotes

JUDGMENT §314.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > pricing -- rebates to wholesalers -- judgment notwithstanding verdict -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]

A defendant cigarette manufacturer is entitled to judgment as a matter of law, notwithstanding a jury verdict in favor of the plaintiff, in an action by a competing cigarette manufacturer alleging that the defendant violated the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), because no adequate basis for a finding of liability is provided by the alleged oligopolistic price coordination scheme--whereby (1) the defendant would enter the generic segment of the cigarette market, previously dominated by the plaintiff cigarette manufacturer, with list prices matching the plaintiff's but with massive discriminatory volume rebates directed at the plaintiff's biggest wholesalers, (2) the net price charged to wholesalers by the defendant for generic cigarettes would drop below the defendant's cost, (3) the plaintiff would suffer losses trying to defend its market share and wholesale customer base by matching the defendant's rebates, (4) to avoid further losses, the plaintiff would raise its list prices on generics or acquiesce in price leadership by the defendant, (5) higher list prices to consumers would shrink the percentage gap in retail price between generic and branded cigarettes, and (6) this narrowing of the gap would make generics less appealing to consumers, thus slowing the growth of the economy cigarette market and reducing loss of sales of branded cigarettes and their associated supracompetitive prices--where, although the record contains sufficient evidence from which a reasonable jury could conclude that the defendant envisioned or intended this anticompetitive course of events, that the net prices charged to wholesalers by the defendant for generic cigarettes were below the defendant's cost for a period of 18 months, and that this imposed losses on the plaintiff which the plaintiff was unwilling to sustain, the evidence is inadequate to show that the defendant manufacturer had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics and producing sustained supracompetitive pricing in the generic market, as the evidence neither (1) supports a reasonable inference that the defendant and other cigarette manufacturers actually elevated prices for generic cigarettes above a competitive level, nor (2) demonstrates that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in the generic cigarette market. (Stevens, White, and Blackmun, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.3 > price discrimination -- purpose of statute -- > Headnote:
LEdHN[2][] [2]

The provision of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, condemning price discrimination (*15 USCS 13(a)*) is not intended to outlaw price differences that result from or further the forces of competition; thus, the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 > price discrimination -- anticompetitive effect -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

Primary-line competitive injury, as required under the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), is of the same general character as the injury inflicted by predatory pricing schemes actionable under 2 of the Sherman Act (*15 USCS 2*); there are differences between the two statutes, as, for example, the Sherman Act provision condemns predatory pricing when it poses a dangerous possibility of actual monopolization, whereas the Robinson-Patman Act requires only that there be a reasonable possibility of substantial injury to competition before that Act's protections are triggered; however, the essence of the claim under either statute is the same, namely that a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market; thus, under either statute, two prerequisites to recovery remain the same, requiring a plaintiff seeking to establish competitive injury resulting from a rival's low prices to prove that (1) the prices complained of are below an appropriate measure of the rival's costs, and (2) the rival has a reasonable prospect--or, under the Sherman Act, a dangerous probability--of recouping the rival's investment in below-cost prices.

APPEAL §1317 > agreement of parties -- > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]

The United States Supreme Court--in reviewing on certiorari lower court decisions in a case involving alleged violations by a cigarette manufacturer, with respect to the generic cigarette market, of the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*)--will not resolve a conflict among the lower courts over the appropriate measure of cost to be used in determining whether prices complained of under 2(a) are below cost, where the parties in the case at hand agree that the relevant measure of cost is average variable cost.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose -- acts prohibited -- > Headnote:
LEdHN[5][] [5]

The federal antitrust laws are intended for the protection of competition, not competitors; even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws, which do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 > price discrimination -- competitive harm -- recoupment -- > Headnote:
LEdHN[6][] [6]

In order for recoupment to occur--for purposes of the rule that there is no competitive injury actionable either as price discrimination under 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), or as predatory pricing under 2 of the Sherman Act (*15 USCS 2*), unless the competitor has a reasonable prospect or a dangerous probability of recouping its investment in below-cost prices--(1) below-cost pricing must be capable, as a threshold matter, of producing the intended effect on the rivals of the firm accused of such conduct, whether that effect is driving the rivals from the market or causing them to raise their prices to supracompetitive levels within a disciplined oligopoly, and (2) if circumstances indicate that below-cost pricing could likely produce its intended effect on the target, then the further question arises whether such pricing would likely injure competition in the relevant market; with respect to the first factor, determining the likelihood of recoupment requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and of its intended victim, and their respective incentives and will, the inquiry being whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb; with respect to the second factor, the plaintiff is required to demonstrate a likelihood that the alleged predatory scheme would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in the predation, and determining whether recoupment is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market; if market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, then the plaintiff's case has failed, and in certain situations--such as where the market is highly diffuse and competitive, new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of rivals and cannot quickly create or purchase new capacity--summary disposition of the case is appropriate.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §37 > price control -- tacit collusion -- > Headnote:
LEdHN[7][] [7]

It is not in itself unlawful for firms in a concentrated market to effectively share monopoly power through a process variously known as tacit collusion, oligopolistic price coordination, or conscious parallelism, whereby such firms set their prices at a supracompetitive, profit-maximizing level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 > predatory pricing -- competitive harm -- > Headnote:
LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]

The interdependent pricing of an oligopoly may provide a means for achieving recoupment, and so may form the basis of a primary-line injury claim for purposes of the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), as a predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as a predatory pricing scheme designed to bring about a monopoly; however unlikely that possibility might be as a general matter, when the realities of the market and the record facts of a case indicate that the possibility has occurred and was likely to have succeeded, theory will not stand in the way of liability; there is no per se rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing.

STATUTES §170 > identical words -- > Headnote:
LEdHN[9][] [9]

It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.

APPEAL §1323 > sufficiency of evidence -- > Headnote:
LEdHN[10][] [10]

Although it is not customary for the United States Supreme Court, on certiorari, to review the sufficiency of the evidence in a case, the court will do so when the issue is properly before the court and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources.

EVIDENCE §343.5 > inference -- antitrust -- restricted output -- > Headnote:
LEdHN[11][] [11]

The record evidence--in a case involving alleged violations by the defendant, a cigarette manufacturer, with respect to the generic cigarette market, of the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*)--does not permit a reasonable inference that the total industry output of generic cigarettes would have been greater but for the defendant's entry into the generic market, and thus that such entry resulted in the restriction of output which would be essential to supracompetitive pricing, where (1) the rate at which generic cigarettes were increasing their share of the overall cigarette market did not slow following the defendant's entry into the generic market, and in fact the average rate of growth doubled; (2) there is no concrete evidence that the generics' growth rate would have been even greater but for the defendant's alleged predatory price discrimination; (3) the output of generics expanded more robustly following the defendant's entry into the generic market than the defendant had previously estimated would occur if the defendant did not enter the generic market; and (4) an observation by the defendant that its entry appeared to have slowed the generic market's growth rate was made at a time when it is claimed that the defendant was selling its generics below cost and before any anticompetitive contraction in output is alleged to have occurred.

EVIDENCE §343.5 > inference -- antitrust -- supracompetitive prices -- > Headnote:
LEdHN[12][] [12]

A reasonable jury--being presented, in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), with evidence that the list prices on all types of cigarettes rose to a significant degree during the period in question, that these price increases outpaced increases in costs, taxes, and promotional expenditures, and that the list prices of generic cigarettes rose at a faster rate than the prices of branded cigarettes, thus narrowing the list price differential between the two cigarette types--cannot draw an inference that the defendant cigarette manufacturer succeeded in bringing about oligopolistic price coordination and supracompetitive prices in the generic cigarette category sufficient to slow the category's growth, preserve supracompetitive branded profits, and recoup the manufacturer's losses from alleged predatory price discrimination, where (1) there is undisputed evidence that list prices were not the actual prices paid by consumers during the period in question, and it would be unreasonable--especially in an oligopoly setting such as the cigarette industry in which price competition is most likely to take place through less observable and less regulable means than list prices--to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflects only list prices, and (2) the list price data as to generic and full-price branded cigarettes ignores the effect of the introduction, during the period in question, of "subgeneric" cigarettes discounted 50 percent or more from the list prices of normal branded cigarettes, expanding rather than narrowing the differential between highest and lowest cigarette prices; even if a reasonable jury could conclude that the cumulative discounts attributable to subgenerics and various consumer promotions did not cancel out the full effect of the increases in list prices, and that actual prices to consumers rose, rising prices do not themselves permit an inference of a collusive market dynamic, since when output is expanding at the same time prices are increasing, as in the case at hand, rising prices are equally consistent with growing product demand; under these conditions, a jury may not infer competitive injury from price and output data absent some evidence tending to prove that output was restricted or prices were above a competitive level. (Stevens, White, and Blackmun, JJ., dissented from this holding.)

EVIDENCE §343.5 > inference -- antitrust -- denial -- > Headnote:
LEdHN[13][] [13]

An inference of supracompetitive pricing is particularly anomalous, in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), where the very party alleged to have been coerced into pricing through oligopolistic coordination has denied that such coordination existed, as the officers and directors of the plaintiff cigarette manufacturer consistently denied that they or other firms in the industry priced their cigarettes through tacit collusion or reaped supracompetitive profits; an explanation that the officers and directors are businessmen who do not ascribe the same meanings to terms like "competitive" and "collusion" that an economist would is entitled to little, if any, weight where the officers and directors--having made such statements in pretrial depositions, and thereafter having claimed that they were confused by opposing counsel's questions and had not meant to contradict the testimony of the manufacturer's expert economic witness, repeated their denials as to collusion and profits at trial after having consulted extensively with the expert witness and having had adequate time to familiarize themselves with the relevant concepts.

EVIDENCE §979 > sufficiency -- restraint of trade -- > Headnote:
LEdHN[14][] [14]

A reasonable jury--being presented, in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), with evidence of a pricing structure whereby the defendant cigarette manufacturer maintained existing list prices while offering substantial rebates to wholesalers--cannot conclude that this pricing structure eliminated or rendered insignificant the risk that other firms in the cigarette industry might misunderstand the defendant manufacturer's entry into the generic cigarette market, supposedly intended to stifle competition and to produce oligopolistic price coordination, as a competitive move, since the likelihood that the manufacturer's rivals would have regarded the pricing structure as an important signal that the manufacturer did not intend to attract additional smokers to the generic cigarette market is low given that other firms, including the plaintiff competing manufacturer which was the purported target of the defendant manufacturer's predatory pricing, had been using similar rebates.

EVIDENCE §343.5 > inference -- sufficiency -- antitrust -- > Headnote:
LEdHN[15][] [15]

Although some of a defendant cigarette manufacturer's corporate planning documents--introduced in evidence in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*)--speak of a desire to slow the growth of that market, no objective evidence of the manufacturer's conduct permits a reasonable inference that the manufacturer had any real prospect of achieving such a slowdown through anticompetitive means, where (1) the manufacturer, in introducing a line of generic cigarettes, offered them to 1,000 wholesalers who had never before purchased generic cigarettes, (2) the unprecedentedly large volume rebates which the manufacturer offered to wholesalers provided substantial incentives for wholesalers to place large orders and so created strong pressure for wholesalers to sell more generic cigarettes, (3) many wholesalers stimulated demand by passing portions of the rebates on to consumers, and (4) the manufacturer provided further direct stimulus by spending $ 10 million placing discount stickers on cartons of generic cigarettes to reduce prices to the ultimate consumer; in the light of these facts, it is not reasonable to conclude that the manufacturer threatened in a serious way to restrict output, raise prices above a competitive level, and artificially slow the growth of the economy cigarette market.

EVIDENCE §874 > sufficiency -- expert testimony -- > Headnote:
LEdHN[16][] [16]

When an expert opinion is not supported by sufficient facts to validate the opinion in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, the opinion cannot support a jury's verdict.

EVIDENCE §979 > sufficiency -- antitrust -- expert testimony -- > Headnote:
LEdHN[17][] [17]

In an antitrust case, expert opinion evidence has little probative value in comparison with the economic factors that may dictate a particular conclusion; specifically, in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*), an expert economic witness' opinion that the defendant cigarette manufacturer had a reasonable prospect of recouping its predatory losses cannot sustain a jury verdict in favor of the plaintiff competing manufacturer, where the evidence on which the expert's opinion was based amely (1) the fact that the defendant's pricing structure maintained existing list prices while offering substantial rebates to wholesalers, (2) corporate documents showing an intent to shrink the price differential between generic and branded cigarettes, and (3) evidence that the defendant had reduced its net prices to wholesalers for generic cigarettes below the defendant's cost--is insufficient as a matter of law to support a finding, for purposes of the Robinson-Patman Act, of primary-line injury to competition.

EVIDENCE §147 > presumption -- knowledge of law and facts -- > Headnote:
LEdHN[18][] [18]

A reasonable jury in an antitrust case is presumed to know and understand the law, the facts of the case, and the realities of the market.

Syllabus

Cigarette manufacturing is a concentrated industry dominated by only six firms, including the two parties here. In 1980, petitioner (hereinafter Liggett) pioneered the economy segment of the market by developing a line of generic cigarettes offered at a list price roughly 30% lower than that of branded cigarettes. By 1984, generics had captured 4% of the market, at the expense of branded cigarettes, and respondent Brown & Williamson entered the economy segment, beating Liggett's net price. Liggett responded in kind, precipitating a price war, which ended, according to Liggett, with Brown & Williamson selling its generics at a loss. Liggett filed this suit, alleging, *inter alia,* that volume rebates by Brown & Williamson to wholesalers amounted to **[****2]** price discrimination that had a reasonable possibility of injuring competition in violation of *§ 2(a)* of the Clayton Act, as amended by the Robinson-Patman Act. Liggett claimed that the rebates were integral to a predatory pricing scheme, in which Brown & Williamson set below-cost prices to pressure Liggett to raise list prices on its generics, thus restraining the economy segment's growth and preserving Brown & Williamson's supracompetitive profits on branded cigarettes. After a jury returned a verdict in favor of Liggett, the District Court held that Brown & Williamson was entitled to judgment as a matter of law. Among other things, it found a lack of injury to competition because there had been no slowing of the generics' growth rate and no tacit coordination of prices in the economy segment by the various manufacturers. In affirming, the Court of Appeals held that the dynamic of conscious parallelism among oligopolists could not produce competitive injury in a predatory pricing setting.

Held: Brown & Williamson is entitled to judgment as a matter of law. Pp. 219-243.

(a) The Robinson-Patman Act, by its terms, condemns price discrimination only to the extent that **[****3]** it threatens to injure competition. A claim of primary-line competitive injury under the Act, the type alleged here, is of the same general character as a predatory pricing claim under *§ 2* of the Sherman Act: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market. *Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326*, distinguished. Accordingly, two prerequisites to recovery are also the same. A plaintiff must prove (1) that the prices complained of are below an appropriate measure of its rival's costs and (2) that the competitor had a reasonable prospect of recouping its investment in below-cost prices. Without recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced. For recoupment to occur, the pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals. This requires an understanding of the extent and duration of the alleged predation, the relative financial **[****4]** strength of the predator and its intended victim, and their respective incentives and will. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb. If so, then there is the further question whether the below-cost pricing would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the scheme alleged would cause a rise in prices above a competitive level sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. The determination requires an estimate of the alleged predation's cost and a close analysis of both the scheme alleged and the relevant market's structure and conditions. Although not easy to establish, these prerequisites are essential components of real market injury. Pp. 219-227.

(b) An oligopoly's interdependent pricing may provide a means for achieving recoupment and thus may form the basis of a primary-line injury claim. Predatory pricing schemes, in **[****5]** general, are implausible, see *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588-590, 89 L. Ed. 2d 538, 106 S. Ct. 1348*, and are even more improbable when they require coordinated action among several firms, *id., at 590*. They are least likely to occur where, as alleged here, the cooperation among firms is tacit, since effective tacit coordination is difficult to achieve; since there is a high likelihood that any attempt by one oligopolist to discipline a rival by cutting prices will produce an outbreak of competition; and since a predator's present losses fall on it alone, while the later supracompetitive profits must be shared with every other oligopolist in proportion to its market share, including the intended victim. Nonetheless, the Robinson-Patman Act suggests no exclusion from coverage when primary-line injury occurs in an oligopoly setting, and this Court declines to create a *per se* rule of nonliability. In order for all of the Act's words to carry adequate meaning, competitive injury under the Act must extend beyond the monopoly setting. Pp. 227-230.

(c) The record in this case demonstrates that the **[****6]** scheme Liggett alleged, when judged against the market's realities, does not provide an adequate basis for a finding of liability. While a reasonable jury could conclude that Brown & Williamson envisioned or intended an anticompetitive course of events and that the price of its generics was below its costs for 18 months, the evidence is inadequate to show that in pursuing this scheme, it had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson was likely to obtain the power to raise the prices for generic cigarettes above a competitive level, which is an indispensable aspect of Liggett's own proffered theory. The output and price information does not indicate that oligopolistic price coordination in fact produced supracompetitive prices in the generic segment. Nor does the evidence about the market and Brown & Williamson's conduct indicate that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in that segment. Pp. 230-243.

Counsel: Phillip Areeda argued the cause for petitioner. **[****7]** With him on the briefs were Charles Fried, Jean E. Sharpe, Josiah S. Murray III, James W. Dobbins, Garret G. Rasmussen, and C. Allen Foster.

Robert H. Bork argued the cause for respondent. With him on the brief were Griffin B. Bell, Frederick M. Rowe, Michael L. Robinson, Abbott B. Lipsky, Jr., and Veronica G. Kayne. [*]

Judges: KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, post, p. 243.

Opinion by: KENNEDY

Opinion

[*212] **[***179]** **[**2582]** JUSTICE KENNEDY delivered the opinion of the Court.

LEdHN[1A][] [1A] **[****8]** This case stems from a market struggle that erupted in the domestic cigarette industry in the mid-1980's. Petitioner Brooke Group Ltd., whom we, like the parties to the case, refer to as Liggett because of its former corporate name, charges that to counter its innovative development of generic cigarettes, respondent Brown & Williamson Tobacco Corporation introduced its own line of generic cigarettes in an unlawful effort to stifle price competition in the economy segment of the national cigarette market. Liggett contends that Brown & Williamson cut prices on generic cigarettes below cost and offered discriminatory volume rebates to wholesalers to force Liggett to raise its own generic cigarette prices and introduce oligopoly pricing in the economy segment. We hold that Brown & Williamson is entitled to judgment as a matter of law.

I

In 1980, Liggett pioneered the development of the economy segment of the national cigarette market by introducing a line of "black and white" generic cigarettes. The economy segment of the market, sometimes called the generic segment, is characterized by its bargain prices and comprises a variety of different products: black and whites, which are true **[****9]** generics sold in plain white packages with simple black lettering describing their contents; private label generics, which carry the trade dress of a specific purchaser, usually a retail chain; branded generics, which carry a brand name but which, like black and whites and private label generics, are sold at a deep discount and with little or no advertising; and "Value-25s," packages of 25 cigarettes that are sold to the consumer some 12.5% below the cost of a normal 20-cigarette pack. By 1984, when Brown & Williamson entered the generic segment and set in motion the series of events giving rise to this suit, Liggett's black and whites represented 97% of the generic segment, which in turn accounted for a little **[*213]** more than 4% of domestic cigarette sales. Prior to Liggett's introduction of black and whites in 1980, sales of generic cigarettes amounted to less than 1% of the domestic cigarette market.

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[*] Briefs of amici curiae urging affirmance were filed for Atlantic Richfield Co. by Ronald C. Redcay, Matthew T. Heartney, Otis Pratt Pearsall, Philip H. Curtis, Francis X. McCormack, Donald A. Bright, and Edward E. Clark; and for ITT Corp. by John H. Schafer and Edwin A. Kilburn.

Briefs of amici curiae were filed for the Business Roundtable by Thomas B. Leary; and for the Grocery Manufacturers of America, Inc., by Terry Calvani, W. Todd Miller, and C. Douglas Floyd.

Because of the procedural posture **[***180]** of this case, we view the evidence in the light most favorable to Liggett. The parties are in basic agreement, however, regarding the central, historical facts. Cigarette manufacturing has long been one of America's most concentrated **[****10]** industries, see F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 250 (3d ed. 1990) (hereinafter Scherer & Ross); App. 495-498, and for decades, production has been dominated by six firms: R. J. Reynolds, Philip Morris, American Brands, Lorillard, and the two litigants involved here, Liggett and Brown & Williamson. R.J. Reynolds and Philip Morris, the two industry leaders, enjoyed respective market shares of about 28% and 40% at the time of trial. Brown & Williamson ran a **[**2583]** distant third, its market share never exceeding 12% at any time relevant to this dispute. Liggett's share of the market was even less, from a low of just over 2% in 1980 to a high of just over 5% in 1984.

The cigarette industry also has long been one of America's most profitable, in part because for many years there was no significant price competition among the rival firms. See Scherer & Ross 250-251; R. Tennant, American Cigarette Industry 86-87 (1950); App. 128, 500-509, 531. List prices for cigarettes increased in lockstep, twice a year, for a number of years, irrespective of the rate of inflation, changes in the costs of production, or shifts in consumer demand. Substantial **[****11]** evidence suggests that in recent decades, the industry reaped the benefits of prices above a competitive level, though not through unlawful conduct of the type that once characterized the industry. See Tennant, *supra,* at 275, 342; App. 389-392, 514-519, 658-659; cf. *American Tobacco Co. v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*; *United States* ***[*214]*** *v. American Tobacco Co., 221 U.S. 106, 55 L. Ed. 663, 31 S. Ct. 632 (1911)*; Scherer & Ross 451.

By 1980, however, broad market trends were working against the industry. Overall demand for cigarettes in the United States was declining, and no immediate prospect of recovery existed. As industry volume shrank, all firms developed substantial excess capacity. This decline in demand, coupled with the effects of nonprice competition, had a severe negative impact on Liggett. Once a major force in the industry, with market shares in excess of 20%, Liggett's market share had declined by 1980 to a little over 2%. With this meager share of the market, Liggett was on the verge of going out of business.

At the urging of a distributor, Liggett took an unusual step to **[****12]** revive its prospects: It developed a line of black and white generic cigarettes. When introduced in 1980, black and whites were offered to consumers at a list price roughly 30% lower than the list price of full-priced, branded cigarettes. They were also promoted at the wholesale level by means of rebates that increased with the volume of cigarettes ordered. Black and white cigarettes thus represented a new marketing category. The category's principal competitive characteristic was low price. Liggett's black and whites were an immediate and considerable success, growing from a fraction of a percent of the market at their introduction to over 4% of the total cigarette market by early 1984.

As the market for Liggett's generic **[***181]** cigarettes expanded, the other cigarette companies found themselves unable to ignore the economy segment. In general, the growth of generics came at the expense of the other firms' profitable sales of branded cigarettes. Brown & Williamson was hardest hit, because many of Brown & Williamson's brands were favored by consumers who were sensitive to changes in cigarette prices. Although Brown & Williamson sold only 11.4% of the market's branded cigarettes, **[****13]** 20% of the converts to **[*215]** Liggett's black and whites had switched from a Brown & Williamson brand. Losing volume and profits in its branded products, Brown & Williamson determined to enter the generic segment of the cigarette market. In July 1983, Brown & Williamson had begun selling Value-25s, and in the spring of 1984, it introduced its own black and white cigarette.

Brown & Williamson was neither the first nor the only cigarette company to recognize the threat posed by Liggett's black and whites and to respond in the economy segment. R.J. Reynolds had also introduced a Value-25 in 1983. And before Brown & Williamson introduced its own black and whites, R.J. Reynolds had repriced its "Doral" branded cigarette at generic levels. To compete with Liggett's black and whites, R.J. Reynolds dropped its list price on Doral about 30% and used volume rebates to wholesalers as an incentive to spur orders. Doral was the first competition at Liggett's price level.

[2584]** Brown & Williamson's entry was an even graver threat to Liggett's dominance of the generic category. Unlike R. J. Reynolds' Doral, Brown & Williamson's product was also a black and white and so would be in **[****14]** direct competition with Liggett's product at the wholesale level and on the retail shelf. Because Liggett's and Brown

& Williamson's black and whites were more or less fungible, wholesalers had little incentive to carry more than one line. And unlike R. J. Reynolds, Brown & Williamson not only matched Liggett's prices but beat them. At the retail level, the suggested list price of Brown & Williamson's black and whites was the same as Liggett's, but Brown & Williamson's volume discounts to wholesalers were larger. Brown & Williamson's rebate structure also encompassed a greater number of volume categories than Liggett's, with the highest categories carrying special rebates for orders of very substantial size. Brown & Williamson marketed its black and whites to Liggett's existing distributors as well as to its own full list of **[*216]** buyers, which included a thousand wholesalers who had not yet carried any generic products.

Liggett responded to Brown & Williamson's introduction of black and whites in two ways. First, Liggett increased its own wholesale rebates. This precipitated a price war at the wholesale level, in which Liggett five times attempted to beat the rebates offered **[****15]** by Brown & Williamson. At the end of each round, Brown & Williamson maintained a real advantage over Liggett's prices. Although it is undisputed that Brown & Williamson's original net price for its black and whites was above its costs, Liggett contends that by the end of the rebate war, Brown & Williamson was selling its black and whites at a loss. This rebate war occurred before Brown & Williamson **[***182]** had sold a single black and white cigarette.

Liggett's second response was to file a lawsuit. Two weeks after Brown & Williamson announced its entry into the generic segment, again before Brown & Williamson had sold any generic cigarettes, Liggett filed a complaint in the United States District Court for the Middle District of North Carolina alleging trademark infringement and unfair competition. Liggett later amended its complaint to add an antitrust claim under *§ 2(a)* of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, *15 U.S.C. § 13(a)*, which alleged illegal price discrimination between Brown & Williamson's full-priced branded cigarettes and its low-priced generics. See *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 1989-1 Trade Cas. (CCH) P 68,583*, p. 61,099 (MDNC 1988). **[****16]** These claims were either dismissed on summary judgment, see *ibid.,* or rejected by the jury. They were not appealed.

Liggett also amended its complaint to add a second Robinson-Patman Act claim, which is the subject of the present controversy. Liggett alleged that Brown & Williamson's volume rebates to wholesalers amounted to price discrimination that had a reasonable possibility of injuring competition, **[*217]** in violation of *§ 2(a)*. Liggett claimed that Brown & Williamson's discriminatory volume rebates were integral to a scheme of predatory pricing, in which Brown & Williamson reduced its net prices for generic cigarettes below average variable costs. According to Liggett, these below-cost prices were not promotional but were intended to pressure it to raise its list prices on generic cigarettes, so that the percentage price difference between generic and branded cigarettes would narrow. Liggett explained that it would have been unable to reduce its wholesale rebates without losing substantial market share to Brown & Williamson; its only choice, if it wished to avoid prolonged losses on its principal product line, was to raise retail prices. The resulting reduction in **[****17]** the list price gap, it was said, would restrain the growth of the economy segment and preserve Brown & Williamson's supracompetitive profits on its branded cigarettes.

[2585]** The trial began in the fall of 1989. By that time, all six cigarette companies had entered the economy segment. The economy segment was the fastest growing segment of the cigarette market, having increased from about 4% of the market in 1984, when the rebate war in generics began, to about 15% in 1989. Black and white generics had declined as a force in the economy segment as consumer interest shifted toward branded generics, but Liggett's overall volume had increased steadily to 9 billion generic cigarettes sold. Overall, the 2.8 billion generic cigarettes sold in 1981 had become 80 billion by 1989.

The consumer price of generics had increased along with output. For a year, the list prices for generic cigarettes established at the end of the rebate war remained stable. But in June 1985, Liggett raised its list price, and the other firms followed several months later. The precise effect of the list price increase is difficult to assess, because all of the cigarette firms offered a variety of discounts, **[****18]** coupons, and other promotions directly to consumers on both **[***183]** generic and **[*218]** branded cigarettes. Nonetheless, at least some portion of the list price increase was reflected in a higher net price to the consumer.

In December 1985, Brown & Williamson attempted to increase its list prices, but retracted the announced increase when the other firms adhered to their existing prices. Thus, after Liggett's June 1985 increase, list prices on generics did not change again until the summer of 1986, when a pattern of twice yearly increases in tandem with the full-priced branded cigarettes was established. The dollar amount of these increases was the same for generic and full-priced cigarettes, which resulted in a greater percentage price increase in the less expensive generic cigarettes and a narrowing of the percentage gap between the list price of branded and black and white cigarettes, from approximately 38% at the time Brown & Williamson entered the segment to approximately 27% at the time of trial. Also by the time of trial, five of the six manufacturers, including Liggett, had introduced so-called "subgenerics," a category of branded generic cigarettes that sold at a **[****19]** discount of 50% or more off the list price of full-priced branded cigarettes.

After a 115-day trial involving almost 3,000 exhibits and over a score of witnesses, the jury returned a verdict in favor of Liggett, finding on the special verdict form that Brown & Williamson had engaged in price discrimination that had a reasonable possibility of injuring competition in the domestic cigarette market as a whole. The jury awarded Liggett $ 49.6 million in damages, which the District Court trebled to $ 148.8 million. After reviewing the record, however, the District Court held that Brown & Williamson was entitled to judgment as a matter of law on three separate grounds: lack of injury to competition, lack of antitrust injury to Liggett, and lack of a causal link between the discriminatory rebates and Liggett's alleged injury. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344 (MDNC 1990)*. With respect to the first issue, which is the **[*219]** only one before us, the District Court found that no slowing of the growth rate of generics, and thus no injury to competition, was possible unless there had been tacit coordination of prices in the **[****20]** economy segment of the cigarette market by the various manufacturers. *Id., at 354-355*. The District Court held that a reasonable jury could come to but one conclusion about the existence of such coordination among the firms contending for shares of the economy segment: it did not exist, and Brown & Williamson therefore had no reasonable possibility of limiting the growth of the segment. *Id., at 356-358*.

The United States Court of Appeals for the Fourth Circuit affirmed. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 964 F.2d 335 (1992)*. The Court of Appeals held that the dynamic of conscious parallelism among oligopolists could not produce competitive injury in a predatory pricing setting, which necessarily involves a price cut by one of the oligopolists. *Id., at 342*. In the **[**2586]** Court of Appeals' view, "to rely on the characteristics of an oligopoly to assure recoupment of losses from a predatory pricing scheme after one oligopolist has made a competitive move is . . . economically irrational." *Ibid.*

We granted certiorari, *506 U.S. 984 (1992)*, and now affirm.

II

A

[**21]** ***LEdHN[2]***[] [2]Price discrimination is made unlawful by *§ 2(a)* of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, which provides:

> ***HN1***[] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent **[*220]** competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." *15 U.S.C. § 13(a)*.

Although we have reiterated that ***HN2***[] "'a price discrimination within the meaning of [this] provision is merely a price difference,'" *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 558, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990)* **[****22]** (quoting *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960))*, the statute as a practical matter could not, and does not, ban all price differences charged to "different purchasers of commodities of like grade and quality." Instead, the statute contains a number of important limitations, one of which is central to evaluating Liggett's claim: ***HN3***[] By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination when it is based on differences in costs, *§ 13(a)*, "changing conditions affecting the market for or the marketability of the goods concerned," *ibid.*, or conduct undertaken "in good faith to meet an equally low price of a competitor," *§ 13(b)*; *Standard Oil Co. v. FTC, 340 U.S. 231, 250, 95 L. Ed. 239, 71 S. Ct. 240 (1951)*, confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, **[****23]** ***HN4***[] "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." *Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80, n. 13, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979)*. See also *Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 63, 74, 97 L. Ed. 1454, 73 S. Ct. 1017 (1953)*.

Liggett contends that Brown & Williamson's discriminatory volume rebates to wholesalers threatened substantial competitive injury by furthering a predatory pricing scheme designed to purge competition from the economy segment of the cigarette market. This type of injury, which harms direct competitors of the discriminating seller, is known as primary-line injury. See *FTC v. Anheuser-Busch, Inc., supra, at 538*. We last addressed primary-line injury over 25 years ago, in *Utah Pie Co. v. Continental Baking Co.,* ***[*221]*** *386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326 (1967)*. In *Utah Pie*, we reviewed the sufficiency of the evidence supporting jury verdicts against three national pie companies that had engaged in a variety of **[***185]** **[****24]** predatory practices in the market for frozen pies in Salt Lake City, with the intent to drive a local pie manufacturer out of business. We reversed the Court of Appeals and held that the evidence presented was adequate to permit a jury to find a likelihood of injury to competition. *Id., at 703*.

LEdHN[3A][] [3A]*Utah Pie* has often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure. The case **[**2587]** has been criticized on the ground that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition. See Bowman, Restraint of Trade by the Supreme Court: The Utah Pie Case, 77 Yale L. J. 70 (1967); R. Posner, ***Antitrust Law***: An Economic Perspective 193-194 (1976); L. Sullivan, Antitrust 687 (1977); 3 P. Areeda & D. Turner, ***Antitrust Law*** P720c (1978) (hereinafter Areeda & Turner); R. Bork, The Antitrust Paradox 386-387 (1978); H. Hovenkamp, Economics and Federal ***Antitrust Law*** 188-189 (1985). **[****25]** We do not regard the *Utah Pie* case itself as having the full significance attributed to it by its detractors. *Utah Pie* was an early judicial inquiry in this area and did not purport to set forth explicit, general standards for establishing a violation of the Robinson-Patman Act. As the law has been explored since *Utah Pie*, it has become evident that ***HN5***[] primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under *§ 2* of the Sherman Act. See, *e.g., Henry v. Chloride, Inc., 809 F.2d 1334, 1345 (CA8 1987)*; *D. E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (CA6 1983)*, cert. denied, *467 U.S. 1242, 82 L. Ed. 2d 822, 104 S. Ct. 3513 (1984)*; *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1041 (CA9 1981)*, cert. denied, *459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982)*; **[*222]** *Malcolm v. Marathon Oil Co., 642 F.2d 845, 853, n. 16* **[****26]** (CA5), cert. denied, *454 U.S. 1125, 71 L. Ed. 2d 113, 102 S. Ct. 975 (1981)*; *Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790, 798* (CA10), cert. denied, *434 U.S. 879, 54 L. Ed. 2d 160, 98 S. Ct. 234 (1977)*; *International Telephone & Telegraph Corp., 104 F.T.C. 280, 401-402 (1984)*; Hovenkamp, *supra*, at 189; 3 Areeda & Turner P720c; P. Areeda & H. Hovenkamp, ***Antitrust Law*** P720c (Supp. 1992) (hereinafter Areeda & Hovenkamp). There are, to be sure, differences between the two statutes. For example, we interpret *§ 2* of the Sherman Act to condemn predatory pricing when it poses "a dangerous probability of actual monopolization," *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*, whereas the Robinson-Patman Act requires only that there be "a reasonable possibility" of substantial injury to competition before its protections are triggered, *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)*. But whatever additional flexibility the Robinson-Patman **[****27]** Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise **[***186]** control over prices in the relevant market.

LEdHN[3B][] [3B]***LEdHN[4A]***[] [4A]Accordingly, whether the claim alleges predatory pricing under *§ 2* of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, ***HN6***[] a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. [1] See, *e.g., Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*;*Matsushita* ***[*223]*** *Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585, n. 8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; **[****28]** *Utah Pie, 386 U.S. at 698, 701, 702-703, n. 14*;*In re E. I. DuPont de Nemours & Co., 96 F.T.C. 653, 749 (1980)*.Cf. *United States v. National Dairy Products Corp., 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963)* (holding that below-cost prices may constitute "unreasonably **[**2588]** low" prices for purposes of § 3 of the Robinson-Patman Act, *15 U.S.C. § 13a*). Although *Cargill* and *Matsushita* reserved as a formal matter the question "'whether recovery should *ever* be available . . . when the pricing in question is above some measure of incremental cost,'" *Cargill, supra, at 117-118, n. 12* (quoting *Matsushita, supra, at 585, n. 9*), the reasoning in both opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that ***HN7***[] above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. See *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*. **[****29]** "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved." *Ibid.* As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting. See Areeda & Hovenkamp PP714.2, 714.3. "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result." *Cargill, supra, at 116*.

LEdHN[4B][] [4B]

[**30]** Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be **[*224]** illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most **[***187]** conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy. Cf. Areeda & Hovenkamp PP714.2d, 714.2f; Areeda & Turner, Predatory Pricing and Related Practices under *Section 2* of the Sherman Act, 88 Harv. L. Rev. 697, 708-709 (1975); Posner, ***Antitrust Law***: An Economic Perspective, at 195, n. 39.

HN8[] The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under *§* ***[****31]*** *2* of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. See *Matsushita, supra, at 589*; *Cargill, supra, at 119, n. 15*. "For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Matsushita, supra, at 588-589*. Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

[1] Because the parties in this case agree that the relevant measure of cost is average variable cost, however, we again decline to resolve the conflict among the lower courts over the appropriate measure of cost. See *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117-118, n. 12, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*; *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 585, n. 8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

LEdHN[5][] [5]That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for "the protection of *competition*, not *competitors."* *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502* ***[**2589]*** *(1962)*. **[****32]** Earlier this Term, we held in the Sherman Act *§ 2* context **[*225]** that it was not enough to inquire "whether the defendant has engaged in 'unfair' or 'predatory' tactics"; rather, we insisted that the plaintiff prove "a dangerous probability that [the defendant] would monopolize a particular market." *Spectrum Sports, 506 U.S. at 459*. ***HN9***[] Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945)*.

LEdHN[6][] [6]For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly. This requires an understanding of **[****33]** the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will. See 3 Areeda & Turner P711b. The inquiry is whether, given the aggregate losses **[***188]** caused by the below-cost pricing, the intended target would likely succumb.

If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, "in order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess **[*226]** profits what they earlier gave up in below-cost prices." *Matsushita, 475 U.S. at 590-591*.

[**34]** ***HN10***[] Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. ***HN11***[] Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. Cf., *e.g.*, Elzinga & Mills, Testing for Predation: Is Recoupment Feasible?, 34 Antitrust Bull. 869 (1989) (constructing one possible model for evaluating recoupment). If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed. In certain situations -- for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity -- summary disposition of the case **[****35]** is appropriate. See, *e.g., Cargill, 479 U.S. at 119-120, n. 15*.

These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury. As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," *Matsushita, supra, at 589*, and the costs of an erroneous finding of liability are high. "The mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, **[**2590]** because they chill the very conduct the antitrust laws are designed to protect.'" *Cargill, supra, at 122, n. 17* (quoting *Matsushita, supra, at 594*). It would be ironic indeed if the standards for predatory pricing liability **[*227]** were so low that antitrust suits themselves became a tool for keeping prices high.

B

LEdHN[7][] [7] **[****36]** Liggett does not allege that Brown & Williamson sought to drive **[***189]** it from the market but that Brown & Williamson sought to preserve supracompetitive profits on branded cigarettes by pressuring Liggett to raise its generic cigarette prices through a process of tacit collusion with the other cigarette companies. Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions. See 2 Areeda & Turner P404; Scherer & Ross 199-208.

In *Matsushita*, we remarked upon the general implausibility of predatory pricing. See *475 U.S. at 588-590*. *Matsushita* observed that such schemes are even more improbable when they require coordinated action among several firms. *Id., at 590*. *Matsushita* involved an allegation of an express conspiracy to engage in predatory pricing. The Court noted that in addition to the usual **[****37]** difficulties that face a single firm attempting to recoup predatory losses, other problems render a conspiracy "incalculably more difficult to execute." *Ibid.* In order to succeed, the conspirators must agree on how to allocate present losses and future gains among the firms involved, and each firm must resist powerful incentives to cheat on whatever agreement is reached. *Ibid.*

However unlikely predatory pricing by multiple firms may be when they conspire, it is even less likely when, as here, there is no express coordination. Firms that seek to recoup predatory losses through the conscious parallelism of oligopoly must rely on uncertain and ambiguous signals to achieve concerted action. The signals are subject to misinterpretation and are a blunt and imprecise means of ensuring smooth **[*228]** cooperation, especially in the context of changing or unprecedented market circumstances. This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.

From one standpoint, recoupment through oligopolistic price coordination could be thought more feasible than recoupment through monopoly: In the oligopoly setting, the victim itself has **[****38]** an economic incentive to acquiesce in the scheme. If forced to choose between cutting prices and sustaining losses, maintaining prices and losing market share, or raising prices and enjoying a share of supracompetitive profits, a firm may yield to the last alternative. Yet on the whole, tacit cooperation among oligopolists must be considered the least likely means of recouping predatory losses. In addition to the difficulty of achieving effective tacit coordination and the high likelihood that any attempt to discipline will produce an outbreak of competition, the predator's present losses in a case like this fall on it alone, while the later supracompetitive profits must be shared with every other oligopolist in proportion to its market share, including the intended victim. In this case, for example, Brown & Williamson, with its 11-12% share of the cigarette market, would have had to generate around $ 9 in supracompetitive profits for each $ 1 invested in predation; the remaining **[***190]** $ 8 would belong to its competitors, who had taken no risk.

Liggett suggests that these considerations led the Court of Appeals to rule out its theory of recovery as a matter of law. Although **[****39]** **[**2591]** the proper interpretation of the Court of Appeals' opinion is not free from doubt, there is some indication that it held as a matter of law that the Robinson-Patman Act does not reach a primary-line injury claim in which tacit coordination among oligopolists provides the alleged basis for recoupment. The Court of Appeals' opinion does not contain the traditional apparatus of fact review; rather, it focuses on theoretical and legal arguments. The final paragraph appears to state the holding: Brown & Williamson **[*229]** may not be held liable because oligopoly pricing does not "'provide an economically rational basis'" for recouping predatory losses. *964 F.2d at 342*.

LEdHN[8A][] [8A]To the extent that the Court of Appeals may have held that the interdependent pricing of an oligopoly may never provide a means for achieving recoupment and so may not form the basis of a primary-line injury claim, we disagree. A predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as one designed to bring about **[****40]** a monopoly. However unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability. See *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466-467, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

LEdHN[8B][] [8B]LEdHN[9][] [9]The Robinson-Patman Act, which amended § 2 of the original Clayton Act, suggests no exclusion from coverage when primary-line injury occurs in an oligopoly setting. Unlike the provisions of the Sherman Act, which speak only of various forms of express agreement and monopoly, see 15 U.S. C. §§ 1, 2, the Robinson-Patman Act is phrased in broader, disjunctive terms, prohibiting price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly," 15 U.S. C. § 13(a). For all the words of the Act to carry adequate meaning, competitive injury under **[****41]** the Act must extend beyond the monopoly setting. Cf. *Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)* ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise"). The language referring to a substantial lessening of competition was part of the original Clayton Act § 2, see Act of Oct. 15, 1914, ch. 322, 38 Stat. 730, and the same phrasing appears in § 7 of that Act. In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination **[*230]** it portends, may be the injury to competition the Act prohibits. See, *e.g., United States v. Philadelphia Nat. Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. We adhere to HN12[] "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop, 496 U.S. 478, 484, 110 L. Ed. 2d 438, 110 S. Ct. 2499 (1990)* **[****42]** (internal quotation marks omitted). See also *J. Truett Payne Co. v. **[***191]** Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)* (evaluating the competitive injury requirement of Robinson-Patman Act § 2(a) in light of analogous interpretations of Clayton Act § 7). We decline to create a *per se* rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing. Cf. *Cargill, 479 U.S. at 121*.

III

LEdHN[1B][] [1B]LEdHN[10][] [10]Although Liggett's theory of liability, as an abstract matter, is within the reach of the statute, we agree with the Court of Appeals and the District Court that Liggett was not entitled to submit its case to the jury. HN13[] It is not customary for this Court to review the sufficiency of the evidence, but we will do so when the issue is properly before us and the benefits of providing guidance **[****43]** **[**2592]** concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources. See, *e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605-611, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*;*Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 765-768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*;*United States v. Pabst Brewing Co., 384 U.S. 546, 550-552, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966)*. The record in this case demonstrates that the anticompetitive scheme Liggett alleged, when judged against the realities of the market, does not provide an adequate basis for a finding of liability.

A

LEdHN[1C][] [1C]Liggett's theory of competitive injury through oligopolistic price coordination depends upon a complex chain of cause **[*231]** and effect: Brown & Williamson would enter the generic segment with list prices matching Liggett's but with massive, discriminatory volume rebates directed at Liggett's biggest wholesalers; as a result, **[****44]** the net price of Brown & Williamson's generics would be below its costs; Liggett would suffer losses trying to defend its market share and wholesale customer base by matching Brown & Williamson's rebates; to avoid further losses, Liggett would raise its list prices on generics or acquiesce in price leadership by Brown & Williamson; higher list prices to consumers would shrink the percentage gap in retail price between generic and branded cigarettes; and this narrowing of the gap would make generics less appealing to the consumer, thus slowing the growth of the economy segment and reducing cannibalization of branded sales and their associated supracompetitive profits.

Although Brown & Williamson's entry into the generic segment could be regarded as procompetitive in intent as well as effect, the record contains sufficient evidence from which a reasonable jury could conclude that Brown & Williamson envisioned or intended this anticompetitive course of events. See, *e.g.*, App. 57-58, 67-68, 89-91, 99, 112-114, 200, 241, 253, 257, 262-263, 279-280, 469-470, 664-666. There is also sufficient evidence in the record from which a reasonable jury could conclude that for a period of approximately **[****45]** 18 months, Brown & Williamson's prices on its generic cigarettes were below its costs, see *id., at 338-339, 651, 740*, and that this below-cost pricing imposed losses on Liggett **[***192]** that Liggett was unwilling to sustain, given its corporate parent's effort to locate a buyer for the company, see *id., at 74, 92, 200, 253, 596-597*. Liggett has failed to demonstrate competitive injury as a matter of law, however, because its proof is flawed in a critical respect: The evidence is inadequate to show that in pursuing this scheme, Brown & Williamson had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. As we have noted, ***HN14***[] "the success of any predatory **[*232]** scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Matsushita, 475 U.S. at 589* (emphasis omitted).

No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson -- whatever its intent in introducing black and whites **[****46]** may have been -- was likely to obtain the power to raise the prices for generic cigarettes above a competitive level. Recoupment through supracompetitive pricing in the economy segment of the cigarette market is an indispensable aspect of Liggett's own proffered theory, because a slowing of growth in the economy segment, even if it results from an increase in generic prices, is not itself anticompetitive. Only if those higher prices are a product of nonmarket forces has competition suffered. If prices rise in response to an excess of demand over supply, or segment growth slows as patterns of consumer preference become stable, the market is **[**2593]** functioning in a competitive manner. Consumers are not injured from the perspective of the antitrust laws by the price increases; they are in fact causing them. Thus, the linchpin of the predatory scheme alleged by Liggett is Brown & Williamson's ability, with the other oligopolists, to raise prices above a competitive level in the generic segment of the market. ***HN15***[] Because relying on tacit coordination among oligopolists as a means of recouping **[****47]** losses from predatory pricing is "highly speculative," Areeda & Hovenkamp P711.2c, at 647, competent evidence is necessary to allow a reasonable inference that it poses an authentic threat to competition. The evidence in this case is insufficient to demonstrate the danger of Brown & Williamson's alleged scheme.

B

Based on Liggett's theory of the case and the record it created, there are two means by which one might infer that **[*233]** Brown & Williamson had a reasonable prospect of producing sustained supracompetitive pricing in the generic segment adequate to recoup its predatory losses: first, if generic output or price information indicates that oligopolistic price coordination in fact produced supracompetitive prices in the generic segment; or second, if evidence about the market and Brown & Williamson's conduct indicate that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in the generic segment, even if it did not actually do so.

1

LEdHN[1D][] [1D]***LEdHN[11]***[] [11]In this case, the price and output data **[****48]** do not support a reasonable inference that Brown & Williamson and the other cigarette companies **[***193]** elevated prices above a competitive level for generic cigarettes. Supracompetitive pricing entails a restriction in output. See *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104-108, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*;*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*; P. Samuelson & W. Nordhaus, Economics 516 (12th ed. 1985); Sullivan, Antitrust, at 32; Bork, The Antitrust Paradox, at 178-179; 2 Areeda & Turner P403a; Easterbrook, The Limits of Antitrust, *63 Texas L. Rev. 1, 20, 31 (1984)*.In the present setting, in which output expanded at a rapid rate following Brown & Williamson's alleged predation, output in the generic segment can only have been restricted in the sense that it expanded at a slower rate than it would have absent Brown & Williamson's intervention. Such a counterfactual proposition is difficult to prove in the best of circumstances; here, the record evidence does not permit a reasonable **[****49]** inference that output would have been greater without Brown & Williamson's entry into the generic segment.

Following Brown & Williamson's entry, the rate at which generic cigarettes were capturing market share did not slow; indeed, the average rate of growth doubled. During the **[*234]** four years from 1980 to 1984 in which Liggett was alone in the generic segment, the segment gained market share at an average rate of 1% of the overall market per year, from 0.4% in 1980 to slightly more than 4% of the cigarette market in 1984. In the next five years, following the alleged predation, the generic segment expanded from 4% to more than 15% of the domestic cigarette market, or greater than 2% per year.

While this evidence tends to show that Brown & Williamson's participation in the economy segment did not restrict output, it is not dispositive. One could speculate, for example, that the rate of segment growth would have tripled, instead of doubled, without Brown & Williamson's alleged predation. But there is no concrete evidence of this. Indeed, the only industry projection in the record estimating what the segment's growth would have been without Brown & Williamson's entry supports **[****50]** the opposite inference. In 1984, Brown & Williamson forecast in an **[**2594]** important planning document that the economy segment would account for 10% of the total cigarette market by 1988 if it did not enter the segment. App. 133, 135. In fact, in 1988, after what Liggett alleges was a sustained and dangerous anticompetitive campaign by Brown & Williamson, the generic segment accounted for over 12% of the total market. *Id., at 354-356*. Thus the segment's output expanded more robustly than Brown & Williamson had estimated it would had Brown & Williamson never entered.

Brown & Williamson did note in 1985, a year after introducing its black and whites, that its presence within the generic segment "appears to have resulted in . . . a slowing in the segment's growth rate." *Id., at 257*. But this statement was made in early 1985, when Liggett itself contends the below-cost pricing was still in effect and before any anticompetitive contraction in output is alleged to have occurred.

[*235] Whatever it may **[***194]** mean, [2] this statement has little value in evaluating the competitive implications of Brown & Williamson's later conduct, which was alleged to provide **[****51]** the basis for recouping predatory losses.

LEdHN[12][] [12]In arguing that Brown & Williamson was able to exert market power and raise generic prices above a competitive level in the generic category through tacit price coordination with the other cigarette manufacturers, Liggett places its principal reliance on direct evidence of price behavior. This evidence demonstrates that the list prices on all cigarettes, generic and branded alike, rose to a significant degree during the late 1980's. *Id., at 325*. From 1986 to 1989, list prices on both generic and branded cigarettes increased twice a year by similar amounts. Liggett's economic expert testified that these price increases outpaced increases in costs, taxes, **[****52]** and promotional expenditures. *Id., at 525*. The list prices of generics, moreover, rose at a faster rate than the prices of branded cigarettes, thus narrowing the list price differential between branded and generic products. *Id., at 325*. Liggett argues that this would permit a reasonable jury to find that Brown & Williamson succeeded in bringing about oligopolistic price coordination and supracompetitive prices in the generic category sufficient to slow its growth, thereby preserving supracompetitive branded profits and recouping its predatory losses.

A reasonable jury, however, could not have drawn the inferences Liggett proposes. All of Liggett's data are based upon the list prices of various categories of cigarettes. Yet the jury had before it undisputed evidence that during the period in question, list prices were not the actual prices paid by consumers. 100 Tr. 227-229. As the market became unsettled **[*236]** in the mid-1980's, the cigarette companies invested substantial sums in promotional schemes, including coupons, stickers, and giveaways, that reduced the actual cost of cigarettes to consumers below list prices. 33 Tr. 206-209, 51 Tr. 130. This promotional activity **[****53]** accelerated as the decade progressed. App. 509, 672. Many wholesalers also passed portions of their volume rebates on to the consumer, which had the effect of further undermining the significance of the retail list prices. *Id., at 672, 687-692, 761-763*. Especially in an oligopoly setting, in which price competition is most likely to take place through less observable and less regulable means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices.

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[2] This statement could well have referred to the rate at which the segment was growing relative to prior years' generic volume; this "internal" rate of growth would inevitably slow as the base volume against which it was measured grew.

Even on its own terms, the list price data relied upon by Liggett to demonstrate a narrowing of the price differential between generic and full-priced branded cigarettes could not support the conclusion that supracompetitive pricing had been introduced into the generic segment. Liggett's gap data ignore the effect of "subgeneric" cigarettes, which **[**2595]** were priced at discounts of 50% or more from the list prices of normal branded cigarettes. See, *e.g., id., at 682-686*. Liggett itself, while **[***195]** supposedly under the sway of oligopoly power, pioneered this development in 1988 with the introduction of **[****54]** its "Pyramid" brand. *Id., at 326*. By the time of trial, five of the six major manufacturers offered a cigarette in this category at a discount from the full list price of at least 50%. *Id., at 685-686*; 147 Tr. 107. Thus, the price difference between the highest priced branded cigarette and the lowest price cigarettes in the economy segment, instead of narrowing over the course of the period of alleged predation as Liggett would argue, grew to a substantial extent. In June 1984, before Brown & Williamson entered the generic segment, a consumer could obtain a carton of black and white generic cigarettes from Liggett at a 38% discount from the list price of a leading brand; after the conduct Liggett **[*237]** complains of, consumers could obtain a branded generic from Liggett for 52% off the list price of a leading brand. See App. 325-326, 685.

It may be that a reasonable jury could conclude that the cumulative discounts attributable to subgenerics and the various consumer promotions did not cancel out the full effect of the increases in list prices, see *id., at 508-509*, and that actual prices to the consumer did indeed rise, but rising prices do not themselves permit **[****55]** an inference of a collusive market dynamic. Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing. Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level. Cf. *Monsanto, 465 U.S. at 763*.

LEdHN[13][] [13]Quite apart from the absence of any evidence of that sort, an inference of supracompetitive pricing would be particularly anomalous in this case, as the very party alleged to have been coerced into pricing through oligopolistic coordination denied that such coordination existed: Liggett's own officers and directors consistently denied that they or other firms in the industry priced their cigarettes through tacit collusion or reaped supracompetitive profits. App. 394-399, 623-631; 11 Tr. 170-174, 64 Tr. 51-56. Liggett **[****56]** seeks to explain away this testimony by arguing that its officers and directors are businesspeople who do not ascribe the same meaning to words like "competitive" and "collusion" that an economist would. This explanation is entitled to little, if any, weight. As the District Court found:

> "This argument was considered at the summary judgment stage since these executives gave basically the same testimony at their depositions. The court allowed **[*238]** the case to go to trial in part because the Liggett executives were not economists and in part because of affidavits from the Liggett executives stating that they were confused by the questions asked by B[rown] & Williamson lawyers and did not mean to contradict the testimony of [their economic expert] Burnett. However, at trial, despite having consulted extensively with Burnett and having had adequate time to familiarize themselves with concepts **[***196]** such as tacit collusion, oligopoly, and monopoly profits, these Liggett executives again contradicted Burnett's theory." *748 F. Supp. at 356*.

2

LEdHN[1E][] [1E]Not only does the evidence **[****57]** fail to show actual supracompetitive pricing in the generic segment, it also does not demonstrate its likelihood. At the time Brown & Williamson entered the generic segment, the cigarette industry as a whole faced declining demand and possessed substantial excess capacity. App. 82-84. These circumstances tend to **[**2596]** break down patterns of oligopoly pricing and produce price competition. See Scherer & Ross 294, 315; 2 Areeda & Turner P404b2, at 275-276; 6 P. Areeda, ***Antitrust Law*** P1430e, p. 181 (1986). The only means by which Brown & Williamson is alleged to have established oligopoly pricing in the face of these unusual competitive pressures is through tacit price coordination with the other cigarette firms.

Yet the situation facing the cigarette companies in the 1980's would have made such tacit coordination unmanageable. Tacit coordination is facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus. See generally Scherer & Ross 215-315; 6 P. Areeda, *supra*, PP1428-1430. Uncertainty is an oligopoly's greatest enemy. By 1984, however, the cigarette market was in an **[****58]** obvious state of flux. The introduction of generic cigarettes in 1980 represented the first serious price competition **[*239]** in the cigarette market since the 1930's. See Scherer & Ross 250-251; App. 128. This development was bound to unsettle previous expectations and patterns of market conduct and to reduce the cigarette firms' ability to predict each other's behavior.

The larger number of product types and pricing variables also decreased the probability of effective parallel pricing. When Brown & Williamson entered the economy segment in 1984, the segment included Value-25s, black and whites, and branded generics. With respect to each product, the net price in the market was determined not only by list prices, but also by a wide variety of discounts and promotions to consumers and by rebates to wholesalers. In order to coordinate in an effective manner and eliminate price competition, the cigarette companies would have been required, without communicating, to establish parallel practices with respect to each of these variables, many of which, like consumer stickers or coupons, were difficult to monitor. Liggett has not even alleged parallel behavior with respect to these **[****59]** other variables, and the inherent limitations of tacit collusion suggest that such multivariable coordination is improbable. See R. Dorfman, The Price System 99-100, and n. 10 (1964); Scherer & Ross 279.

In addition, R. J. Reynolds had incentives that, in some respects, ran counter to those of the other cigarette companies. It is implausible that without a shared interest in retarding the growth of the economy segment, Brown & Williamson and its fellow oligopolists could have engaged in parallel pricing and raised generic prices above a competitive level. "Coordination will not be possible when any significant firm **[***197]** chooses, for any reason, to 'go it alone.'" 2 Areeda & Turner P404b2, at 276. It is undisputed -- indeed it was conceded by Liggett's expert -- that R. J. Reynolds acted without regard to the supposed benefits of oligopolistic coordination when it repriced Doral at generic levels in the spring of 1984 and that the natural and probable consequence **[*240]** of its entry into the generic segment was procompetitive. 55 Tr. 15-16; 51 Tr. 128. Indeed, Reynolds' apparent objective in entering the segment was to capture a significant amount of volume in order to **[****60]** regain its number one sales position in the cigarette industry from Philip Morris. App. 75, 130, 209-211. There is no evidence that R. J. Reynolds accomplished this goal during the period relevant to this case, or that its commitment to achieving that goal changed. Indeed, R. J. Reynolds refused to follow Brown & Williamson's attempt to raise generic prices in June 1985. The jury thus had before it undisputed evidence that contradicts the suggestion that the major cigarette companies shared a goal of limiting the growth of the economy segment; one of the industry's two major players concededly entered the segment to expand volume and compete.

Even if all the cigarette companies were willing to participate in a scheme to restrain the growth of the generic segment, they **[**2597]** would not have been able to coordinate their actions and raise prices above a competitive level unless they understood that Brown & Williamson's entry into the segment was not a genuine effort to compete with Liggett. If even one other firm misinterpreted Brown & Williamson's entry as an effort to expand share, a chain reaction of competitive responses would almost certainly have resulted, and oligopoly **[****61]** discipline would have broken down, perhaps irretrievably. "Once the trust among rivals breaks down, it is as hard to put back together again as was Humpty-Dumpty, and non-collusive behavior is likely to take over." Samuelson & Nordhaus, Economics, at 534.

LEdHN[14][] [14]Liggett argues that the means by which Brown & Williamson signaled its anticompetitive intent to its rivals was through its pricing structure. According to Liggett, maintaining existing list prices while offering substantial rebates to wholesalers was a signal to the other cigarette firms that Brown & Williamson did not intend to attract additional smokers to the generic segment by its entry. But a reasonable **[*241]** jury could not conclude that this pricing structure eliminated or rendered insignificant the risk that the other firms might misunderstand Brown & Williamson's entry as a competitive move. The likelihood that Brown & Williamson's rivals would have regarded its pricing structure as an important signal is low, given that Liggett itself, the purported target of the predation, was already using similar rebates, as was R. J. Reynolds in **[****62]** marketing its Doral branded generic. A Reynolds executive responsible for Doral testified that given its and Liggett's use of wholesaler rebates, Brown & Williamson could not have competed effectively without them. App. 756. And despite extensive discovery of the corporate records of R. J. Reynolds and Philip Morris, no documents appeared that indicated any awareness of Brown & Williamson's supposed signal by its principal rivals. Without effective signaling, it is **[***198]** difficult to see how the alleged predation could have had a reasonable chance of success through oligopoly pricing.

LEdHN[15][] [15]Finally, although some of Brown & Williamson's corporate planning documents speak of a desire to slow the growth of the segment, no objective evidence of its conduct permits a reasonable inference that it had any real prospect of doing so through anticompetitive means. It is undisputed that when Brown & Williamson introduced its generic cigarettes, it offered them to a thousand wholesalers who had never before purchased generic cigarettes. Record, Plaintiff's Exh. No. 4079; 87 Tr. 191; 88 Tr. 143-147. The inevitable **[****63]** effect of this marketing effort was to expand the segment, as the new wholesalers recruited retail outlets to carry generic cigarettes. Even with respect to wholesalers already carrying generics, Brown & Williamson's unprecedented volume rebates had a similar expansionary effect. Unlike many branded cigarettes, generics came with no sales guarantee to the wholesaler; any unsold stock represented pure loss to the wholesaler. By providing substantial incentives for wholesalers to place large orders, Brown & Williamson created **[*242]** strong pressure for them to sell more generic cigarettes. In addition, as we have already observed, see *supra, at 236*, many wholesalers passed portions of the rebates about which Liggett complains on to consumers, thus dropping the retail price of generics and further stimulating demand. Brown & Williamson provided a further, direct stimulus, through some $ 10 million it spent during the period of alleged predation placing discount stickers on its generic cartons to reduce prices to the ultimate consumer. 70 Tr. 246. In light of these uncontested facts about Brown & Williamson's conduct, it is not reasonable to conclude that Brown & Williamson threatened **[****64]** in a serious way to restrict output, raise prices above a competitive level, and artificially slow the growth of the economy segment of the national cigarette market.

LEdHN[16][] [16] ***LEdHN[17]***[] [17]To be sure, Liggett's economic expert explained Liggett's theory of predatory **[**2598]** price discrimination and testified that he believed it created a reasonable possibility that Brown & Williamson could injure competition in the United States cigarette market as a whole. App. 600-614. But this does not alter our analysis. ***HN16***[] When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Cf. *J. Truett Payne Co., Inc., 451 U.S. at 564-565* (referring to expert economic testimony not based on "documentary evidence as to the effect of the discrimination on retail prices" as "weak" at best). **[****65]** Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we observed in *Matsushita*, "expert opinion evidence . . . has little probative value in comparison with the economic factors" that may dictate a particular conclusion. *475 U.S. at 594, n. 19*. Here, Liggett's expert based his opinion that Brown & Williamson had a reasonable prospect of recouping its predatory losses on three factors: Brown & Williamson's **[***199]** black and white pricing structure, corporate **[*243]** documents showing an intent to shrink the price differential between generic and branded cigarettes, and evidence of below-cost pricing. App. 601-602. Because, as we have explained, this evidence is insufficient as a matter of law to support a finding of primary-line injury under the Robinson-Patman Act, the expert testimony cannot sustain the jury's verdict.

IV

LEdHN[1F][] [1F] ***LEdHN[18]***[] [18]We understand that the chain of reasoning by which we have concluded that Brown & Williamson is entitled to judgment as a **[****66]** matter of law is demanding. But a reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market. We hold that the evidence cannot support a finding that Brown & Williamson's alleged scheme was likely to result in oligopolistic price coordination and sustained supracompetitive pricing in the generic segment of the national cigarette market. Without this, Brown & Williamson had no reasonable prospect of recouping its predatory losses and could not inflict the injury to competition the antitrust laws prohibit. The judgment of the Court of Appeals is

Affirmed.

Dissent by: STEVENS

Dissent

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

For a period of 18 months in 1984 and 1985, respondent Brown & Williamson Tobacco Corporation (B&W) waged a price war against petitioner, known then as Liggett & Myers (Liggett). Liggett filed suit claiming that B&W's pricing practices violated the Robinson-Patman Act. [1] After a 115-day **[*244]** trial, the jury agreed, and awarded Liggett substantial damages. The Court of Appeals, however, found that Liggett could not succeed on its claim, because B&W, as an independent **[****67]** actor controlling only 12% of the national cigarette market, could not injure competition. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 964 F.2d 335, 340-342 (CA4 1992)*.

Today, the Court properly rejects that holding. See *ante*, at 229-230. Instead of remanding the case to the Court of Appeals to resolve the other issues raised by the parties, however, the Court goes on to review portions of the **[****68]** voluminous trial record, and comes to the conclusion that the evidence does not support the jury's finding that B&W's price discrimination "had a reasonable **[**2599]** possibility of injuring competition." [2] **[***200]** In my opinion the evidence is plainly sufficient to support that finding.

[**69]** **[*245]** I

The fact that a price war may not have accomplished its purpose as quickly or as completely as originally intended does not immunize conduct that was illegal when it occurred. A proper understanding of this case therefore requires a brief description of the situation before the war began in July 1984; the events that occurred during the period between July 1984 and the end of 1985; and, finally, the facts bearing on the predictability of competitive harm during or at the end of that period. [3]

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[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." *15 U.S. C. § 13(a)*.

[2] The jury gave an affirmative answer to the following special issue:

"1. Did Brown & Williamson engage in price discrimination that had a reasonable possibility of injuring competition in the cigarette market as a whole in the United States?" App. 27.

The jury made its finding after being instructed that "injury to competition" means "the injury to consumer welfare which results when a competitor is able to raise and to maintain prices in a market or well-defined submarket above competitive levels. In order to injure competition in the cigarette market as a whole, Brown & Williamson must be able to create a real possibility of both driving out rivals by loss-creating price cutting and then holding on to that advantage to recoup losses by raising and maintaining prices at higher than competitive levels.

"You must remember that the Robinson-Patman Act was designed to protect competition rather than just competitors and, therefore, injury to competition does not mean injury to a competitor. Liggett & Myers can not satisfy this element simply by showing that they were injured by Brown & Williamson's conduct. To satisfy this element, Liggett & Myers must show, by a preponderance of the evidence, that Brown & Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market and not just a reasonable possibility of injuring a competitor in the cigarette market." *Id., at 829-830*.

[3] As the majority notes, the procedural posture of this case requires that we view the evidence in the light most favorable to Liggett. *Ante*, at 213. On review of a judgment notwithstanding the verdict, the party against whom the judgment is entered "must be given the benefit of every legitimate inference that can be drawn from the evidence." See C. Wright & A. Miller, Federal Practice and Procedure § 2528, pp. 563-564 (1971).

Background

B&W is the third largest firm in a highly concentrated **[****70]** industry. *Ante*, at 213. For decades, the industry has been marked by the same kind of supracompetitive pricing that is characteristic of the textbook monopoly. [4] Without the necessity of actual agreement among the six major manufacturers, "prices for cigarettes increased in lockstep, twice a year, for a number of years, irrespective of the rate of inflation, changes in the costs of production, or shifts in consumer demand." *Ibid.* Notwithstanding the controversy over the health effects of smoking and the increase in the federal excise tax, profit margins improved "handsomely" during the period between 1972 and 1983. [5]

[**71]** **[*246]** **[***201]** The early 1980's brought two new developments to the cigarette market. First, in 1980, when its share of the market had declined to 2.3%, Liggett introduced a new line of generic cigarettes in plain black and white **[**2600]** packages, offered at an effective price of approximately 30% less than branded cigarettes. *Ante*, at 214. A B&W memorandum described this action as "the first time that a [cigarette] manufacturer has used pricing as a strategic marketing weapon in the U.S. since the depression era." App. 128. This novel tactic proved successful; by 1984, Liggett's black and whites represented about 4% of the total market and generated substantial profits. The next development came in 1984, when R.J. Reynolds (RJR), the second largest company in the industry, "repositioned" one of its established brands, Doral, by selling it at discount prices comparable to Liggett's black and whites. App. 117-118; *ante*, at 215.

B&W executives prepared a number of internal memoranda planning responses to these two market developments. See App. 120, 127, 157, 166. With respect to RJR, B&W decided to "follo[w] precisely the pathway" of that company, *id.* ***[****72]*** *, at 121*, reasoning that "introduction of a branded generic by B&W now appears to be feasible as RJR has the clout and sales force coverage to maintain the price on branded generics," *id., at 145*. Accordingly, B&W planned to introduce a new "branded generic" of its own, known as Hallmark, to be sold at the same prices as *RJR's Doral. Id., at 124, 142-144*.

[*247] B&W took a more aggressive approach to Liggett's black and whites. It decided to launch its own line of black and white cigarettes with the "same style array" and list price as Liggett's, but with "superior discounts/allowances." *Id., at 124*. B&W estimated that its own black and whites would generate a "trading profit" of $ 5.1 million for the second half of 1984 and $ 43.6 million for 1985. *Id., at 125*. At the same time, however, B&W, anticipating "competitive counterattacks," was "prepared to redistribute this entire amount in the form of additional trade allowances." *Ibid*. B&W's competitive stance was confined to Liggett; the memorandum outlining B&W's plans made no reference to the possibility of countermoves by RJR, or to the use of B&W's trading profits to increase allowances on any product other **[****73]** than black and whites.

This "dual approach" was designed to "provide B&W more influence to manage up the prices of branded generics to improve profitability," *id., at 123*, and also the opportunity to participate in the economy market, with a view toward "managing down generic volume," *id., at 109*. Notwithstanding its ultimate aim to "limit generic segment growth," *id., at 113*, B&W estimated an aggregate potential trading profit on black and whites of $ 342 million for

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[4] When the Court states that "substantial evidence suggests that in recent decades, the industry reaped the benefits of prices above a competitive level," *ante*, at 213, I assume it accepts the proposition that a reasonable jury could find abnormally high prices characteristic of this industry.

[5] An internal B&W memorandum, dated May 15, 1984, states in part:

"Manufacturer's price increases generally were below the rate of inflation but margins improved handsomely due to favorable leaf prices and cost reductions associated with automation. For example, Brown & Williamson's variable margin increased from $ 2.91/M in 1972 to $ 8.78/M in 1981, an increase of over 200%. In 1982, the industry became much more aggressive on the pricing front, fueled by a 100% increase in the Federal Excise Tax. Brown & Williamson's variable margin increased from $ 10.78/M in 1982 and *[sic]* to $ 12.61/M in 1983.

"The impact of these pricing activities on the smoking public was dramatic. The weighted average retail price of a pack of cigarettes increased 56% between 1980 and 1983 (from $ .63 to $ .98)." App. 127.

1984 to 1988, *id., at 146*. Though B&W recognized that it might be required to use "some or all of this potential trading profit" to maintain its market position, it also believed that it would recoup its losses as the segment became "more profitable, **[***202]** particularly as it approaches maturity." *Ibid*.

B&W began to implement its plan even before it made its first shipment of black and whites in July 1984, with a series of price announcements in June of that year. When B&W announced its first volume discount schedule for distributors, Liggett responded by increasing its own discounts. Though Liggett's discounts remained lower than B&W's, B&W responded in turn by increasing its rebates still **[****74]** further. After four or five moves and countermoves, the dust settled **[*248]** with B&W's net prices to distributors lower than Liggett's. [6] B&W's deep discounts not only forfeited all of its $ 48.7 million in projected trading profits for the next 18 months, but actually resulted in sales below B&W's average variable cost. *Id., at 338-339*.

[2601]** Assessing the pre-July 1984 evidence tending to prove that B&W was motivated by anticompetitive intent, the District Court observed that the documentary evidence was "more voluminous and detailed than any other reported case. This evidence not only indicates **[****75]** B&W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment." *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344, 354 (MDNC 1990)*.

The 18-Month Price War

The volume rebates offered by B&W to its wholesalers during the 18-month period from July 1984 to December 1985 unquestionably constituted price discrimination covered by *§ 2(a)* of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, *15 U.S.C. § 13(a)*. [7] **[****76]** Nor were the discounts justified by any statutory or affirmative defense: They were not cost justified, [8] App. 525, were **[*249]** not good-faith efforts to meet the equally low price of a competitor, [9] and were not mere introductory or promotional discounts, 91 Tr. 42.

The rebate program was intended to harm Liggett and in fact caused it **[***203]** serious injury. [10] The jury found that Liggett had suffered actual damages of $ 49.6 million, App. 28, an amount **[****77]** close to, but slightly larger than, the $ 48.7 million trading profit B&W had indicated it would forgo in order to discipline Liggett. See *supra, at*

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[6] On June 4, 1984, B&W announced a maximum rebate of $ 0.30 per carton for purchases of over 8,000 cases per quarter; a week later, Liggett announced a rebate of $ 0.20 on comparable volumes. On June 21, B&W increased its rebate to $ 0.50, and a day later, Liggett went to $ 0.43. After three more increases, B&W settled at $ 0.80 per carton, while Liggett remained at $ 0.73. See App. 327, 420-421.

[7] That quantity discounts are covered by the Act, and prohibited when they have the requisite effect on competition, has been firmly established since our decision in *FTC v. Morton Salt Co., 334 U.S. 37, 42-44, 92 L. Ed. 1196, 68 S. Ct. 822 (1948)*.

[8] "*Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." *§ 13(a)*.

[9] "*Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." *§ 13(b)*.

The jury gave a negative answer to the following special issue:

"3. Did Brown & Williamson engage in price discrimination in good faith with the intention to meet, but not beat, the equally low net prices of Liggett Group, Inc.?" App. 27-28.

[10] By offering its largest discounts to Liggett's 14 largest customers, App. 168-169, 174, B&W not only put its "money where the volume is," *id., at 402*, but also applied maximum pressure to Liggett at a lesser cost to itself than would have resulted from a nondiscriminatory price cut.

247. To inflict this injury, B&W sustained a substantial loss. During the full 18-month period, B&W's revenues ran consistently below its total variable costs, with an average deficiency of approximately $ 0.30 per carton and a total loss on B&W black and whites of almost $ 15 million. App. 338-339. That B&W executives were willing to accept losses of this magnitude during the entire 18 months is powerful evidence of their belief that prices ultimately could be "managed up" to a level that would allow B&W to recoup its investment.

The Aftermath

At the end of 1985, **[****78]** the list price of branded cigarettes was $ 33.15 per carton, and the list price of black and whites, $ 19.75 per carton. App. 325. Over the next four years, the list price on both branded and black and white cigarettes **[*250]** increased twice a year, by identical amounts. The June 1989 increases brought the price of branded cigarettes to $ 46.15 per carton, and the price of black and whites to $ 33.75 -- an amount even higher than the price for branded cigarettes when the war ended in December 1985. *Ibid*. [11] Because the rate of increase was higher on **[**2602]** black and whites than on brandeds, the price differential between the two types of cigarettes narrowed, *ibid.*, from roughly 40% in 1985 to 27% in 1989. See *964 F.2d at 338*.

[**79]** The expert economist employed by Liggett testified that the post-1985 price increases were unwarranted by increases in manufacturing or other costs, taxes, or promotional expenditures. App. 525. To be sure, some portion of the volume rebates granted distributors was passed on to consumers in the form of promotional activity, so that consumers did not feel the full brunt of the price increases. Nevertheless, the record amply supports the conclusion that the post-1985 price increases in list prices produced higher consumer prices, as well as higher profits for the manufacturers. [12]

[**80]** The legal question presented by **[***204]** this evidence is whether the facts as they existed during and at the close of the 18-month period, and all reasonable inferences to be drawn from **[*251]** those facts, see n. 3, *supra*, justified the finding by the jury that B&W's discriminatory pricing campaign "had a reasonable possibility of injuring competition," see *supra, at 244*, and n. 2.

II

The Sherman Act, 26 Stat. 209, enacted in 1890, the Clayton Act, 38 Stat. 730, enacted in 1914, and the Robinson-Patman Act, which amended the Clayton Act in 1936, all serve the purpose of protecting competition. Because they have a common goal, the statutes are similar in many respects. All three prohibit the predatory practice of deliberately selling below cost to discipline a competitor, either to drive the competitor out of business or to raise prices to a level that will enable the predator to recover its losses and, in the long run, earn additional profits. Sales below cost and anticompetitive intent are elements of the violation of all three statutes. Neither of those elements, however, is at issue in this case. See *ante*, at 231 (record contains sufficient evidence of anticompetitive **[****81]** intent and below-cost pricing).

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[11] It is also true that these same years, other major manufacturers entered the generic market and expanded their generic sales. *Ante*, at 217. Their entry is entirely consistent with the possibility that lockstep increases in the price of generics brought them to a level that was supra-competitive, through lower than that charged on branded cigarettes.

[12] "Q Does this mean that the price increases, which you testified are happening twice a year, are used up in these consumer promotions?

"A Not by any stretch of the imagination. Although there has been an increase in the use of this type of promotional activity over the last four or five years, the increase in that promotional activity has been far outstripped by the list price increases. The prices go up by a lot; the promotional activity, indeed, does go up. But the promotional activity has not gone up by anywhere near the magnitude of the list price increases. Further, those price increases are not warranted by increasing costs, since the manufacturing costs of making cigarettes have remained roughly constant over the last five years." App. 509.

The statutes do differ significantly with respect to one element of the violation, the competitive consequences of predatory conduct. Even here, however, the three statutes have one thing in common: Not one of them requires proof that a predatory plan has actually succeeded in accomplishing its objective. *Section 1* of the Sherman Act requires proof of a conspiracy. It is the joint plan to restrain trade, however, and not its success, that is prohibited by *§ 1*. *Nash v. United States, 229 U.S. 373, 378, 57 L. Ed. 1232, 33 S. Ct. 780 (1913)*. *Section 2* of the Sherman Act applies to independent conduct, and may be violated when there is a "dangerous probability" that an attempt to achieve monopoly power will succeed. *Swift & Co. v. United States, 196 U.S. 375, 396, 49 L. Ed. 518, 25 S. Ct. 276 (1905)*. The Clayton Act goes beyond the "dangerous probability" standard to cover price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *§ 2*, 38 Stat. 730.

[*252] The element of competitive injury as defined **[****82]** in the Robinson-Patman Act is broader still. [13] See S. Rep. No. 1502, 74th Cong., 2d Sess., 4 (1936) (Act substantially **[**2603]** broadens similar clause of Clayton Act). [14] The Robinson-Patman Act was designed to **[***205]** reach discriminations "in their incipiency, before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co. v. FTC, 324 U.S. 726, 738, 89 L. Ed. 1320, 65 S. Ct. 961 (1945)* (internal quotation marks omitted). Or, as the Report of the Senate Judiciary Committee on the proposed Act explained, "to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 1502, at 4.

[**83]** Accordingly, our leading case concerning discriminatory volume rebates described the scope of the Act as follows:

> **[*253]** "There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy, or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that 'the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' *Corn Products* Refining *Co. v. Federal Trade Comm'n, 324 U.S. 726, 742, 65 S. Ct. 961, 89 L. Ed. 1320*." *FTC v. Morton Salt Co., 334 U.S.37, 46*, *68 S. Ct. 822, 92 L. Ed. 1196 (1948)*.

See also *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435, 75 L. Ed. 2d 174, 103 S. Ct. 1282 (1983)* ("In keeping with the Robinson-Patman **[****84]** Act's prophylactic purpose, *§ 2(a)* does not require that the discriminations must in fact have harmed competition" (internal quotation marks omitted)).

In this case, then, Liggett need not show any actual harm to competition, but only the reasonable possibility that such harm would flow from B&W's conduct. The evidence presented supports the conclusion that B&W's price war

[13] See text of statute, n. 1, *supra.*

[14] One of the purposes of broadening the Clayton Act's competitive injury language in the Robinson-Patman Act was to provide more effective protection against predatory price cutting. As the Attorney General's National Committee to Study the Antitrust Laws explained in its 1955 report:

"In some circumstances, to be sure, injury to even a single competitor should bring the Act into play. Predatory price cutting designed to eliminate a smaller business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength. The invalidation of such deliberate price slashes for the purpose of destroying even a single competitor, moreover, accords distinct recognition to the narrower tests of 'injury' added to the price discrimination provisions of the Clayton Act through the 1936 Robinson-Patman amendments. The discrimination provisions in the original Clayton Act were feared by the legislators as inadequate to check the victimization of individual businessmen by predatory price cuts that nevertheless created no *general* impairment of competitive conditions in a wider market. To reach such destructive price cuts endangering the survival of smaller rivals of a powerful seller was an express objective of the liberalizing amendments in the 'injury' clause of the Robinson-Patman Act." Report of the Attorney General's National Committee to Study the Antitrust Laws 165-166 (1955) (footnotes omitted).

was intended to discipline Liggett for its unprecedented use of price competition in an industry that had enjoyed handsome supracompetitive profits for about half a century. The evidence also demonstrates that B&W executives were confident enough in the feasibility of their plan that they were willing to invest millions of company dollars in its outcome. And all of this, of course, must be viewed against a back-ground of supracompetitive, parallel pricing, in which "prices for cigarettes increased in lockstep, twice a year . . . irrespective of the rate of inflation, changes in the cost of production, or shifts in consumer demand," *ante*, at 213, bringing with them dramatic increases in profit margins, see n. 5, *supra.* In this context, it is surely fair to infer that B&W's disciplinary **[*254]** program **[****85]** had a reasonable prospect of persuading Liggett to forgo its maverick price **[***206]** reductions and return to parallel **[**2604]** pricing policies, and thus to restore the same kind of supracompetitive pricing that had characterized the industry in the past. When the facts are viewed in the light most favorable to Liggett, I think it clear that there is sufficient evidence in the record that the "reasonable possibility" of competitive injury required by the statute actually existed.

III

After 115 days of trial, during which it considered 2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses, the jury deliberated for nine days and then returned a verdict finding that B&W engaged in price discrimination with a "reasonable possibility of injuring competition." *748 F. Supp. at 348, n. 4*; n. 2, *supra.* The Court's contrary conclusion rests on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence.

First, as a matter of law, the Court reminds us that the Robinson-Patman Act is concerned with consumer welfare and competition, as opposed to protecting **[****86]** individual competitors from harm; "the antitrust laws were passed for the protection of competition, not competitors. " See *ante*, at 224 (internal quotations marks and emphasis omitted). For that reason, predatory price cutting is not unlawful unless the predator has a reasonable prospect of recouping his investment from supracompetitive profits. *Ibid*. The jury, of course, was so instructed, see n. 2, *supra*, and no one questions that proposition here.

As a matter of fact, the Court emphasizes the growth in the generic segment following B&W's entry. As the Court notes, generics' expansion to over 12% of the total market by 1988 exceeds B&W's own forecast that the segment would grow to only about 10%, assuming no entry by B&W. *Ante*, at 234. What these figures do not do, however, is answer the **[*255]** relevant question: whether the prices of generic cigarettes during the late 1980's were competitive or supracompetitive.

On this point, there is ample, uncontradicted evidence that the list prices on generic cigarettes, as well as the prices on branded cigarettes, rose regularly and significantly during the late 1980's, in a fashion remarkably similar to the price **[****87]** change patterns that characterized the industry in the 1970's when supracompetitive, oligopolistic pricing admittedly prevailed. See *supra, at 245*; *ante*, at 213. Given its knowledge of the industry's history of parallel pricing, I think the jury plainly was entitled to draw an inference that these increased prices were supracompetitive.

The Court responds to this evidence dismissively, suggesting that list prices have no bearing on the question because promotional activities of the cigarette manufacturers may have offset such price increases. *Ante*, at 235-236. That response is insufficient for three reasons. First, the promotions to which the majority refers related primarily to branded cigarettes; accordingly, while they narrowed the differential between branded prices and black and white prices, they did not reduce the consumer price of **[***207]** black and whites. See 33 Tr. 208-210. Second, the Court's speculation is inconsistent with record evidence that the semiannual list price increases were not offset by consumer promotions. See n. 12, *supra.* See also *ante*, at 218 ("at least some portion of the list price increase was reflected in a higher net price **[****88]** to the consumer"). Finally, to the extent there is a dispute regarding the effect of promotional activities on consumer prices for generics, the jury presumably resolved that dispute in Liggett's favor, and the Court's contrary speculation is an insufficient basis for setting aside that verdict. [15]

[**89]** **[*256]** **[**2605]** As a matter of economics, the Court reminds us that price cutting is generally procompetitive, and hence a "boon to consumers." *Ante*, at 224. This is true, however, only so long as reduced prices do not fall below cost, as the cases cited by the majority make clear. [16] **[****90]** When a predator deliberately engages in below-cost pricing targeted at a particular competitor over a sustained period of time, then price cutting raises a credible inference that harm to competition **[*257]** is likely to ensue. [17] None of our cases disputes that proposition.

[**91]** Also as a matter of economics, the **[***208]** Court insists that a predatory pricing program in an oligopoly is unlikely to succeed absent actual conspiracy. Though it has rejected a somewhat stronger version of this proposition as a rule of decision, see *ante*, at 229-230, the Court comes back to the same economic theory, relying on the supposition that an "anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly," *ante*, at 228. See *ante*, at 238-243 (implausibility of tacit coordination among cigarette oligopolists in 1980's). I would suppose, however, that the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would an outsider, who might not know the difference between Haydn and Mozart. [18] In any event, the jury was **[*258]**

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[15] In finding an absence of actual supracompetitive pricing, the Court also relies on the testimony of Liggett executives, who stated that industry prices were fair. Illustrative is the following exchange:

"Q I want to know -- yes or no -- sir, whether or not you say that the price you charged for branded cigarettes, which is the same price you say everybody else charged, was a fair and equitable price for that product to the American consumer.

"A It's what the industry set, and based on that it's a fair price." App. 396.

The problem with this testimony, and testimony like it, is that it relates to the period before the price war, as well as after, see *id., at 392*, when there is no real dispute but that prices were supracompetitive. ("The profits in the cigarette industry are the best of any industry I've been associated with, very much so." *Ibid*.) Some of the testimony cited by the Court, for instance, is that of an outside director who served only from 1977 or 1978 until 1980, see 64 Tr. 51-56, cited *ante*, at 237; his belief in the competitiveness of his industry must be viewed against the "substantial evidence suggesting that in recent decades, the industry reaped the benefits of prices above a competitive level" to which the majority itself refers, *ante*, at 213.

The jury was, of course, entitled to discount the probative force of testimony from executives to the effect that there was no collusion among tobacco manufacturers, App. 397-398, and that they had appeared before a congressional committee to vouch for the competitive nature of their industry, *id., at 623-631*. The jury was also free to give greater weight to the documentary evidence presented, the inferences to be drawn there-from, and the testimony of experts who agreed with the textbook characterization of the industry. See App. 640-645; R. Tennant, American Cigarette Industry 342 (1950).

[16] In *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339-340, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*, for example, we noted that low prices benefit consumers "so long as they are above predatory levels." In *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 118, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*, we recognized that price cutting of a predatory nature is "inimical" to competition, and limited our approving comments to pricing that is "above some measure of incremental costs." *Id., at 117-118*, and n. 12 (internal quotation marks omitted).

[17] *Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 696-698, 18 L. Ed. 2d 406, 87 S. Ct. 1326*, and n. 12, *386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326 (1967)*. See also *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 596 (CA8 1987)* (threat to competition may be shown by predatory intent, combined with injury to competitor), cert. denied, ***484 U.S. 1010, 98 L. Ed. 2d 658, 108 S. Ct. 707 (1988)***; *Double H Plastics, Inc. v. Sonoco Products Co., 732 F.2d 351, 354* (CA3) (threat to competition may be shown by evidence of predatory intent, in form of below-cost pricing), cert. denied, ***469 U.S. 900, 83 L. Ed. 2d 212, 105 S. Ct. 275 (1984)***; *D.E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (CA6 1983)* (anticompetitive effect may be proven inferentially from anticompetitive intent), cert. denied, ***467 U.S. 1242, 82 L. Ed. 2d 822, 104 S. Ct. 3513 (1984)***. See generally *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)* (in determining whether rule violates ***antitrust law***, "knowledge of intent may help the court to interpret facts and to predict consequences").

surely entitled to **[**2606]** infer that at the time of the price war itself, B&W reasonably believed that it could signal its intentions to its fellow oligopolists, see App. 61, assuring their continued cooperation.

[**92]** Perhaps the Court's most significant error is the assumption that seems to pervade much of the final sections of its opinion: that Liggett had the burden of proving either the actuality of supracompetitive pricing, or the actuality of tacit collusion. See *ante*, at 233-237 (finding absence of actual supracompetitive pricing), 238-243 (finding absence of evidence suggesting actual coordination). In my opinion, the jury was entitled to infer from the succession of price increases after 1985 -- when the prices for branded and generic cigarettes increased every six months from $ 33.15 and $ 19.75, respectively, to $ 46.15 and $ 33.75 -- that B&W's below-cost pricing actually produced supracompetitive prices, with the help of tacit collusion among the players. See *supra, at 255*. But even if that were not so clear, the jury would surely be entitled to infer that B&W's predatory plan, in which it invested millions of dollars for the purpose of achieving an admittedly anticompetitive result, carried a "reasonable possibility" of injuring competition.

Accordingly, I respectfully dissent.

References

*54 Am Jur 2d, Monopolies, Restraints of Trade, **[****93]** and Unfair Trade Practices 105*, *153-159*, *188*

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:248, 54:256

12 Am Jur Proof of Facts 345, Tobacco Hazards and Legal Liability

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 13(a)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 36.5, 38, 41.5

L Ed Index, Price Control or Discrimination; Restraints of Trade, Monopolies, and Unfair Trade Practices; Robinson-Patman Act; Tobacco and Tobacco Products

ALR Index, Prices and Pricing; Restraints of Trade and Monopolies; Robinson-Patman Act; Tobacco and Tobacco Products

Annotation References:

Robinson-Patman Act as construed by Supreme Court. *2 L Ed 2d 1737*.

Proof of injury to competition as jurisdictional requirement under 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 USCS 13(a)*). 47 ALR Fed 846.

Discounts permissible under Robinson-Patman Amendment to Clayton Act. **[****94]** 1 ALR2d 276.

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[18] Judge Easterbrook has made the same point:

"Wisdom lags far behind the market

. . . . "Lawyers know less about the business than the people they represent . . . . The judge knows even less about the business than the lawyers." Easterbrook, The Limits of Antitrust, *63 Texas L. Rev. 1, 5 (1984)*.

Hartford Fire Ins. Co. v. Cal.

Supreme Court of the United States

February 23, 1993, Argued ; June 28, 1993 [*] , Decided

No. 91-1111

Reporter

509 U.S. 764 *; 113 S. Ct. 2891 **; 125 L. Ed. 2d 612 ***; 1993 U.S. LEXIS 4404 ****; 61 U.S.L.W. 4855; 1993-1 Trade Cas. (CCH) P70,280; 93 Cal. Daily Op. Service 4830; 93 Daily Journal DAR 8186; 7 Fla. L. Weekly Fed. S 638

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS 91-1111 V. CALIFORNIA ET AL.; AND MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL., PETITIONERS 91-1128 V. CALIFORNIA ET AL.

Prior History: [**1]** ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *938 F.2d 919*, affirmed in part, reversed in part, and remanded.

Core Terms

reinsurers, boycott, primary insurer, terms, Sherman Act, regulated, insurers, domestic, coverage, claim for relief, McCarran-Ferguson Act, conspiracy, comity, risks, concerted, cases, claims-made, complaints, extraterritorial, pollution, insurance business, exemption, occurrence, changes, reinsurance contract, district court, Underwriters, antitrust, policies, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN1[ ] **Antitrust & Trade Law, Sherman Act**

The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. *15 U.S.C.S. § 1*.

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[*] Together with No. 91-1128, Merrett Underwriting Agency Management Ltd. et al. v. California et al., also on certiorari to the same court.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN2[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act declares 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, to be illegal. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

Insurance Law > Industry Practices > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN3[] **Higher Education & Professional Associations, Professional Associations**

The McCarran-Ferguson Act provides that regulation of the insurance industry is generally a matter for the States, *15 U.S.C.S. § 1012(a)*, and that no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, *15 U.S.C.S. § 1012(b)*. *Section 2(b)* of the McCarran-Ferguson Act makes it clear nonetheless that the Sherman Act, *15 U.S.C.S. § 1*, applies to the business of insurance to the extent that such business is not regulated by State Law, *15 U.S.C.S. § 1012(b)*. Section 3(b) provides that nothing in the McCarran-Ferguson Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation, *15 U.S.C.S. § 1013(b)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN4[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

By its terms, the antitrust exemption of *§ 2(b)* of the McCarran-Ferguson Act applies to the business of insurance to the extent that such business is regulated by state law. Business as used in *§ 2(b)* is most naturally read to refer to mercantile transactions, buying and selling, and traffic.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN5[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The business of insurance should be read to single out one activity from others, not to distinguish one entity from another.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **International Aspects, International Application of US Law**

The Sherman Act, *15 U.S.C.S. § 1*, applies to foreign conduct that is meant to produce and did in fact produce some substantial effect in the United States.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **International Aspects, International Application of US Law**

The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct.

Lawyers' Edition Display

Decision

Conspiracy claims under Sherman Act against domestic and foreign insurers held (1) cognizable as within McCarran-Ferguson Act's boycott exception; and (2) not barred by international comity.

Summary

According to complaints filed in multiple federal actions by 19 states and many private plaintiffs, certain members of the insurance industry had conspired to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States, in violation of 1 of the Sherman Act (*15 USCS 1*). Among the allegations made in the complaints, it was claimed that four domestic primary insurers had conspired with domestic and foreign reinsurers, insurance brokers, and insurance associations to procure desired changes with respect to insurance coverage in the terms of the standard CGL forms used in the United States, and in particular that (1) some reinsurers had threatened to withdraw from reinsuring primary insurers who used a CGL form which the reinsurers disfavored; (2) reinsurers had threatened to boycott reinsuring North American CGL risks; (3) foreign and domestic reinsurers had presented positions at an insurance association meeting that the standard CGL forms had to be changed or else there would be no reinsurance; (4) insurers and reinsurers had told insurance brokers and agents that a reinsurance boycott would ensue if revised CGL forms were not approved; (5) the largest domestic reinsurer had agreed either to coerce the adoption of demands for changes in CGL forms or to derail the forms program; and (6) domestic reinsurers had agreed to boycott the CGL forms unless certain terms were added. The complaints also alleged that (1) a group of reinsurers and brokers based in London, England, had conspired to coerce primary insurers in the United States to offer CGL coverage only for claims made during the policy period; (2) a group of London reinsurers had conspired to withhold reinsurance for certain coverage; (3) a group of domestic primary insurers, the association which issued the CGL forms, and foreign reinsurers had conspired to restrain trade in the markets for excess and "umbrella" insurance; and (4) a group of London and domestic retrocessional reinsurers--that is, insurers of the risks of reinsurers--had conspired to withhold retrocessional reinsurance for certain risks. The actions were consolidated for litigation in the United States District Court for the Northern District of California. The

District Court granted the defendants' motions to dismiss the Sherman Act claims for failure to state a cause of action (*723 F Supp 464*). On appeal, the United States Court of Appeals for the Ninth Circuit, reversing, expressed the view that (1) the domestic defendants were not exempt from federal antitrust liability under 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), which provides that the Sherman Act applies to the business of insurance to the extent that such business is not regulated by state law, because the domestic defendants forfeited their exemption when they conspired with the foreign reinsurers, who were not exempt; (2) even if the defendants' alleged conduct was exempt from Sherman Act liability under 2(b), such conduct was within the exception to immunity under the McCarran-Ferguson Act provided by 3(b) (*15 USCS 1013(b)*) for any "act of boycott, coercion, or intimidation"; and (3) the principle of international comity did not bar the exercise of federal jurisdiction against the foreign defendants (*938 F2d 919*).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded the case for further proceedings. It was held, with different majorities of the Justices for each holding, that (1) the domestic insurers were immune from antitrust liability under 2(b); (2) there were sufficient allegations of a "boycott" under 3(b)--defined as the refusal to deal with another in unrelated transactions in order to achieve the terms desired in a targeted transaction--to sustain several counts of complaint against a motion to dismiss; and (3) international comity did not counsel against exercising jurisdiction over the London-based reinsurers.

In those portions of the opinion of Souter, J., which constituted the opinion of the court, it was held in pertinent part (1) in a portion (Part II-A) expressing the unanimous view of the court, that domestic insurers did not lose their immunity from antitrust liability under 2(b) by acting in concert with foreign insurers that were assumed for the sake of argument not to be regulated by state law within the meaning of 2(b); and (2) in a portion (Part III) joined by Rehnquist, Ch. J., and White, Blackmun, and Stevens, JJ., that, even assuming that in a proper case a court could decline to exercise Sherman Act jurisdiction over foreign conduct, the principle of international comity did not counsel against exercising jurisdiction with respect to allegations that the London-based reinsurers had engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact had produced substantial effect, because there was no conflict with British law, where the London reinsurers did not claim that (a) British law required them to act in some fashion prohibited by the law of the United States, or (b) their compliance with the laws of both countries was otherwise impossible. Also, Souter, J., in a portion (Part II-B) joined by White, Blackmun, and Stevens, J., expressed the view that (1) neither the Supreme Court's precedents nor 3(b) warranted a definition of "boycott" which was confined to refusals to deal that were unrelated or collateral to the objective sought by those refusing to deal; and (2) those claims which asserted a conspiracy among the primary insurers, reinsurers, brokers, and associations to procure changes in the CGL forms alleged one or more acts of "boycott" under 3(b) and were thus sufficient to survive a motion to dismiss.

In that portion (Part I) of the opinion of Scalia, J., which constituted the opinion of the court, it was held by Scalia, J., joined by Rehnquist, Ch. J., and O'Connor, Kennedy, and Thomas, JJ., that (1) for purposes of 3(b), a "boycott" meant the refusal to deal with another in unrelated transactions in order to achieve the terms desired in a targeted transaction; and (2) there were sufficient allegations of a "boycott" under such standard to sustain counts of complaint against a motion to dismiss, with respect to those claims asserting a conspiracy to procure changes in the CGL forms. Also, Scalia, J., in a dissenting portion (Part II) joined by O'Connor, Kennedy, and Thomas, JJ., expressed the view that in the case at hand (1) there was a conflict of laws with respect to the extraterritorial application of the Sherman Act to British corporations and other British subjects; and (2) application of the Sherman Act to the British defendants was unreasonable, since (a) the relevant activity took place primarily in the United Kingdom, (b) the defendants had their principal places of business and residence outside the United States, (c) England had comprehensive regulations governing reinsurance and a heavy interest in regulating such activity, and (d) the fact that 2(b) generally allowed states to override the Sherman Act in the insurance field suggested that the importance of regulation to the United States was slight.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

Domestic insurers do not lose their immunity from antitrust liability under 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), which immunity applies to the business of insurance to the extent that such business is regulated by state law, by acting in concert with foreign insurers that are assumed for the sake of argument not to be regulated by state law within the meaning of 2(b).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- McCarran-Ferguson Act -- "boycott" -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]***LEdHN[2D]***[] [2D]***LEdHN[2E]***[] [2E]

For purposes of 3(b) of the McCarran-Ferguson Act (*15 USCS 1013(b)*), which provides that nothing in such Act--under which the business of insurance generally is exempt from antitrust liability to the extent that such business is regulated by state law--renders the Sherman Act (*15 USCS 1 et seq.*) inapplicable to any act of "boycott," a "boycott" means the refusal to deal with another in unrelated transactions in order to achieve the terms desired in a targeted transaction; the parties to a concerted agreement to terms--that is, a cartelization--are not engaging in a conditional boycott within the meaning of 3(b) because such parties are not coercing anyone in the usual sense of the word; accordingly, there are sufficient allegations of a "boycott" under such standard to sustain several counts of complaint against a motion to dismiss, in a consolidated action alleging a conspiracy in unreasonable restraint of commerce among members of the insurance industry in violation of 1 of the Sherman Act (*15 USCS 1*), insofar as such counts contain allegations that (1) reinsurers threatened to withdraw from reinsuring primary insurers who used a certain commercial general liability (CGL) form which the reinsurers disfavored, (2) reinsurers threatened to boycott reinsuring North American CGL risks, (3) foreign and domestic reinsurers presented positions at an insurance association meeting that the standard CGL forms had to be changed or else there would be no reinsurance, (4) insurers and reinsurers told insurance brokers and agents that a reinsurance boycott would ensue if revised CGL forms were not approved, (5) the largest domestic reinsurer agreed either to coerce the adoption of demands for changes in CGL forms or to derail the forms program, and (6) domestic reinsurers agreed to boycott the CGL forms unless certain terms were added. (Souter, White, Blackmun, and Stevens, JJ., dissented in part from this holding.)

CONFLICT OF LAWS §45 > comity -- Sherman Act -- foreign reinsurers -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]***LEdHN[3D]***[] [3D]

Even assuming that, in a proper case a court may decline to exercise jurisdiction under the Sherman Act (*15 USCS 1 et seq.*) over foreign conduct, the principle of international comity does not counsel against exercising jurisdiction with respect to Sherman Act allegations that reinsurers based in London, England, engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect, because there is no conflict with British law, where the London reinsurers do not claim that (1) British law requires them to act in some fashion prohibited by the law of the United States, or (2) their compliance with the laws of both countries is otherwise impossible. (Scalia, O'Connor, Kennedy, and Thomas, JJ., dissented from this holding.)

APPEAL §1293 > complaint -- acceptance of allegations -- > Headnote:
LEdHN[4][] [4]

On certiorari to review a Federal Court of Appeals' judgment reversing a Federal District Court's grant of motions to dismiss complaints in a consolidated action alleging a conspiracy among members of the insurance industry in violation of 1 of the Sherman Act (*15 USCS 1*), the United States Supreme Court will take the allegations of the complaints as true.

APPEAL §1293 > model complaint -- assumptions -- consideration on remand -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

On certiorari to review a Federal Court of Appeals' judgment reversing a Federal District Court's grant of motions to dismiss complaints by states and private parties in a consolidated action alleging a conspiracy among members of the insurance industry in violation of 1 of the Sherman Act (*15 USCS 1*), the United States Supreme Court will assume that where the private parties have chosen in their brief to use one state's complaint as a representative model of their claims, the private parties' complaints track that state's complaint; upon the Supreme Court's remand of such case, the courts below will be free to take into account any relevant differences among the complaints that the parties may bring to their attention.

APPEAL §1293 > complaints -- assumptions -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

With respect to complaints in a consolidated action against members of the insurance industry in violation of 1 of the Sherman Act (*15 USCS 1*), the United States Supreme Court, on certiorari to review a Federal Court of Appeals' judgment reversing a Federal District Court's grant of motions to dismiss such complaints, will assume that domestic reinsurers alleged to be involved in a conspiracy to withhold retrocessional insurance--that is, insurers of the risks of reinsurers--for certain risks are among the unnamed coconspirators mentioned in the complaints where (1) the complaints' statements of facts describe the conspiracy as involving reinsurers in "London and the United States"; but (2) the claims for relief name only the London reinsurers.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- > Headnote:
LEdHN[7][] [7]

With respect to the provision of 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*) that "the business of insurance" is exempt from antitrust liability to the extent that such business is regulated by state law, the definite article before the word "business" shows that such word is most naturally read to refer to mercantile transactions, buying and selling, and traffic; for purposes of 2(b), "the business of insurance" is not meant to refer to a single entity and should be read to single out one activity from others, rather than to distinguish one entity from another.

EVIDENCE §343.5 > antitrust -- assumption -- > Headnote:
LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]

The grant of immunity, under 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), from liability under the Sherman Act (*15 USCS 1 et seq.*), the Clayton Act (*15 USCS 12 et seq.*), or the Federal Trade Commission Act (*15 USCS 41 et seq.*) for acts constituting "the business of insurance" to the extent that such business is regulated by state law assumes that acts which, but for that grant, would violate such federal statutes are part of "the business of insurance."

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §13 > labor unions -- > Headnote:
LEdHN[9A][] [9A]***LEdHN[9B]***[] [9B]

Labor unions are not immune from federal antitrust liability for certain types of agreements with employers, such as agreements to impose a certain wage scale on other bargaining units.

APPEAL §1750 > question left open on remand -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

Upon reversing a Federal Court of Appeals' judgment to the extent that such judgment held that domestic primary insurers, reinsurers, insurance trade associations, and a reinsurance broker lost their exemption from antitrust liability under 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*) because they acted in concert with foreign reinsurers, the United States Supreme Court will leave to the Court of Appeals on remand the question whether the activities of the domestic reinsurers were "regulated by state law" within the meaning of 2(b).

CONFLICT OF LAWS §97.5 > INTERNATIONAL LAW §6 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §21 > comity -- > Headnote:
LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]***LEdHN[11C]***[] [11C]

The Sherman Act (*15 USCS 1 et seq.*) applies to foreign conduct which produces a substantial intended effect in the United States; concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.

COURTS §530 > jurisdiction -- Congress -- > Headnote:
LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]

Congress has exercised prescriptive jurisdiction under the Sherman Act (*15 USCS 1 et seq.*).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > statutory exemption -- > Headnote:
LEdHN[13A][] [13A]***LEdHN[13B]***[] [13B]

The alleged conduct of reinsurers based in London, England, in engaging in unlawful conspiracies which substantially affected the market for insurance in the United States meets the requirements of the exception to 402 of the Foreign Trade Antitrust Improvements Act of 1982 (*15 USCS 6a*)--which generally makes the Sherman Act (*15 USCS 1 et seq.*) inapplicable to conduct involving nonimport foreign trade or commerce--for conduct which has a direct, substantial, and reasonably forseeable effect on domestic or import commerce.

CONFLICT OF LAWS §97.5 > INTERNATIONAL LAW §6 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §21 > foreign conduct -- > Headnote:
LEdHN[14][] [14]

The fact that conduct is lawful in the foreign state in which it took place will not, of itself, bar application of the United States antitrust laws, even where such foreign state has a strong policy to permit or encourage such conduct; no conflict of law exists, for these purposes, where a person subject to regulation by two states can comply with the laws of both. (Scalia, O'Connor, Kennedy, and Thomas, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > license refusal -- employment -- > Headnote:
LEdHN[15][] [15]

Although both an agreement among competing motion picture distributors under which they refuse to license films to exhibitors except on standardized terms, and an attempt by an association of employers to establish industrywide terms of employment, are unreasonable restraints of trade under the Sherman Act (*15 USCS 1 et seq.*), neither of such concerted actions are properly characterized as boycotts as far as the Sherman Act is concerned.

BOYCOTT §1 > activities -- > Headnote:
LEdHN[16A][] [16A]***LEdHN[16B]***[] [16B]

"Boycott" is a multifaceted phenomenon that includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, and social boycotts, but it does not include refusals to deal because of objections to proposed terms.

LABOR §123 > boycott -- > Headnote:
LEdHN[17][] [17]

A refusal to work changes from strike to boycott only when it seeks to obtain action from the employer which is unrelated to the employment contract.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- McCarran-Ferguson Act -- > Headnote:
LEdHN[18A][] [18A]***LEdHN[18B]***[] [18B]***LEdHN[18C]***[] [18C]

For purposes of 3(b) of the McCarran-Ferguson Act (*15 USCS 1013(b)*)--which provides that nothing in such Act, under which the business of insurance generally is exempt from antitrust liability to the extent that such business is regulated by state law, renders the Sherman Act (*15 USCS 1 et seq.*) inapplicable to any act of "boycott, coercion, or intimidation"--the alleged insistence by a number of reinsurers upon certain primary insurance terms as a condition of writing reinsurance is a concerted agreement to terms and not a "boycott," since the terms of primary insurance policies are the subject matter insured by reinsurance; furthermore, it follows from such determination that the reinsurers' alleged actions do not constitute "coercion" or "intimidation" within the meaning of 3(b). (Souter, White, Blackmun, and Stevens, JJ., dissented from this holding.)

PLEADING §103 > dismissal -- > Headnote:
LEdHN[19][] [19]

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- McCarran-Ferguson Act -- > Headnote:
LEdHN[20A][] [20A]***LEdHN[20B]***[] [20B]

Claims for relief made in complaints in a consolidated action in Federal District Court fail to allege any boycotts within the meaning of 3(b) of the McCarran-Ferguson Act (*15 USCS 1013(b)*)--which provides that nothing in such Act, under which the business of insurance generally is exempt from antitrust liability to the extent that such business is regulated by state law, renders the Sherman Act (*15 USCS 1 et seq.*) inapplicable to any act of boycott--where such claims allege a conspiracy among a group of domestic primary insurers, some foreign insurers, and an association of domestic insurers, to draft restrictive model forms and policy language for "umbrella" and "excess" insurance.

Syllabus

Nineteen States and many private plaintiffs filed complaints alleging that the defendants -- four domestic primary insurers, domestic companies who sell reinsurance to insurers, two domestic trade associations, a domestic reinsurance broker, and reinsurers based in London -- violated the Sherman Act by engaging in various conspiracies aimed at forcing certain other primary insurers to change the terms of their standard domestic commercial general liability insurance policies to conform with the policies the defendant insurers wanted to sell. After the actions were consolidated for litigation, the District Court granted the defendants' motions to dismiss. The Court of Appeals reversed, rejecting the District Court's **[****2]** conclusion that the defendants were entitled to antitrust immunity under *§ 2(b)* of the McCarran-Ferguson Act, which exempts from federal regulation "the business of insurance," except "to the extent that such business is not regulated by State Law." Although it held the conduct involved to be "the business of insurance," the Court of Appeals ruled that the foreign reinsurers did not fall within *§ 2(b)*'s protection because their activities could not be "regulated by State Law," and that the domestic insurers had forfeited their *§ 2(b)* exemption when they conspired with the nonexempt foreign reinsurers. Furthermore, held the court, most of the conduct in question fell within § 3(b), which provides that nothing in the McCarran-Ferguson Act "shall render the . . . Sherman Act inapplicable to any . . . act of boycott . . . ." Finally, the court rejected the District Court's conclusion that the principle of international comity barred it from exercising Sherman Act jurisdiction over the three claims brought solely against the London reinsurers.

Held: The judgment is affirmed in part and reversed in part, and the cases are remanded.

JUSTICE SOUTER delivered the opinion **[****3]** of the Court with respect to Parts I, II-A, III, and IV, concluding that:

1. The domestic defendants did not lose their *§ 2(b)* immunity by conspiring with the foreign defendants. The Court of Appeals's conclusion to the contrary was based in part on the statement, in *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231, 59 L. Ed. 2d 261, 99 S. Ct. 1067*, that, "in analogous contexts, the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." Even assuming that foreign reinsurers were "not regulated by State Law," the Court of Appeals's reasoning fails because the analogy drawn by the *Royal Drug* Court was a loose one. Following that language, the *Royal Drug* Court cited two cases dealing with the Capper-Volstead Act, which immunizes certain "persons" from Sherman Act liability. *Ibid.* Because, in contrast, the McCarran-Ferguson Act immunizes activities rather than entities, an entity-based analysis of *§ 2(b)* immunity is inappropriate. See *id., at 232-233*. Moreover, the agreements at issue in *Royal Drug Co.* were made with "parties wholly outside the insurance **[****4]** industry," *id., at 231*, whereas the alleged agreements here are with foreign reinsurers and admittedly concern "the business of insurance." Pp. 781-784.

2. Even assuming that a court may decline to exercise Sherman Act jurisdiction over foreign conduct in an appropriate case, international comity would not counsel against exercising jurisdiction in the circumstances alleged here. The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555, 96 L. Ed. 2d 461, 107 S. Ct. 2542* (BLACKMUN, J., concurring in part and dissenting in part). That question must be answered in the negative, since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by United States law or claim that their compliance with the laws of both countries is otherwise impossible. Pp. 794-799.

JUSTICE SCALIA delivered the opinion of the Court with respect to Part I, concluding that a "boycott" for purposes of § 3(b) of the Act occurs where, **[****5]** in order to coerce a target into certain terms on one transaction, parties refuse to engage in other, unrelated transactions with the target. It is not a "boycott" but rather a concerted agreement to terms (a "cartelization") where parties refuse to engage in a particular transaction until the terms of that transaction are agreeable. Under the foregoing test, the allegations of a "boycott" in this litigation, construed most favorably to the respondents, are sufficient to sustain most of the relevant counts of complaint against a motion to dismiss. Pp. 800-811.

Counsel: Stephen M. Shapiro argued the cause for petitioners in No. 91-1111. With him on the briefs were Kenneth S. Geller, Mark I. Levy, Roy T. Englert, Jr., Timothy S. Bishop, Ronald A. Jacks, Richard E. Sherwood, William A. Montgomery, William M. Hannay, John G. Harkins, Jr., Eleanor Morris Illoway, Bartlett H. McGuire, Douglas I. Brandon, James S. Greenan, Raoul D. Kennedy, Alan H. Silberman, Stuart Altschuler, Peter O. Glaessner, David L. Foster, Gregory L. Harris, Frank Rothman, Timothy E. Carr, Kent E. Keller, Lewis A. Kaplan, Allan Blumstein, Ronald C. Redcay, Michael M. Uhlmann, Robert B. Green, Stephen M. Axinn, Michael **[****6]** L. Weiner, James M. Burns, Eugene F. Bannigan, Christine C. Burgess, Robert M. Mitchell, Philip H. Curtis, Zoe Baird, Jane Kelly, Joseph P. Giasi, Jr., Joseph A. Gervasi, Debra J. Anderson, Michael S. Wilder, Jeffrey L. Morris, Edmond F. Rondepierre, and John J. Hayden. Molly S. Boast argued the cause for petitioners in No. 91-1128. With her on the briefs for petitioners Merrett Underwriting Agency Management Ltd. et al. were Lawrence W. Pollack, Andreas F. Lowenfeld, Barry L. Bunshoft, Eric J. Sinrod, David W. Slaby, Michael L. McCluggage, James T. Nyeste, Michael R. Blankshain, Jerome N. Lerch, Paul R. Haerle, Martin Frederic Evans, Donald Francis Donovan, and Colby A. Smith. Barry R. Ostrager, Eleanor M. Fox, Mary Kay Vyskocil, and Kathryn A. Clokey filed briefs for petitioner Sturge Reinsurance Syndicate Management Ltd.

Laurel A. Price, Deputy Attorney General of New Jersey, argued the cause for respondents in both cases. With her on the brief for state respondents in No. 91-1111 and on the brief for state respondents in No. 91-1128 were J. Joseph Curran, Jr., Attorney General of Maryland, Ellen S. Cooper, Assistant Attorney General, James H. Evans, Attorney General of Alabama, **[****7]** Charles E. Cole, Attorney General of Alaska, Jim Forbes, Assistant Attorney General, Grant Woods, Attorney General of Arizona, Suzanne M. Dallimore, Assistant Attorney General, Daniel E. Lungren, Attorney General of California, Roderick E. Walston, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, Thomas Greene, Supervising Deputy Attorney General, Kathleen E. Foote, Deputy Attorney General, Gale A. Norton, Attorney General of Colorado, James R. Lewis, Assistant Attorney General, Richard Blumenthal, Attorney General of Connecticut, Robert M. Langer and William M. Rubenstein, Assistant Attorneys General, Richard T. Ieyoub, Attorney General of Louisiana, Jenifer Schaye, Assistant Attorney General, Scott Harshbarger, Attorney General of Massachusetts, Thomas M. Alpert and George K. Weber, Assistant Attorneys General, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Thomas F. Pursell, Deputy Attorney General, Lisa Tiegel, Special Assistant Attorney General, Marc Racicot, Attorney General of Montana, Paul Johnson, Assistant Attorney General, Robert J. Del Tufo, Attorney General of New Jersey, Robert Abrams, **[****8]** Attorney General of New York, Jerry Boone, Solicitor General, George Sampson, Richard L. Schwartz and Gary J. Malone, Assistant Attorneys General, Lee Fisher, Attorney General of Ohio, Doreen C. Johnson and Marc B. Bandman, Assistant Attorneys General, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Thomas L. Welch and David R. Weyl, Deputy Attorneys General, Kenneth O. Eikenberry, Attorney General of Washington, John R. Ellis, Deputy Attorney General, Tina E. Kondo, Assistant Attorney General, Mario J. Palumbo, Attorney General of West Virginia, Donald L. Darling, Deputy Attorney General, Donna S. Quesenberry, Senior Assistant Attorney General, James E. Doyle, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General. H. Laddie Montague, Jr., Howard Langer, Nicholas E. Chimicles, Eugene Gressman, Jerry S. Cohen, and Robert Miller filed a brief for private respondents in both cases.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Acting Solicitor General Bryson, Acting Assistant Attorney General Clark, Robert A. Long, Jr., Robert B. Nicholson, Marion L. Jetton, **[****9]** Charles S. Stark, and Edward T. Hand. [+]

[+] Briefs of amici curiae urging reversal were filed for the Government of Canada by Douglas E. Rosenthal; for the Government of the United Kingdom of Great Britain and Northern Ireland by Mark R. Joelson; for the American Insurance Association et al. by John E. Nolan, Jr., Craig A. Berrington, and Patrick J. McNally; for the National Association of Casualty & Surety Agents et al. by Anthony C. Epstein and Ann M. Kappler; for the National Conference of Insurance Legislators by Stephen W. Schwab, Seymour Simon, and Reuben A. Bernick; and for the Washington Legal Foundation by Daniel J. Popeo and Richard A. Samp.

Briefs of amici curiae urging affirmance were filed for the State of Texas et al. by Dan Morales, Attorney General of Texas, Will Pryor, First Assistant Attorney General, Mary F. Keller, Deputy Attorney General, and Thomas P. Perkins, Jr., Mark Tobey, Katherine D. Farroba, and Floyd Russell Ham, Assistant Attorneys General, Charles M. Oberly III, Attorney General of Delaware, John J. Polk, Deputy Attorney General, Robert A. Butterworth, Attorney General of Florida, Scott E. Clodfelter, Assistant Attorney General, Robert A. Marks, Attorney General of Hawaii, Larry EchoHawk, Attorney General of Idaho, Brett T. DeLange, Deputy Attorney General, Bonnie J. Campbell, Attorney General of Iowa, John R. Perkins, Deputy Attorney General, Chris Gorman, Attorney General of Kentucky, Robert V. Bullock, Assistant Attorney General, Mike Moore, Attorney General of Mississippi, Jim Steele, Special Assistant Attorney General, William L. Webster, Attorney General of Missouri, Henry T. Herschel, Tom Udall, Attorney General of New Mexico, Frankie Sue Del Papa, Attorney General of Nevada, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Nicholas J. Spaeth, Attorney General of North Dakota, David W. Huey, Assistant Attorney General, James E. O'Neil, Attorney General of Rhode Island, Maureen G. Glynn, Special Assistant Attorney General, T. Travis Medlock, Attorney General of South Carolina, Mark Barnett, Attorney General of South Dakota, Jeffrey P. Hallem, Assistant Attorney General, R. Paul Van Dam, Attorney General of Utah, Patrice Arent and Cy H. Castle, Assistant Attorneys General, Jeffrey L. Amestoy, Attorney General of Vermont, Julie Brill, Assistant Attorney General, and Mary Sue Terry, Attorney General of Virginia; for the National League of Cities et al. by Lawrence Kill and Anthony P. Coles; and for the Service Station Dealers of America by Dimitri G. Daskalopoulos.

Richard I. Fine filed a brief for the Service Industry Council et al. as amicus curiae.

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Judges: SOUTER, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and II-A, the opinion of the Court with respect to Parts III and IV, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and STEVENS, JJ., joined, and an opinion concurring in the judgment with respect to Part II-B, in which WHITE, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., delivered the opinion of the Court with respect to Part I, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined, and a dissenting opinion with respect to Part II, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined, post, p. 800.

Opinion by: SOUTER

Opinion

[*769] **[***621]** **[**2895]** JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, III, and IV, and an opinion concurring in the judgment with respect to Part II-B. *

[**11]** ***LEdHN[1A]***[] [1A] ***LEdHN[2A]***[] [2A] ***LEdHN[3A]***[] [3A]***HN1***[] The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. 26 Stat. 209, as amended, *15 U.S.C. § 1*. These consolidated cases present questions about the application of that Act to the insurance industry, both here and abroad. The plaintiffs (respondents here) allege that both domestic and foreign defendants (petitioners here) violated the Sherman Act by engaging in various conspiracies to affect the American insurance market. A group of domestic **[***622]** defendants argues that the McCarran-Ferguson Act, 59 Stat. 33, as amended, *15 U.S.C. § 1011 et seq.*, precludes application of the Sherman Act to the conduct alleged; a group of foreign defendants argues that the principle of international comity requires the District Court to refrain **[****12]** from exercising jurisdiction over certain claims against it. We hold that most of the domestic defendants' alleged conduct is not immunized **[*770]** from antitrust liability by the McCarran-Ferguson Act, and that, even assuming it applies, the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged.

I

LEdHN[4][] [4] ***LEdHN[5A]***[] [5A]The two petitions before us stem from consolidated litigation comprising the complaints of 19 States and many private plaintiffs alleging that the defendants, members of the insurance industry, conspired in violation of *§ 1* of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance [1] available in the United States. Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true. [2]

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* JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS join this opinion in its entirety, and THE CHIEF JUSTICE joins Parts I, II-A, III, and IV.

[1] CGL insurance provides "coverage for third party casualty damage claims against a purchaser of insurance (the 'insured')." App. 8 (Cal. Complaint P4.a).

[2] Following the lower courts and the parties, see *In re Insurance Antitrust Litigation, 938 F.2d 919, 924, 925 (CA9 1991)*, we will treat the complaint filed by California as representative of the claims of Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin, and the complaint filed by Connecticut as representative of the claims of Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. As will become apparent, the California and Connecticut Complaints differ slightly in their presentations of background information and their claims for relief; their statements of facts are identical. Because the private party plaintiffs have chosen in their brief in this Court to use the California Complaint as a "representative model" of their claims, Brief for Respondents (Private Party Plaintiffs)

[**13]** ***LEdHN[5B]***[] [5B]

[**14]** A

According to the complaints, the object of the conspiracies was to force certain primary **[**2896]** insurers (insurers who sell insurance directly to consumers) to change the terms of their **[*771]** standard CGL insurance policies to conform with the policies the defendant insurers wanted to sell. The defendants wanted four changes. [3]

First, CGL insurance has traditionally been sold in the United States on an "occurrence" basis, through a policy obligating the insurer "to pay or defend claims, whenever made, resulting from an accident **[****15]** or 'injurious exposure to conditions' that occurred during the [specific time] period the policy was in effect." App. 22 (Cal. Complaint P52). In place of this traditional "occurrence" trigger of coverage, the **[***623]** defendants wanted a "claims-made" trigger, obligating the insurer to pay or defend only those claims made during the policy period. Such a policy has the distinct advantage for the insurer that when the policy period ends without a claim having been made, the insurer can be certain that the policy will not expose it to any further liability. Second, the defendants wanted the "claims-made" policy to have a "retroactive date" provision, which would further restrict coverage to claims based on incidents that occurred after a certain date. Such a provision eliminates the risk that an insurer, by issuing a claims-made policy, would assume liability arising from incidents that occurred before the policy's effective date, but remained undiscovered or caused no immediate harm. Third, CGL insurance has traditionally covered "sudden and accidental" pollution; the defendants wanted to eliminate that coverage. Finally, CGL insurance has traditionally provided that the insurer **[****16]** would bear the legal costs of defending covered claims against the insured without regard to the policy's stated limits of coverage; the defendants **[*772]** wanted legal defense costs to be counted against the stated limits (providing a "legal defense cost cap").

To understand how the defendants are alleged to have pressured the targeted primary insurers to make these changes, one must be aware of two important features of the insurance industry. First, most primary insurers rely on certain outside support services for the type of insurance coverage they wish to sell. Defendant Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers (including the primary insurer defendants, Hartford Fire Insurance Company, Allstate Insurance Company, CIGNA Corporation, and Aetna Casualty and Surety Company), is the almost exclusive source of support services in this country for CGL insurance. See *id.*, at 19 (Cal. Complaint P38). ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. *Ibid.* (Cal. Complaint P39); **[****17]** *id.*, at 74 (Conn. Complaint P50). All of the "traditional" features of CGL insurance relevant to this litigation were embodied in the ISO standard CGL insurance form that had been in use since 1973 (1973 ISO CGL form). *Id.*, at 22 (Cal. Complaint PP51-54); *id.*, at 75 (Conn. Complaint **[**2897]** PP56-58). For each of its standard policy forms, ISO also supplies actuarial and rating information: it collects, aggregates, interprets, and distributes data on the premiums charged, claims filed and paid, and defense costs expended with respect to each form, *id.*, at 19 (Cal. Complaint P39); *id.*, at 74 (Conn. Complaint PP51-52), and on the basis of these data it predicts future loss trends and calculates advisory premium rates, *id.*, at 19 (Cal. Complaint P39); *id.*, at 74 (Conn. Complaint P53). Most ISO members cannot afford to continue to use a form if ISO withdraws these support services. See *id.*, at 32-33 (Cal. Complaint PP97, 99).

Second, primary insurers themselves usually purchase insurance to cover a portion of the risk they assume from the **[*773]** consumer. This so-called "reinsurance" may serve at least two purposes, protecting the primary insurer **[****18]** from catastrophic **[***624]** loss, and allowing the primary insurer to sell more insurance than its own financial capacity might otherwise permit. *Id.*, at 17 (Cal. Complaint P29). Thus, "the availability of reinsurance

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3, n.6, we will assume that their complaints track that complaint. On remand, the courts below will of course be free to take into account any relevant differences among the complaints that the parties may bring to their attention.

[3] The First Claim for Relief in the Connecticut Complaint, App. 88-90 (PP115-119), charges all the defendants with an overarching conspiracy to force all four of these changes on the insurance market. The eight federal-law Claims for Relief in the California Complaint, *id.*, at 36-49 (PP111-150), charge various subgroups of the defendants with separate conspiracies that had more limited objects; not all of the defendants are alleged to have desired all four changes.

affects the ability and willingness of primary insurers to provide insurance to their customers." *Id.*, at 18 (Cal. Complaint P34); *id.*, at 63 (Conn. Complaint P4(p)). Insurers who sell reinsurance themselves often purchase insurance to cover part of the risk they assume from the primary insurer; such "retrocessional reinsurance" does for reinsurers what reinsurance does for primary insurers. See *ibid.* (Conn. Complaint P4(r)). Many of the defendants here are reinsurers or reinsurance brokers, or play some other specialized role in the reinsurance business; defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers.

B

The prehistory of events claimed to give rise to liability starts in 1977, when ISO began the process of revising its 1973 CGL form. *Id.*, at 22 (Cal. Complaint P55). For the first time, it proposed two CGL forms (1984 ISO CGL forms), one the traditional "occurrence" type, the other "with a new **[****19]** 'claims-made' trigger." *Id.*, at 22-23 (Cal. Complaint P56). The "claims-made" form did not have a retroactive date provision, however, and both 1984 forms covered "'sudden and accidental' pollution" damage and provided for unlimited coverage of legal defense costs by the insurer. *Id.*, at 23 (Cal. Complaint PP59-60). Within the ISO, defendant Hartford Fire Insurance Company objected to the proposed 1984 forms; it desired elimination of the "occurrence" form, a retroactive date provision on the "claims-made" form, elimination of sudden and accidental pollution coverage, and a legal defense cost cap. Defendant Allstate Insurance Company also expressed its desire for a retroactive date provision on **[*774]** the "claims-made" form. *Id.*, at 24 (Cal. Complaint P61). Majorities in the relevant ISO committees, however, supported the proposed 1984 CGL forms and rejected the changes proposed by Hartford and Allstate. In December 1983, the ISO Board of Directors approved the proposed 1984 forms, and ISO filed or lodged the forms with state regulators in March 1984. *Ibid.* (Cal. Complaint P62).

Dissatisfied with this state of affairs, the defendants began to take other steps **[****20]** to force a change in the terms of coverage of CGL insurance generally available, steps that, the plaintiffs allege, implemented a series of conspiracies in violation of *§ 1* of the Sherman Act. The plaintiffs recount these steps as a number of separate episodes corresponding to different claims for relief in their complaints; [4] because it will become important to distinguish among these counts and the acts and defendants associated with them, we will note these correspondences.

The first four Claims for Relief in the California Complaint, *id.*, at 36-43 (PP111-130), **[**2898]** and the Second Claim for Relief in the Connecticut Complaint, *id.*, at 90-92 (PP120-124), charge **[***625]** the four domestic primary insurer defendants and varying groups of domestic and foreign **[****21]** reinsurers, brokers, and associations with conspiracies to manipulate the ISO CGL forms. In March 1984, primary insurer Hartford persuaded General Reinsurance Corporation (General Re), the largest American reinsurer, to take steps either to procure desired changes in the ISO CGL forms, or "failing that, [to] 'derail' the entire ISO CGL forms program." *Id.*, at 24 (Cal. Complaint P64). General Re took up the matter with its trade association, RAA, which created a special committee that met and agreed to "boycott" the 1984 ISO CGL forms unless a retroactive-date provision was added to the **[*775]** claims-made form, and a pollution exclusion and defense cost cap were added to both forms. *Id.*, at 24-25 (Cal. Complaint PP65-66). RAA then sent a letter to ISO "announcing that its members would not provide reinsurance for coverages written on the 1984 CGL forms," *id.*, at 25 (Cal. Complaint P67), and Hartford and General Re enlisted a domestic reinsurance broker to give a speech to the ISO Board of Directors, in which he stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms. *Ibid.* (Cal. Complaint P68).

The four primary insurer defendants (Hartford, **[****22]** Aetna, CIGNA, and Allstate) also encouraged key actors in the London reinsurance market, an important provider of reinsurance for North American risks, to withhold reinsurance for coverages written on the 1984 ISO CGL forms. *Id.*, at 25-26 (Cal. Complaint PP69-70). As a consequence, many London-based underwriters, syndicates, brokers, and reinsurance companies informed ISO of their intention to withhold reinsurance on the 1984 forms, *id.*, at 26-27 (Cal. Complaint PP71-75), and at least some

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[4] The First Claim for Relief in the Connecticut Complaint, *id.*, at 88-90 (PP115-119), charging an overarching conspiracy encompassing all of the defendants and all of the conduct alleged, is a special case. See n. 18, *infra*.

of them told ISO that they would withhold reinsurance until ISO incorporated all four desired changes, see *supra, at 771*, and n. 3, into the ISO CGL forms. App. 26 (Cal. Complaint P74).

For the first time ever, ISO invited representatives of the domestic and foreign reinsurance markets to speak at an ISO Executive Committee meeting. *Id.*, at 27-28 (Cal. Complaint P78). At that meeting, the reinsurers "presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance." *Id.*, at 29 (Cal. Complaint P82). The ISO Executive Committee then voted to include a retroactive-date provision in the claims-made form, and to exclude all pollution coverage from **[****23]** both new forms. (But it neither eliminated the occurrence form, nor added a legal defense cost cap.) The 1984 ISO CGL forms were then withdrawn from the marketplace, and replaced with forms (1986 ISO CGL forms) containing the new provisions. *Ibid.* **[*776]** (Cal. Complaint P84). After ISO got regulatory approval of the 1986 forms in most States where approval was needed, it eliminated its support services for the 1973 CGL form, thus rendering it impossible for most ISO members to continue to use the form. *Id.*, at 32-33 (Cal. Complaint PP97, 99).

The Fifth Claim for Relief in the California Complaint, *id.*, at 43-44 (PP131-135), and the virtually identical Third Claim for Relief in the Connecticut Complaint, *id.*, at 92-94 (PP125-129), charge a conspiracy among a **[***626]** group of London reinsurers and brokers to coerce primary insurers in the United States to offer CGL coverage only on a claims-made basis. The reinsurers collectively refused to write new reinsurance contracts for, or to renew longstanding contracts with, "primary . . . insurers unless they were prepared to switch from the occurrence to the claims-made form," *id.*, at 30 (Cal. Complaint P88); **[****24]** they also amended their reinsurance contracts to cover only claims made before a "'sunset date,'" thus eliminating reinsurance for claims made on occurrence policies after that date, *id.*, at 31 (Cal. Complaint PP90-92).

[2899]** The Sixth Claim for Relief in the California Complaint, *id.*, at 45-46 (PP136-140), and the nearly identical Fourth Claim for Relief in the Connecticut Complaint, *id.*, at 94-95 (PP130-134), charge another conspiracy among a somewhat different group of London reinsurers to withhold reinsurance for pollution coverage. The London reinsurers met and agreed that all reinsurance contracts covering North American casualty risks, including CGL risks, would be written with a complete exclusion for pollution liability coverage. *Id.*, at 32 (Cal. Complaint PP94-95). In accordance with this agreement, the parties have in fact excluded pollution liability coverage from CGL reinsurance contracts since at least late 1985. *Ibid.* (Cal. Complaint P94).

[*777] The Seventh Claim for Relief in the California Complaint, *id.*, at 46-47 (PP141-145), and the closely similar Sixth Claim for Relief in the Connecticut Complaint, *id.*, at 97-98 (PP140-144), **[****25]** charge a group of domestic primary insurers, foreign reinsurers, and the ISO with conspiring to restrain trade in the markets for "excess" and "umbrella" insurance by drafting model forms and policy language for these types of insurance, which are not normally offered on a regulated basis. *Id.*, at 33 (Cal. Complaint P101). The ISO Executive Committee eventually released standard language for both "occurrence" and "claims-made" umbrella and excess policies; that language included a retroactive date in the claims-made version, and an absolute pollution exclusion and a legal defense cost cap in both versions. *Id.*, at 34 (Cal. Complaint P105).

LEdHN[6A][] [6A]Finally, the Eighth Claim for Relief in the California Complaint, *id.*, at 47-49 (PP146-150), and its counterpart in the Fifth Claim for Relief in the Connecticut Complaint, *id.*, at 95-97 (PP135-139), charge a group of London and domestic retrocessional reinsurers [5] with conspiring to withhold retrocessional reinsurance for North American seepage, pollution, and property contamination risks. Those retrocessional reinsurers signed, and have implemented, **[****26]** an agreement to use their "'best **[***627]** endeavors'" to ensure that they would provide

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[5] The California and Connecticut Complaints' Statements of Facts describe this conspiracy as involving "specialized reinsurers in London and the United States." App. 34 (P106); *id.*, at 87 (Conn. Complaint P110). The claims for relief, however, name only London reinsurers; they do not name any of the domestic defendants who are the petitioners in No. 91-1111. See *id.*, at 48 (P147); *id.*, at 96 (Conn. Complaint P136). Thus, we assume that the domestic reinsurers alleged to be involved in this conspiracy are among the "unnamed co-conspirators" mentioned in the complaints. See *id.*, at 48 (Cal. Complaint P147); *id.*, at 96 (Conn. Complaint P136).

such reinsurance for North American risks "'only . . . where the original business includes a seepage and pollution exclusion **[*778]** wherever legal and applicable.'" *Id.*, at 35 (Cal. Complaint P108). [6]

LEdHN[6B][] [6B]

[**27]** C

Nineteen States and a number of private plaintiffs filed 36 complaints against the insurers involved in this course of events, charging that the conspiracies described above violated *§ 1* of the Sherman Act, *15 U.S.C. § 1*. After the actions had been consolidated for litigation in the Northern District of California, the defendants moved to dismiss for failure to state a cause of action, or, in the alternative, for summary judgment. The District Court granted the motions to dismiss. *In re Insurance Antitrust Litigation, 723 F. Supp. 464 (1989)*. It held that the conduct alleged fell within the grant of antitrust immunity contained in *§ 2(b)* of the McCarran-Ferguson Act, *15 U.S.C. § 1012(b)*, because it amounted to "the business of insurance" and was "regulated by **[**2900]** State Law" within the meaning of that section; none of the conduct, in the District Court's view, amounted to a "boycott" within the meaning of the § 3(b) exception to that grant of immunity. *15 U.S.C. § 1013(b)*. The District Court also dismissed the three claims that named only certain London-based defendants, [7] invoking **[****28]** international comity and applying the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597 (1976)*.

The Court of Appeals reversed. *In re Insurance Antitrust Litigation, 938 F.2d 919 (CA9 1991)*. Although it held the conduct involved to be "the business of insurance" within the meaning of *§ 2(b)*, it concluded that the defendants could **[*779]** not claim McCarran-Ferguson Act antitrust immunity for two independent reasons. First, it held, the foreign reinsurers were beyond the regulatory jurisdiction of the States; because their activities could not be "regulated by State Law" within the meaning of *§ 2(b)*, they did not fall within that section's grant of immunity. Although the domestic insurers were "regulated by State Law," the court held, they **[****29]** forfeited their *§ 2(b)* exemption when they conspired with the nonexempt foreign reinsurers. Second, the Court of Appeals held that, even if the conduct alleged fell within the scope of *§ 2(b)*, it also fell within the § 3(b) exception for "act[s] of boycott, coercion, or intimidation." Finally, as to the three claims brought solely against foreign defendants, the court applied its *Timberlane* analysis, but concluded that the principle of international comity was no bar to exercising Sherman Act jurisdiction.

We granted certiorari in No. 91-1111 to address two narrow questions about the scope of McCarran-Ferguson **[***628]** Act antitrust immunity, [8] **[****30]** and in No. 91-1128 to address the application of the Sherman Act to the foreign conduct at issue. [9] *506 U.S. 814 (1992)*. We now affirm in part, reverse in part, and remand.

[*780] II

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[6] The Ninth, Tenth, and Eleventh Claims for Relief in the California Complaint, *id.*, at 49-50 (PP151-156), and the Seventh Claim for Relief in the Connecticut Complaint, *id.*, at 98 (PP145-146), allege state-law violations not at issue here.

[7] These are the Fifth, Sixth, and Eighth Claims for Relief in the California Complaint, and the corresponding Third, Fourth, and Fifth Claims for Relief in the Connecticut Complaint.

[8] We limited our grant of certiorari in No. 91-1111 to these questions: "1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance," and "2. Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a 'boycott' outside the exemption of the McCarran-Ferguson Act." Pet. for Cert. in No. 91-1111, p. i; see ***506 U.S. 814 (1992)***.

[9] The question presented in No. 91-1128 is: "Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?" Pet. for Cert. in No. 91-1128, p. i.

The petition in No. 91-1111 touches on the interaction of two important pieces of economic legislation. *HN2*[] The Sherman Act declares "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, . . . to be illegal." *15 U.S.C. § 1*. *HN3*[] The McCarran-Ferguson Act provides that regulation of the insurance industry is generally a matter for the States, *15 U.S.C. § 1012(a)*, and (again, **[****31]** generally) that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," *§ 1012(b)*. *Section 2(b)* of the McCarran-Ferguson Act makes it clear nonetheless that the Sherman Act applies "to the business of insurance to the extent that such business is not regulated by State Law," *§ 1012(b)*, and § 3(b) provides that nothing in the McCarran-Ferguson Act "shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation," *§ 1013(b)*.

[2901]** Petitioners in No. 91-1111 are all of the domestic defendants in the consolidated cases: the four domestic primary insurers, the domestic reinsurers, the trade associations ISO and RAA, and the domestic reinsurance broker Thomas A. Greene & Company, Inc. They argue that the Court of Appeals erred in holding, first, that their conduct, otherwise immune from antitrust liability under *§ 2(b)* of the McCarran-Ferguson Act, lost its immunity when they conspired with the foreign defendants, and, second, that their conduct amounted to "act[s] of boycott" falling within **[****32]** the exception to antitrust immunity set out in § 3(b). We conclude that the Court of Appeals did err about the effect of conspiring with foreign defendants, but correctly decided that all but one of the complaints' relevant Claims for Relief are fairly read to allege conduct falling within the "boycott" exception to McCarran-Ferguson Act antitrust immunity. We therefore **[*781]** affirm the Court of Appeals's judgment that it was error for the District Court to dismiss the complaints on grounds of McCarran-Ferguson Act **[***629]** immunity, except as to the one claim for relief that the Court of Appeals correctly found to allege no boycott.

A

LEdHN[7][] [7]*HN4*[] By its terms, the antitrust exemption of *§ 2(b)* of the McCarran-Ferguson Act applies to "the business of insurance" to the extent that such business is regulated by state law. While "business" may mean "[a] commercial or industrial establishment or enterprise," Webster's New International Dictionary 362 (2d ed. 1942), the definite article before "business" in *§ 2(b)* **[****33]** shows that the word is not used in that sense, the phrase "the business of insurance" obviously not being meant to refer to a single entity. Rather, "business" as used in *§ 2(b)* is most naturally read to refer to "mercantile transactions; buying and selling; [and] traffic." *Ibid.*

The cases confirm that *HN5*[] "the business of insurance" should be read to single out one activity from others, not to distinguish one entity from another. In *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*, for example, we held that *§ 2(b)* did not exempt an insurance company from antitrust liability for making an agreement fixing the price of prescription drugs to be sold to Blue Shield policyholders. Such activity, we said, "would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the 'business of insurance companies.' But that is precisely what Congress did not do." *Id., at 233* (footnote omitted); see *SEC v. National Securities, Inc., 393 U.S. 453, 459, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969)* **[****34]** (the McCarran-Ferguson Act's "language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance'") (emphasis in original). And in *Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1982)*, we explicitly framed the question as whether "a particular *practice* is part of the 'business of insurance' exempted from the antitrust **[*782]** laws by *§ 2(b)*," *id., at 129* (emphasis added), and each of the three criteria we identified concerned a quality of the practice in question: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry," *ibid.* (emphasis in original).

LEdHN[1B][] [1B]*LEdHN[8A]*[] [8A]The Court of Appeals did not hold that, under these criteria, the domestic **[****35]** defendants' conduct fell outside "the business of insurance"; to the contrary, it held that that condition was met. [10] See *938 F.2d at 927*. **[**2902]** Nor did it hold the domestic defendants' conduct to be "[un]regulated by State Law." Rather, it constructed an altogether different **[***630]** chain of reasoning, the middle link of which comes from a sentence in our opinion in *Royal Drug Co.* "Regulation . . . of foreign reinsurers," the Court of Appeals explained, "is beyond the jurisdiction of the states," *938 F.2d at 928*, and hence *§ 2(b)* does not exempt foreign reinsurers from antitrust liability, because their activities are not "regulated by State Law." Under *Royal Drug Co.*, "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *440 U.S. at 231*. Therefore, the domestic insurers, by acting in concert with the nonexempt foreign insurers, lost their McCarran-Ferguson Act antitrust immunity. See *938 F.2d at 928*. This reasoning fails, however, because even if we were to agree that foreign reinsurers were not subject to state regulation (a point on which we express no opinion), **[****36]** the quoted language from *Royal Drug Co.*, read **[*783]** in context, does not state a proposition applicable to this litigation.

LEdHN[8B][] [8B]

LEdHN[1C][] [1C]***LEdHN[9A]***[] [9A]***LEdHN[10A]***[] [10A]The full sentence from *Royal Drug Co.* places the quoted fragment in a different light. "In analogous contexts," we stated, "the Court has held that an exempt entity **[****37]** forfeits antitrust exemption by acting in concert with nonexempt parties." *440 U.S. at 231*. We then cited two cases dealing with the Capper-Volstead Act, which immunizes from liability under *§ 1* of the Sherman Act particular activities of certain persons "engaged in the production of agricultural products." [11] Capper-Volstead Act, *§ 1*, 42 Stat. 388, *7 U.S.C. § 291*; see *Case- Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 19 L. Ed. 2d 621, 88 S. Ct. 528 (1967)*; *United States v. Borden Co., 308 U.S. 188, 84 L. Ed. 181, 60 S. Ct. 182 (1939)*. Because these cases relied on statutory language referring to certain "persons," whereas we specifically acknowledged in *Royal Drug Co.* that the McCarran-Ferguson Act immunizes activities rather than entities, see *440 U.S. at 232-233*, the analogy we were drawing was of course a loose one. The agreements that insurance companies made with "parties wholly outside the insurance industry," *id., at 231*, we noted, such as the retail pharmacists involved in *Royal Drug Co.* itself, or "automobile body repair shops or landlords," **[****38]** *id., at 232* (footnote omitted), are unlikely **[*784]** to be about anything that could be called "the business of insurance," as distinct from the broader "'business of insurance companies,'" *id., at 233*. The alleged agreements **[***631]** at issue in the instant litigation, of course, are entirely different; the foreign reinsurers are hardly "wholly outside the insurance industry," and respondents do not contest the Court of Appeals's holding that the agreements concern "the business of insurance." These facts neither support even the rough analogy we drew in *Royal Drug Co.* nor fall within the rule about acting in concert with nonexempt parties, which derived from a statute inapplicable here. Thus, we think it was error for **[**2903]** the Court of Appeals to hold the domestic insurers bereft of their McCarran-Ferguson Act

[10] The activities in question here, of course, are alleged to violate federal law, and it might be tempting to think that unlawful acts are implicitly excluded from "the business of insurance." Yet *§ 2(b)*'s grant of immunity assumes that acts which, but for that grant, would violate the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, are part of "the business of insurance."

[11] We also cited two cases dealing with the immunity of certain agreements of labor unions under the Clayton and Norris-LaGuardia Acts. See *440 U.S. at 231-232*. These cases, however, did not hold that labor unions lose their immunity whenever they enter into agreements with employers; to the contrary, we acknowledged in one of the cases that "the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit." *Mine Workers v. Pennington, 381 U.S. 657, 664, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. Because the cases stand only for the proposition that labor unions are not immune from antitrust liability for certain types of agreements with employers, such as agreements "to impose a certain wage scale on other bargaining units," *id., at 665*, they do not support the far more general statement that exempt entities lose immunity by conspiring with nonexempt entities.

exemption simply because they agreed or acted with foreign reinsurers that, we assume for the sake of argument, were "not regulated by State Law." [12]

LEdHN[9B][] [9B]

[**39]** *LEdHN[10B]*[] [10B]

[*794] **[***638]** **[**2908]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published opinion.]

III

Finally, we take up the question presented by No. 91-1128, whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman **[*795]** Act to foreign conduct. The Fifth Claim for Relief in the California Complaint alleges a violation of *§ 1* of the Sherman Act by certain London reinsurers who conspired to coerce primary insurers in the United States to offer CGL coverage on a claims-made basis, thereby making "occurrence CGL coverage . . . unavailable in the State of California for many risks." App. 43-44 (PP131-135). The Sixth Claim **[****40]** for Relief in the California Complaint alleges that the London reinsurers violated *§ 1* by a conspiracy to limit coverage of pollution risks in North America, thereby rendering "pollution liability coverage . . . almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California." *Id.*, at 45-46 (PP136-140). The Eighth Claim for Relief in the California Complaint alleges a further *§ 1* violation by the London reinsurers who, along with domestic retrocessional reinsurers, conspired to limit coverage of seepage, pollution, and property contamination risks in North America, thereby eliminating such coverage in the State of California. [20] *Id.*, at 47-48 (PP146-150).

[**41]**

[2909]** *LEdHN[3B]*[] [3B]*LEdHN[11A]*[] [11A]*LEdHN[12A]*[] [12A]*LEdHN[13A]*[] [13A]At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. See Tr. of Oral Arg. 37 ("Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained"). [21] Although the **[*796]** proposition was perhaps not always free from doubt, see *American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 (1909)*, it is well established by now that *HN6*[] the Sherman Act **[****42]** applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n. 6, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *United States v. Aluminum Co. of*

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[12] The Court of Appeals's assumption that "the American reinsurers . . . are subject to regulation by the states and therefore prima facie immune," *938 F.2d at 928*, appears to rest on the entity-based analysis we have rejected. As with the foreign reinsurers, we express no opinion whether the activities of the domestic reinsurers were "regulated by State Law" and leave that question to the Court of Appeals on remand.

[20] As we have noted, see *supra, at 776-777*, each of these claims has a counterpart in the Connecticut Complaint. The claims each name different groups of London reinsurers, and not all of the named defendants are petitioners in No. 91-1128; but nothing in our analysis turns on these variations.

[21] One of the London reinsurers, Sturge Reinsurance Syndicate Management Limited, argues that the Sherman Act does not apply to its conduct in attending a single meeting at which it allegedly agreed to exclude all pollution coverage from its reinsurance contracts. Brief for Petitioner Sturge Reinsurance Syndicate Management Ltd. in No. 91-1128, p. 22. Sturge may have attended only one meeting, but the allegations, which we are bound to credit, remain that it participated in conduct that was intended to and did in fact produce a substantial effect on the American insurance market.

America, 148 F.2d 416, 444 (CA2 1945) (L. Hand, J.); Restatement (Third) of Foreign Relations Law of the United States § 415, and Reporters' Note 3 (1987) (hereinafter Restatement (Third) Foreign Relations Law); 1 P. Areeda & D. Turner, ***Antitrust* [***639] *Law*** P236 (1978); cf. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962); Steele v. Bulova Watch Co., 344 U.S. 280, 288, 97 L. Ed. 319, 73 S. Ct. 252 (1952); United States v. Sisal Sales Corp., 274 U.S. 268, 275-276, 71 L. Ed. 1042, 47 S. Ct. 592 (1927). [22] Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect. [23] See 938 F.2d at 933. **[****43]**

LEdHN[12B][] [12B]

[**44]** ***LEdHN[13B]***[] [13B]

[**45]**

[*797] ***LEdHN[11B]***[] [11B]According to the London reinsurers, the District Court should have declined to exercise such jurisdiction under the principle of international comity. [24] The Court of **[**2910]** Appeals agreed that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act. *Id.*, at 932. This availed the London reinsurers nothing, however. To be sure, the Court of Appeals believed that "application of [American] antitrust laws to the London reinsurance market 'would lead to significant conflict with English law and policy,'" and that "[s]uch a conflict, unless out-weighed by other factors, would by itself be reason to decline **[*798]** exercise of jurisdiction." Id., at 933 (citation omitted). **[***640]** But other factors, in the court's view, including the London reinsurers' express purpose to affect United States commerce and the substantial nature of the effect produced, out-weighed the supposed conflict and required the exercise of jurisdiction in this litigation. Id., at 934.

LEdHN[11C][] [11C] **[****46]**

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[22] JUSTICE SCALIA believes that what is at issue in this litigation is prescriptive, as opposed to subject-matter, jurisdiction. *Post*, at 813-814. The parties do not question prescriptive jurisdiction, however, and for good reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act. See G. Born & D. Westin, International Civil Litigation in United States Courts 542, n. 5 (2d ed. 1992) (Sherman Act is a "prime example of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction").

[23] Under § 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U.S. C. § 6a, the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. § 6a(1)(A). The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy, see H. R. Rep. No. 97-686, pp. 2-3, 9-10 (1982); P. Areeda & H. Hovenkamp, ***Antitrust Law*** P236'a, pp. 296-297 (Supp. 1992), and it is unclear how it might apply to the conduct alleged here. Also unclear is whether the Act's "direct, substantial, and reasonably foreseeable effect" standard amends existing law or merely codifies it. See id., P236'a, p. 297. We need not address these questions here. Assuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements.

[24] JUSTICE SCALIA contends that comity concerns figure into the prior analysis whether jurisdiction exists under the Sherman Act. *Post*, at 817-818. This contention is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction. See United States v. Aluminum Co. of America, 148 F.2d 416, 444 (CA2 1945) ("It follows from what we have . . . said that [the agreements at issue] were unlawful [under the Sherman Act], though made abroad, if they were intended to affect imports and did affect them"); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (CA3 1979) (once court determines that jurisdiction exists under the Sherman Act, question remains whether comity precludes its exercise); H. R. Rep. No. 97-686, ***supra, at 13***. But cf. Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597, 613 (CA9 1976); 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad 166 (1981). In any event, the parties conceded jurisdiction at oral argument, see supra, at 795, and we see no need to address this contention here.

[**47]**

LEdHN[3C][] [3C]When it enacted the FTAIA, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. See H. R. Rep. No. 97-686, p. 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction") (citing *Timberlane*). We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct (or, as JUSTICE SCALIA would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel against exercising jurisdiction in the circumstances alleged here.

LEdHN[3D][] [3D]*LEdHN[14]*[] [14]The only substantial **[****48]** question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555, 96 L. Ed. 2d 461, 107 S. Ct. 2542 (1987)* (BLACKMUN, J., concurring in part and dissenting in part). The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae*, concurs. See Brief for Petitioners Merrett Underwriting Agency Management Ltd. et al. in No. 91-1128, pp. 22-27; Brief for Government of United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 10-14. They assert that Parliament has established a comprehensive **[*799]** regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. *HN7*[] "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application **[****49]** of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. *Restatement (Third) Foreign Relations Law § 415, Comment j*; see *Continental Ore Co., supra, at 706-707*. No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." *Restatement (Third) Foreign Relations Law § 403, Comment e*. [25] Since the London reinsurers **[**2911]** do not argue that British law requires them to act in some fashion prohibited by the law of the United States, see Reply Brief for Petitioners Merrett Underwriting Agency Management Ltd. et al. in No. 91-1128, pp. 7-8, or claim that their compliance with the laws of both countries is otherwise impossible, **[***641]** we see no conflict with British law. See *Restatement (Third) Foreign Relations Law § 403, Comment e*, *§ 415, Comment j*. We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

[**50]** IV

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

[*800] JUSTICE SCALIA delivered the opinion of the Court with respect to Part I, and delivered a dissenting opinion with respect to Part II. [*]

With respect to the petition in No. 91-1111, I join the Court's judgment and Parts I and II-A of its opinion. I write separately because I do not agree with JUSTICE SOUTER's analysis, set forth in Part II-B of his opinion, of what

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[25] JUSTICE SCALIA says that we put the cart before the horse in citing this authority, for he argues it may be apposite only after a determination that jurisdiction over the foreign acts is reasonable. *Post*, at 821. But whatever the order of cart and horse, conflict in this sense is the only substantial issue before the Court.

[*] JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS join this opinion in its entirety, and THE CHIEF JUSTICE joins Part I of this opinion.

constitutes a "boycott" for purposes of § 3(b) of the McCarran-Ferguson Act, *15 U.S.C. § 1013(b)*. With respect to the petition in No. 91-1128, I dissent from the Court's ruling concerning the extraterritorial application of the Sherman Act. Part I below discusses the boycott issue; Part **[****51]** II extraterritoriality.

I

LEdHN[2B][] [2B]Determining proper application of § 3(b) of the McCarran-Ferguson Act to the present cases requires precise definition of the word "boycott." [1] It is a relatively new word, little more than a century old. It was first used in 1880, to describe the collective action taken against Captain Charles Boycott, an English agent managing various estates in Ireland. The Land League, an Irish organization formed the previous year, had demanded that landlords reduce their rents and had urged tenants to avoid dealing with those who failed to do so. Boycott did not bend to the demand and instead ordered evictions. In retaliation, the tenants "sent Captain Boycott to Coventry in a very thorough manner." J. McCarthy, England Under Gladstone 108 (1886). "The population of the region for miles round resolved not to have anything to do with him, and, as far as they could prevent **[*801]** it, not to allow any one else to have anything to do with him. . . . The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him; no one **[****52]** would supply him with food." *Id., at 108-109*; see also H. Laidler, Boycotts and the Labor Struggle 23-27 (1968). Thus, the verb made from the unfortunate Captain's name has had from the outset the meaning it continues to carry today. To "boycott" means "to combine **[***642]** in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it." 2 Oxford English Dictionary 468 (2d ed. 1989).

Petitioners have suggested that a boycott ordinarily requires "an absolute refusal to deal on any terms," which was concededly not the case here. Brief for Petitioners **[**2912]** **[****53]** in No. 91-1111, p. 31; see also Reply Brief for Petitioners in No. 91-1111, pp. 12-13. We think not. As the definition just recited provides, the refusal may be imposed "to punish [the target] for the position he has taken up, or *coerce him into abandoning it*." The refusal to deal may, in other words, be *conditional*, offering its target the incentive of renewed dealing if and when he mends his ways. This is often the case -- and indeed seems to have been the case with the original Boycott boycott. Cf. McCarthy, *supra*, at 109 (noting that the Captain later lived "at peace" with his neighbors). Furthermore, other dictionary definitions extend the term to include a *partial* boycott -- a refusal to engage in some, but not all, transactions with the target. See Webster's New International Dictionary 321 (2d ed. 1950) (defining "boycott" as "to withhold, wholly *or in part*, social or business inter-course from, as an expression of disapproval or means of coercion" (emphasis added)).

It is, however, important -- and crucial in the present cases -- to distinguish between a conditional boycott and a concerted agreement to seek particular terms in particular **[*802]** **[****54]** transactions. A concerted agreement to terms (a "cartelization") is "a way of obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact." L. Sullivan, Law of Antitrust 257 (1977). The parties to such an agreement (the members of a cartel) are not engaging in a boycott, because:

> "They are not coercing anyone, at least in the usual sense of that word; they are merely (though concertedly) saying '*we will deal with you only on the following trade terms*.'
>
> ". . . Indeed, if a concerted agreement, say, to include a security deposit in all contracts is a 'boycott' because it excludes all buyers who won't agree to it, then by parity of reasoning every price fixing agreement would be a boycott also. The use of the single concept, boycott, to cover agreements so varied in nature can only add to confusion." *Ibid.* (emphasis added).

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[1] Section 3(b) of the McCarran-Ferguson Act, *15 U.S.C. § 1013(b)*, provides:

"Nothing contained in this Act shall render the said Sherman Act in-applicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Thus, if Captain Boycott's tenants had agreed among themselves that they would refuse to renew their leases unless he reduced his rents, that would have been a concerted agreement on the terms of the leases, but not a boycott. [2] The tenants, of course, did more than that; **[***643]** they refused **[****55]** to engage in other, unrelated transactions with Boycott -- *e.g.*, selling him food -- unless he agreed to their terms on rents. It is **[*803]** this expansion of the refusal to deal beyond the targeted transaction that gives great coercive force to a commercial boycott: unrelated transactions are used as leverage to achieve the terms desired.

[**56]** The proper definition of "boycott" is evident from the Court's opinion in *Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 (1914)*, which is recognized in the antitrust field as one of the "leading case[s] involving commercial boycotts." Barber, Refusals to Deal under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 873 (1955). The associations of retail lumber dealers in that case refused to buy lumber from wholesale lumber dealers who sold directly to consumers. The boycott attempted "to impose as a condition . . . on [the wholesale dealers'] trade that they shall not sell in such manner that a local retailer may regard such sale as **[**2913]** an infringement of his exclusive right to trade." *234 U.S. at 611*. We held that to be an "'artificial condition,'" since "the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations." *Id., at 611-612*. In other words, the associations' activities were a boycott because they sought **[****57]** an objective -- the wholesale dealers' forbearance from retail trade -- that was collateral to their transactions with the wholesalers.

LEdHN[2C][] [2C]***LEdHN[15]***[] [15]***LEdHN[16A]***[] [16A]Of course as far as the Sherman Act (outside the exempted insurance field) is concerned, concerted agreements on contract terms are as unlawful as boycotts. For example, in *Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 75 L. Ed. 145, 51 S. Ct. 42 (1930)*, and *United States v. First Nat. Pictures, Inc., 282 U.S. 44, 75 L. Ed. 151, 51 S. Ct. 45 (1930)*, we held unreasonable an agreement among competing motion picture distributors under which they refused to license films to exhibitors except on standardized terms. We also found unreasonable the restraint of trade in *Anderson v. Shipowners Assn. of Pacific Coast, 272 U.S. 359, 71 L. Ed. 298, 47 S. Ct. 125 (1926)*, which involved an attempt by an association of **[*804]** employers to establish **[****58]** industry-wide terms of employment. These sorts of concerted actions, similar to what is alleged to have occurred here, are not properly characterized as "boycotts," and the word does not appear in the opinions. [3] **[****59]** In fact, in the 65 **[***644]** years between the coining of the word and enactment of the McCarran-Ferguson Act in 1945, "boycott" appears in only seven opinions of this Court involving commercial (nonlabor) antitrust matters, and *not once* is it used as JUSTICE SOUTER uses it -- to describe a concerted refusal to engage in particular transactions until the terms of those transactions are agreeable. [4]

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[2] Under the Oxford English Dictionary definition, of course, this example would not be a "boycott" because the tenants had not suspended *all* relations with the Captain. But if one recognizes partial boycotts (as we and JUSTICE SOUTER do), and if one believes (as JUSTICE SOUTER does but we do not) that the purpose of a boycott can be to secure different terms in the very transaction that is the supposed subject of the boycott, then it is impossible to explain why this is not a boycott. Under JUSTICE SOUTER's reasoning, it *would* be a boycott, at least if the tenants acted "at the behest of" (whatever *that* means), *ante*, at 792, the Irish Land League. This hypothetical shows that the problems presented by partial boycotts (which we agree fall within § 3(b)) make more urgent the need to distinguish boycotts from concerted agreements on terms.

[3] JUSTICE SOUTER points out that the Court in *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)*, found the term "boycott" "does not refer to "'a unitary phenomenon,"'" *ante*, at 788 (quoting *Barry, supra, at 543* (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974))), and asserts that our position contradicts this. *Ante*, at 793-794. But to be not a "unitary phenomenon" is different from being an all-encompassing one. "Boycott" is a multifaceted "phenomenon" that includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, social boycotts, etc. It merely does *not* include refusals to deal because of objections to proposed terms.

[4] See *United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 295-296, 298, 89 L. Ed. 951, 65 S. Ct. 661 (1945)* (refusal to engage in *all* transactions with targeted companies unless they agreed to defendants' price-fixing scheme); *United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 535, 536, 562, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)* (discussed *infra*, at 808-809); *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722, 88 L. Ed. 1024, 64 S. Ct. 805 (1944)* (word used in

LEdHN[16B][] [16B]

[**60]**

LEdHN[17][] [17]In addition to its use in the antitrust field, the concept of "boycott" frequently appears in labor law, and in this context as well there is a clear distinction between boycotts and concerted agreements seeking terms. The ordinary strike **[*805]** seeking better contract terms is a "refusal to deal" -- *i.e.*, union members refuse to sell their labor until the employer capitulates to their contract demands. But no one would call this a boycott, because the conditions of the "refusal to deal" relate directly to the terms of the refused transaction (the employment contract). A refusal to work changes from strike to boycott only when it seeks to obtain action from the employer unrelated to the employment contract. This distinction is well illustrated by the **[**2914]** famous boycott of Pullman cars by Eugene Debs' American Railway Union in 1894. The incident began when workers at the Pullman Palace Car Company called a strike, but the "boycott" occurred only when other members of the American Railway Union, not Pullman employees, supported the strikers by refusing to work on any train drawing **[****61]** a Pullman car. See *In re Debs, 158 U.S. 564, 566-567, 39 L. Ed. 1092, 15 S. Ct. 900 (1895)* (statement of the case); H. Laidler, Boycotts and the Labor Struggle 100-108 (1968). The refusal to handle Pullman cars had nothing to do with Pullman cars themselves (working on Pullman cars was no more difficult or dangerous than working on other cars); rather, it was in furtherance of the collateral objective of obtaining better employment terms for the Pullman workers. In other labor cases as well, the term "boycott" invariably holds the meaning that we ascribe to it: Its goal is to alter, not the terms of the refused transaction, but the terms of workers' employment. [5]

[**62]** **[*806]** **[***645]** The one case in which we have found an activity to constitute a "boycott" within the meaning of the McCarran-Ferguson Act is *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)*. There the plaintiffs were licensed physicians and their patients, and the defendant (St. Paul) was a malpractice insurer that had refused to renew the physicians' policies on an "occurrence" basis, but insisted upon a "claims made" basis. The allegation was that, at the instance of St. Paul, the three other malpractice insurers in the State had collectively refused to write insurance for St. Paul's customers, thus forcing them to accept St. Paul's renewal terms. Unsurprisingly, we held the allegation sufficient to state a cause of action. The insisted-upon condition of the boycott (not being a former St. Paul policyholder) was "artificial": it bore no relationship (or an "artificial" relationship) to the proposed contracts of insurance that the physicians wished to conclude with St. Paul's competitors.

LEdHN[18A][] [18A]Under the standard described, **[****63]** it is obviously not a "boycott" for the reinsurers to "refuse to reinsure coverages written on the ISO CGL forms until the desired changes were made," *ante*, at 788, because the terms of the primary coverages are central elements of the reinsurance contract -- they are *what* is reinsured. See App. 16-17 (Cal. Complaint PP26-27). The "primary policies are . . . the basis of the losses that are shared in the reinsurance agreements." 1 B. Webb, H. Anderson, J. Cookman, & P. Kensicki, Principles of

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reference to a refusal to deal as means of enforcing resale price maintenance); *Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 461, 465, 467, 85 L. Ed. 949, 61 S. Ct. 703 (1941)* (boycott of retailers who sold competitors' products); *United States v. American Livestock Commission Co., 279 U.S. 435, 436-438, 73 L. Ed. 787, 49 S. Ct. 425 (1929)* (absolute boycott of a competing livestock association, intended to drive it out of business); *Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600, 610-611, 58 L. Ed. 1490, 34 S. Ct. 951 (1914)* (discussed *supra, at 803*); *Nash v. United States, 229 U.S. 373, 376, 57 L. Ed. 1232, 33 S. Ct. 780 (1913)* (word used in passing).

[5] See, *e.g.*, *Bedford Cut Stone Co. v. Stone Cutters', 274 U.S. 37, 47, 49, 71 L. Ed. 916, 47 S. Ct. 522 (1927)* (refusal to work on stone received from nonunion quarries); *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 462-463, 65 L. Ed. 349, 41 S. Ct. 172 (1921)* (boycott of target's product until it agreed to union's employment demands); *Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 55 L. Ed. 797, 31 S. Ct. 492 (1911)* (boycott of company's products because of allegedly unfair labor practices); *Loewe v. Lawlor, 208 U.S. 274, 52 L. Ed. 488, 28 S. Ct. 301 (1908)* (boycott of fur hats made by a company that would not allow its workers to be unionized). See also *Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-505, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)* (distinguishing between ordinary strikes and boycotts).

Reinsurance 87 (1990); see also *id., at 55*; Gurley, Regulation of Reinsurance in the United States, *19 Forum 72, 73 (1983)*. Indeed, reinsurance is so closely tied to the terms of the primary insurance contract that one of the two categories of reinsurance (assumption reinsurance) substitutes the reinsurer for the primary or "ceding" insurer and places the reinsurer into contractual privity with the primary insurer's policyholders. See *id.*, at 73-74; *Colonial American Life Ins. Co. v. Commissioner, 491 U.S. 244, 247, 105 L. Ed. 2d 199, 109 S. Ct. 2408 (1989)*; B. Ostrager & T. Newman, Handbook on Insurance Coverage **[*807]** Disputes **[****64]** chs. 15-16 (5th ed. 1992). And in the other category of reinsurance (indemnity reinsurance), either the terms of the underlying insurance policy are incorporated **[**2915]** by reference (if the reinsurance is written under a facultative agreement), see J. Butler & R. Merkin, Reinsurance Law B.1.1-04 (1992); R. Carter, Reinsurance 235 (1979), or (if the reinsurance is conducted on a treaty basis) the reinsurer will require full disclosure of the terms of the underlying insurance policies and usually require that the primary insurer not vary those terms without prior approval, see *id., at 256, 297*.

JUSTICE SOUTER simply disregards this integral relationship between the terms of the primary insurance **[***646]** form and the contract of reinsurance. He describes the reinsurers as "individuals and entities who were not members of ISO, and who would not ordinarily be parties to an agreement setting the terms of primary insurance, not being in the business of selling it." *Ante*, at 788. While this factual assumption is crucial to JUSTICE SOUTER's reasoning (because otherwise he would not be able to distinguish permissible agreements among primary insurers), he offers **[****65]** no support for the statement. But even if it happens to be true, he does not explain why it *must* be true -- that is, why the law must exclude reinsurers from full membership and participation. The realities of the industry may make explanation difficult:

> "Reinsurers also benefit from the services by ISO and other rating or service organizations. The underlying rates and policy forms are the basis for many reinsurance contracts. Reinsurers may also subscribe to various services. For example, a facultative reinsurer may subscribe to the rating service, so that they have the rating manuals available, or purchase optional services, such as a sprinkler report for a specific property location." 2 R. Reinarz, J. Schloss, G. Patrik, & P. Kensicki, Reinsurance Practices 18 (1990).

[*808] ***LEdHN[18B]***[] [18B]JUSTICE SOUTER also describes reinsurers as being "outside the primary insurance industry." *Ante*, at 789. That is technically true (to the extent the two symbiotic industries can be separated) but quite irrelevant. What matters is that the scope and predictability of the risks assumed in a reinsurance **[****66]** contract depend entirely upon the terms of the primary policies that are reinsured. The terms of the primary policies are the "subject-matter insured" by reinsurance, Carter, *supra*, at 4, so that to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way "artificial"; and hence for a number of reinsurers to insist upon such terms jointly is in no way a "boycott." [6]

LEdHN[18C][] [18C]

JUSTICE SOUTER seems **[****67]** to believe that a nonboycott is converted into a boycott by the fact that it occurs "at the behest of," *ante*, at 789, or is "solicited" by, *ibid.*, competitors of the target. He purports to find support for this implausible proposition in *United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)*, which involved a classic boycott, by primary insurers, of competitors who refused to join their price-fixing conspiracy, the South-Eastern Underwriters Association (S. E. U. A.). The conspirators would not deal with independent agents who wrote for such companies, and would not write policies for customers who insured with them. See *id., at 535-536*. Moreover, Justice Black's opinion for the Court noted cryptically, "companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks." *Id., at* ***[***647]*** *535*. JUSTICE SOUTER speculates **[*809]** that "the *[S. E. U. A.]* defendants could have [managed to cut the targets off from reinsurance] by prompting reinsurance companies to refuse to deal with nonmembers." *Ante*, at 789. Even assuming that **[****68]** is what happened, all that can be derived from *S. E. U. A.* is the **[**2916]** proposition that one who prompts *a boycott* is a co-conspirator with the boycotters. For *with or without the defendants' prompting*,

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[6] Once it is determined that the actions of the reinsurers did not constitute a "boycott," but rather a concerted agreement to terms, it follows that their actions do not constitute "coercion" or "intimidation" within the meaning of the statute. That is because, as previously mentioned, such concerted agreements do "not coerce anyone, at least in the usual sense of that word," L. Sullivan, Law of Antitrust 257 (1977), and because they are precisely what is protected by McCarran-Ferguson immunity.

the reinsurers' refusal to deal in *S. E. U. A.* was a boycott, membership in the association having no discernible bearing upon the terms of the refused reinsurance contracts.

JUSTICE SOUTER suggests that we have somehow mistakenly "posited . . . autonomy on the part of the reinsurers." *Ante*, at 792. We do not understand this. Nothing in the complaints alleges that the reinsurers were deprived of their "autonomy," which we take to mean that they were coerced by the primary insurers. (Given the sheer size of the Lloyd's market, such an allegation would be laughable.) That is not to say that we disagree with JUSTICE SOUTER's contention that, according to the allegations, the reinsurers would not "have taken exactly the same course of action without the intense efforts of the four primary insurers." *Ibid.* But the same could be said of the participants in virtually all conspiracies: If they had not been enlisted by the "intense efforts" of the leaders, their **[****69]** actions would not have been the same. If this factor renders otherwise lawful conspiracies (under McCarran-Ferguson) illegal, then the Act would have a narrow scope indeed.

Perhaps JUSTICE SOUTER feels that it is undesirable, as a policy matter, to allow insurers to "prompt" reinsurers not to deal with the insurers' competitors -- *whether or not* that refusal to deal is a boycott. That feeling is certainly understandable, since under the normal application of the Sherman Act the reinsurers' concerted refusal to deal would be an unlawful conspiracy, and the insurers' "prompting" could make them part of that conspiracy. The McCarran-Ferguson **[*810]** Act, however, makes that conspiracy lawful (assuming reinsurance is state regulated), unless the refusal to deal is a "boycott."

LEdHN[2D][] [2D]Under the test set forth above, there are sufficient allegations of a "boycott" to sustain the relevant counts of complaint against a motion to dismiss. For example, the complaints allege that some of the defendant reinsurers threatened to "withdraw entirely from the business of reinsuring primary U.S. insurers who wrote **[****70]** on the occurrence form." App. 31 (Cal. Complaint P89), *id.*, at 83 (Conn. Complaint P93). Construed most favorably to respondents, that allegation claims that primary insurers who wrote insurance on disfavored forms would be refused all reinsurance, *even* as to risks written on *other forms*. If that were the case, the reinsurers might have been engaging in a boycott -- they would, that is, unless the primary insurers' other business were relevant to the proposed reinsurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses). Cf. Gonye, Underwriting the Reinsured, in Reinsurance 439, 463-466 (R. Strain ed. 1980); 2 R. Reinarz, J. Schloss, G. **[***648]** Patrik, & P. Kensicki, Reinsurance Practices 21-23 (1990) (same). Other allegations in the complaints could be similarly construed. For example, the complaints also allege that the reinsurers "threatened a boycott of North American CGL risks," not just CGL risks containing dissatisfactory terms, App. 26 (Cal. Complaint P74), *id.*, at 79 (Conn. Complaint P78); that "the foreign and domestic reinsurer representatives presented their agreed upon positions that **[****71]** there would be changes in the CGL forms or no reinsurance," *id.*, at 29 (Cal. Complaint P82), *id.*, at 81-82 (Conn. Complaint P86); that some of the defendant insurers and reinsurers told "groups of insurance brokers and agents . . . that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the [revised] ISO forms were not approved," **[*811]** *id.*, at 29 (Cal. Complaint P85), *id.*, at 82 (Conn. Complaint P89).

LEdHN[2E][] [2E] ***LEdHN[19]***[] [19] ***LEdHN[20A]***[] [20A]Many other allegations in the complaints describe conduct that may amount to **[**2917]** a boycott if the plaintiffs can prove certain additional facts. For example, General Re, the largest American reinsurer, is alleged to have "agreed to either coerce ISO to adopt [the defendants'] demands or, failing that, 'derail' the entire CGL forms program." *Id.*, at 24 (Cal. Complaint P64), *id.*, at 77 (Conn. Complaint P68). **[****72]** If this means that General Re intended to withhold all reinsurance on all CGL forms -- even forms having no objectionable terms -- that might amount to a "boycott." Also, General Re and several other domestic reinsurers are alleged to have "agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both [the occurrence and claims made] forms." *Id.*, at 25 (Cal. Complaint P66), *id.*, at 78 (Conn. Complaint P70). Liberally construed, this allegation may mean that the defendants had linked their demands so that they would continue to refuse to do business on *either* form until *both* were changed to their liking. Again, that might amount to a boycott. "[A] complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S.*

232, 246, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). Under that standard, **[****73]** these allegations are sufficient to sustain the First, Second, Third, and Fourth Claims for Relief in the California Complaint and the First and Second Claims for Relief in the Connecticut Complaint. [7]

LEdHN[20B][] [20B]

Concur by: SOUTER

Concur

[*784contd] **[***631contd]** **[**2903contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

SOUTER, J., delivered an opinion concurring in the judgment with respect to Part II-B, in which WHITE, BLACKMUN, and STEVENS, JJ., joined.

B

That the domestic defendants did not lose their § 2(b) exemption by acting together with foreign reinsurers, however, is not enough reason **[****74]** to reinstate the District Court's dismissal order, for the Court of Appeals reversed that order on two independent grounds. Even if the participation of foreign reinsurers did not affect the § 2(b) exemption, the Court of Appeals held, the agreements and acts alleged by the plaintiffs constitute "agreement[s] to boycott" and "act[s] of boycott [and] coercion" within the meaning of § 3(b) of the McCarran-Ferguson Act, which makes it clear that the Sherman Act applies to such agreements and acts regardless of the § 2(b) exemption. See 938 F.2d, at 928. I agree with **[*785]** the Court that, construed in favor of the plaintiffs, the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the First and Second Claims for Relief in the Connecticut Complaint, allege one or more § 3(b) "act[s] of boycott," and are thus sufficient to survive a motion to dismiss. See *infra*, at 789-790; *post*, at 811.

In reviewing the motions to dismiss, however, the Court has decided to use what I believe to be an overly narrow definition of the term "boycott" as used in § 3(b), confining it to those refusals to deal that are "unrelated" or "collateral" **[****75]** to the objective sought by those refusing to deal. *Post*, at 803. I do not believe that the McCarran-Ferguson Act or our precedents warrant such a cramped reading of the term.

The majority and I find common ground in four propositions concerning § 3(b) boycotts, as established in our decisions in St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978), and United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944). First, as we noted in *St. Paul*, our only prior decision construing "boycott" as it appears in § 3(b), only those refusals to deal involving the coordinated action of multiple actors constitute § 3(b) boycotts: "conduct by individual actors falling short of concerted activity is simply not a 'boycott' within [the meaning of] § 3(b)." **[***632]** 438 U.S. at 555; see *post*, at 800 ("'boycott'" used "to describe . . . collective action"); *post*, at 801 ("To 'boycott' means 'to combine in refusing to hold relations'" (citation omitted)).

Second, a § 3(b) boycott need not involve an absolute refusal to deal. [13] A primary goal **[****76]** of the alleged conspirators in *South-Eastern Underwriters*, as we described it, was "to force nonmember insurance companies

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[7] We agree with JUSTICE SOUTER's conclusion, *ante*, at 790-791, n. 18, that the Seventh Claim for Relief in the California Complaint and the Sixth Claim for Relief in the Connecticut Complaint fail to allege any § 3(b) boycotts.

[13] Petitioners correctly concede this point. See Brief for Petitioners in No. 91-1111, p. 32, n. 14.

into the conspiracies." [14] *322 U.S. at 535*; **[**2904]** cf. Joint Hearing on S. 1362, H. R. **[*786]** 3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2, p. 335 (1943) (statement of Edward L. Williams, President, Insurance Executives Association) ("The companies that want to come into the Interstate Underwriters Board can come in there. I do not know of any company that is turned down"). Thus, presumably, the refusals to deal orchestrated by the defendants would cease if the targets agreed to join the association and abide by its terms. See *post*, at 801 ("The refusal to deal may . . . be conditional" (emphasis omitted)).

[**77]** Third, contrary to petitioners' contentions, see Brief for Petitioners in No. 91-1111, pp. 32, n. 14, 34, 38-39, a § 3(b) boycott need not entail unequal treatment of the targets of the boycott and its instigators. Some refusals to deal (those, perhaps, which are alleged to violate only *§ 2* of the Sherman Act [15]) may have as their object the complete destruction of the business of competitors; these may well involve unconditional discrimination against the targets. Other refusals to deal, however, may seek simply to prevent competition as to the price or features of the product sold; and these need not depend on unequal treatment of the targets. Assuming, **[*787]** as the *South-Eastern Underwriters* Court appears to have done, that membership in the defendant association was open to all insurers, the association is most readily seen as having intended to treat all insurers equally: they all had the choice either to join the association and abide by its rules, or to be subjected to the "boycotts," **[***633]** and acts of coercion and intimidation, alleged in that case. See *post*, at 808 (describing *South-Eastern Underwriters* as involving a "boycott, by primary insurers, **[****78]** of competitors who refused to join their price-fixing conspiracy").

Fourth, although a necessary element, "concerted activity" is not, by itself, sufficient for a finding of "boycott" under § 3(b). Were this the case, we recognized in *Barry*, § 3(b) might well "'devour the broad antitrust immunity bestowed by *§ 2(b)*,'" *438 U.S. at 545, n. 18* (quoting *id., at 559* (Stewart, J., dissenting)), since every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," *15 U.S. C. § 1*, involves "concerted activity." Thus, we suggested, simple price fixing has been treated neither as a boycott nor as coercion "in the absence of any additional enforcement activity. **[****79]** " *438 U.S. at 545, n. 18*; see *post*, at 804 (contending that simple concerted agreements on contract terms are not properly characterized as boycotts).

Contrary to the majority's view, however, our decisions have suggested that "enforcement activity" is a multifarious concept. The *South-Eastern Underwriters* Court, which coined the phrase "boycotts[,] . . . coercion and intimidation," *322 U.S. at 535*; see n. 14, *supra*, provides us with a list of actions that, it finds, are encompassed by these terms. "Companies not members of [the association]," it states, "were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-[association] companies were punished by a withdrawal of the right to represent the members of [the association]; and persons needing insurance who purchased from non-[association] **[*788]** companies **[**2905]** were threatened with boycotts and withdrawal of all patronage." *322 U.S. at 535-536*. Faced with such a list, and with all of the other instances in which we have used the term "boycott," we **[****80]** rightly came to the conclusion in *Barry* that, as used in our cases, the term does not refer to a "'unitary phenomenon.'" *438 U.S. at 543* (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974)).

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[14] As we have noted before, see *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*; *SEC v. National Securities, Inc., 393 U.S. 453, 458, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969)*, the McCarran-Ferguson Act was precipitated by our holding in *South-Eastern Underwriters* that the business of insurance was interstate commerce and thus subject generally to federal regulation under the *Commerce Clause*, and to scrutiny under the Sherman Act specifically. Congress responded, both to "ensure that the States would continue to have the ability to tax and regulate the business of insurance," *Royal Drug Co., 440 U.S. at 217-218* (footnote omitted), and to limit the application of the antitrust laws to the insurance industry, *id., at 218*. In drafting the § 3(b) exception to the *§ 2(b)* grant of antitrust immunity, Congress borrowed language from our description of the indictment in *South-Eastern Underwriters* as charging that "the conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies." *322 U.S. at 535*.

[15] *Section 2* of the Sherman Act, 26 Stat. 209, as amended, *15 U.S. C. § 2*, prohibits monopolization of, or attempts or conspiracies to monopolize, "any part of the trade or commerce among the several States, or with foreign nations."

The question in this litigation is whether the alleged activities of the domestic defendants, acting together with the foreign defendants who are not petitioners here, include "enforcement activities" that would raise the claimed attempts to fix terms to the level of § 3(b) boycotts. I believe they do. The core of the plaintiffs' allegations against the domestic defendants concern those activities that form the basis of the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the Second Claim for Relief in the Connecticut Complaint: the conspiracies involving both the primary insurers and domestic and foreign brokers and reinsurers to force changes in the ISO CGL forms. According to the complaints, primary insurer defendants Hartford and Allstate first tried to convince other members of the ISO that the ISO CGL forms should be changed to limit coverage in the manner we **[***634]** have detailed above, see *supra, at 773-774*; but they failed **[****81]** to persuade a majority of members of the relevant ISO committees, and the changes were not made. Unable to persuade other primary insurers to agree voluntarily to their terms, Hartford and Allstate, joined by Aetna and CIGNA, sought the aid of other individuals and entities who were not members of ISO, and who would not ordinarily be parties to an agreement setting the terms of primary insurance, not being in the business of selling it. The four primary insurers convinced these individuals and entities, the reinsurers, to put pressure on ISO and its members by refusing to reinsure coverages written on the ISO CGL forms until the desired changes were made. Both domestic and foreign reinsurers, acting at the behest of the four primary **[*789]** insurers, announced that they would not reinsure under the ISO CGL forms until changes were made. As an immediate result of this pressure, ISO decided to include a retroactive-date provision in its claims-made form, and to exclude all pollution coverage from both its claims-made and occurrence forms. In sum, the four primary insurers solicited refusals to deal from outside the primary insurance industry as a means of forcing their fellow primary **[****82]** insurers to agree to their terms; the outsiders, acting at the behest of the four, in fact refused to deal with primary insurers until they capitulated, which, in part at least, they did.

This pattern of activity bears a striking resemblance to the first act of boycott listed by the *South-Eastern Underwriters* Court; although neither the *South-Eastern Underwriters* opinion, nor the underlying indictment, see Transcript of Record, O. T. 1943, No. 354, p. 11 (P22(e)), details exactly how the defendants managed to "cut off [nonmembers] from the opportunity to reinsure their risks," *322 U.S. at 535*, the defendants could have done so by prompting reinsurance companies to refuse to deal with nonmembers, just as is alleged here. [16] **[****84]** Moreover, the activity falls squarely **[*790]** **[**2906]** within even the narrow theory of the § 3(b) exception Justice Stewart advanced in dissent in *Barry*. Under that theory, [17] **[****85]** the **[***635]** § 3(b) exception should be limited to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." *438 U.S. at 565*. I can think of no better description of **[****83]** the four primary insurers' activities in this

[16] The majority claims that this refusal to deal was a boycott only because "membership in the association [had] no discernible bearing upon the terms of the refused reinsurance contracts." *Post*, at 809. Testimony at the hearings on the bill that became the McCarran-Ferguson Act indicates that the insurance companies thought otherwise. "We say 'You do not issue insurance to a company that does not do business the way we think it should be done and belong to our association.' . . . It is for the protection of the public, the stockholders, and the companies . . . . You know when those large risks are taken that they have to be reinsured. We do not want to have to take a risk that is bad, or at an improper rate, or an excessive commission, we do not want our agents to take that, nor do we want to reinsure part of the risk that is written that way. We feel this way -- that some groups are doing business in what is not the proper way, we feel it is not in the interest of the companies and it is not in the interest of the public, and we just do not want to do business with them." Joint Hearing on S. 1362, H. R. 3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2, p. 333 (1943) (statement of Edward L. Williams, President, Insurance Executives Association).

[17] In passing the McCarran-Ferguson Act, Justice Stewart argued, "Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest." *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 565, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)* (dissenting opinion). Hence, *§ 2(b)* provides that the federal antitrust laws will generally not be applicable to those insurance business practices "regulated by State law," and presumably state law could, for example, either mandate price fixing, or specifically authorize voluntary price-fixing agreements. On the other hand, Congress intended to delegate regulatory power only to the States; nothing in the McCarran-Ferguson Act suggests that Congress wanted one insurer, or a group of insurers, to be able to formulate and enforce policy for other insurers. Thus, the enforcement activities that distinguish § 3(b) "boycotts" from other concerted activity include, in this context, "*private enforcement* . . . of industry rules and practices, even if those rules and practices are permitted by state law." *Id., at 565-566* (emphasis in original) (footnote omitted).

litigation. For these reasons, I agree with the Court's ultimate conclusion that the Court of Appeals was correct in reversing the District Court's dismissal of the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the Second Claim for Relief in the Connecticut Complaint. [18]

[**86]** **[*791]** The majority concludes that, so long as the reinsurers' role in this course of action was limited to "a concerted agreement to seek particular terms in particular transactions," *post*, at 801-802, the course of action could never constitute a § 3(b) boycott. The majority's emphasis on this conclusion assumes **[**2907]** an artificial segmentation of the course of action, and a **[***636]** false perception of the unimportance of the elements of that course of action other than the reinsurers' agreement. The majority concedes that the complaints allege, not just implementation of a horizontal agreement, but refusals to deal that occurred "at the behest of," or were "solicited by," the four primary insurers, who were "competitors of the target[s]." **[*792]** *Post*, at 808 (citations and internal quotation marks omitted). But it fails to acknowledge several crucial features of these events that bind them into a single course of action recognizable as a § 3(b) boycott.

First, the allegation that the reinsurers acted at the behest of the four primary insurers excludes the possibility that the reinsurers acted entirely in their own independent self-interest, **[****87]** and would have taken exactly the same course of action without the intense efforts of the four primary insurers. Although the majority never explicitly posits such autonomy on the part of the reinsurers, this would seem to be the only point of its repeated emphasis on the fact that "the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured." *Ibid*. If the encouragement of the four primary insurers played no role in the reinsurers' decision to act as they did, then it is difficult to see how one could describe the reinsurers as acting at the behest of the primary insurers, an element I find crucial to the § 3(b) boycott alleged here. From the vantage point of a ruling on motions to dismiss, however, I discern sufficient allegations in the complaints that this is not the case. In addition, according to the complaints, the four primary insurers were not acting out of concern for the reinsurers' financial health when they prompted the reinsurers to refuse reinsurance for certain risks; rather, they simply wanted to ensure that no other primary insurer would be able to sell insurance policies **[****88]** that they did not want to sell. Finally, as the complaints portray the business of insurance, reinsurance is a separate, specialized product, "the availability [of which] affects the ability and willingness of primary insurers to provide insurance to their customers." App. 18 (Cal. Complaint P34). Thus, contrary to the majority's assertion, the boundary between the primary insurance industry and the reinsurance industry is not merely "technical." *Post*, at 808.

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[18] The First and Sixth Claims for Relief in the Connecticut Complaint, and the Seventh Claim for Relief in the California Complaint, which also name some or all of the petitioners, present special cases. The First Claim for Relief in the Connecticut Complaint alleges an overarching conspiracy involving all of the defendants named in the complaint and all of the conduct alleged. As such, it encompasses "boycott" activity, and the Court of Appeals was correct to reverse the District Court's order dismissing it. As currently described in the complaint's statement of facts, however, some of the actions of the reinsurers and the retrocessional reinsurers appear to have been taken independently, rather than at the behest of the primary insurer defendants. I express no opinion as to whether those acts, if they were indeed taken independently, could amount to § 3(b) boycotts; but I note that they lack the key element on which I rely in this litigation to find a sufficient allegation of boycott.

The Seventh Claim for Relief in the California Complaint, and the virtually identical Sixth Claim for Relief in the Connecticut Complaint, allege a conspiracy among a group of domestic primary insurers, foreign reinsurers, and the ISO to draft restrictive model forms and policy language for "umbrella" and "excess" insurance. On these claims, the Court of Appeals reversed the District Court's order of dismissal as to the domestic defendants solely because those defendants "acted in concert" with nonexempt foreign defendants, *938 F.2d, at 931*, relying on reasoning that the Court has found to be in error, see *supra, at 781-784*. The Court of Appeals found that "no boycotts [were] alleged as the defendants' modus operandi in respect to [excess and umbrella] insurance." *938 F.2d, at 930*. I agree; even under a liberal construction of the complaints in favor of plaintiffs, I can find no allegation of any refusal to deal in connection with the drafting of the excess and umbrella insurance language. Therefore I conclude that neither the participation of unregulated parties nor the application of § 3(b) furnished a basis to reverse the District Court's dismissal of these claims as against the domestic insurers, and I would reverse the judgment of the Court of Appeals in this respect. The Fifth, Sixth, and Eighth Claims for Relief in the California Complaint and the Third, Fourth, and Fifth Claims for Relief in the Connecticut Complaint also allege concerted refusals to deal; but because they do not name any of the petitioners in No. 91-1111, the Court has no occasion to consider whether they allege § 3(b) boycotts.

[*793] The majority insists that I "disregard the integral relationship between the terms of the primary insurance form and the contract of reinsurance," *post*, at 807, a fact which it seems to believe makes it impossible to draw any distinction whatsoever between primary insurers and reinsurers. Yet it is the majority that fails to see that, in spite of such an "integral relationship," the interests of primary insurer and reinsurer will almost certainly differ in some cases. For example, the complaints allege that reinsurance contracts often "layer" risks, "in the sense that [a] reinsurer may have to respond only to claims above a certain amount . . . ." App. 10 (Cal. Complaint P4.q); *id., at 61* (Conn. **[****89]** Complaint P4(f)). Thus, a primary insurer might be much more concerned than its reinsurer about a risk that resulted in a high number of relatively small **[***637]** claims. Or the primary insurer might simply perceive a particular risk differently from the reinsurer. The reinsurer might be indifferent as to whether a particular risk was covered, so long as the reinsurance premiums were adjusted to its satisfaction, whereas the primary insurer might decide that the risk was "too hot to handle," on a standardized basis, at any cost. The majority's suggestion that "to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way 'artificial,'" *post*, at 808; see *post*, at 806, simply ignores these possibilities; the conditions could quite easily be "artificial," in the sense that they are not motivated by the interests of the reinsurers themselves. Because the parties have had no chance to flesh out the facts of this case, because I have no *a priori* knowledge of those facts, and because I do not believe I can locate them in the **[**2908]** pages of insurance treatises, I would not rule out these possibilities on a motion to dismiss.

Believing **[****90]** that there is no other principled way to narrow the § 3(b) exception, the majority decides that "boycott" encompasses just those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. *Post*, at 803. This designation of a single "'unitary phenomenon,'" **[*794]** *Barry, 438 U.S. at 543*, to which the term "boycott" will henceforth be confined, is of course at odds with our own description of our Sherman Act cases in *Barry*. [19] See *ibid*. Moreover, the limitation to "collateral" refusals to deal threatens to shrink the § 3(b) exception far more than the majority is willing to admit. Even if the reinsurers refused all reinsurance to primary insurers "who wrote insurance on disfavored forms," including insurance "as to risks written on other forms," the majority states, the reinsurers would not be engaging in a § 3(b) boycott if "the primary insurers' other business were relevant to the proposed insurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses)." *Post*, at 810 (emphasis deleted). Under this standard, and under facts comparable **[****91]** to those in this litigation, I assume that reinsurers who refuse to deal at all with a primary insurer unless it ceases insuring a particular risk would not be engaging in a § 3(b) boycott if they could show that (1) insuring the risk in question increases the probability that the primary insurer will become insolvent, and that (2) it costs more to administer the reinsurance contracts of a bankrupt primary insurer (including those unrelated to the risk that caused the primary insurer to declare bankruptcy). One can only imagine the variety of similar arguments that may slowly plug what remains of the § 3(b) exception. For these reasons, I cannot agree with the majority's narrow theory of § 3(b) boycotts.

[**92]**

Dissent by: SCALIA

Dissent

[*812] **[***648contd]** **[**2917contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

SCALIA, J., delivered a dissenting opinion with respect to Part II, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined post, p. 800.

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[19] The majority contends that its concept of boycott is still "multifaceted" because it can be modified by such adjectives as "punitive," "labor," "political," and "social." *Post*, at 804, n. 3. This does not hide the fact that it is attempting to concoct a "precise definition" of the term, *post*, at 800, composed of a simple set of necessary and sufficient conditions.

II

Petitioners in No. 91-1128, various British corporations and other British subjects, argue that certain of the claims against them constitute an inappropriate extraterritorial application of the Sherman **[***649]** Act. [8] It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). Respondents asserted nonfrivolous claims under the Sherman Act, and *28 U.S.C. § 1331* vests district courts with subject-matter jurisdiction over cases "arising under" federal statutes. As precedents such as *Lauritzen v. Larsen, 345 U.S. 571, 97 L. Ed. 1254, 73 S. Ct. 921 (1953)*, make clear, that is sufficient to establish the District Court's jurisdiction over these claims. *Lauritzen* involved **[****93]** a Jones Act claim brought by a foreign sailor against a foreign shipowner. The shipowner contested the District Court's jurisdiction, see *id., at 573*, apparently on the grounds that the Jones Act did not govern the dispute between the foreign parties to the action. Though ultimately agreeing with the shipowner that the Jones Act did not apply, see discussion *infra*, at 816, the Court held that the District Court had jurisdiction.

> "As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." *345 U.S. at 575*.

[*813] See also *Romero v. International Terminal Operating Co., 358 U.S. 354, 359, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959)*.

[**94]** **[**2918]** The second question -- the extraterritorial reach of the Sherman Act -- has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. See *EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991)* (*Aramco*) ("It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States"). If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction -- want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute. See *Romero, supra, at 384* (holding no claim available under the Jones Act); *American Banana Co. v. United Fruit Co., 213 U.S. 347, 359, 53 L. Ed. 826, 29 S. Ct. 511 (1909)* (holding that complaint based upon foreign conduct "alleges no case under the [Sherman Act]").

There **[****95]** is, however, a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it **[***650]** is known as "legislative jurisdiction," *Aramco, supra*, at 253; *Restatement (First) Conflict of Laws § 60* (1934), or "jurisdiction to prescribe," 1 Restatement (Third) of Foreign Relations Law of the United States 235 (1987) (hereinafter Restatement (Third)). This refers to "the authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate," see *id., at 231*. There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, "to regulate Commerce with foreign Nations," and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United **[*814]** States interests are affected. See *Ford v. United States, 273 U.S. 593, 621-623, 71 L. Ed. 793, 47 S. Ct. 531 (1927)*; *United States v. Bowman, 260 U.S. 94, 98-99, 67 L. Ed. 149, 43 S. Ct. 39 (1922)*; *American Banana, supra, at 356*. **[****96]** But the question in this litigation is whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction in enacting the Sherman Act.

Two canons of statutory construction are relevant in this inquiry. The first is the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial

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[8] The counts at issue in this litigation are the Fifth, Sixth, and Eighth Claims for Relief in the California Complaint. See App. 43-46 (PP131-140), *id., at 47-49 (PP146-150)*.

jurisdiction of the United States.'" *Aramco, supra*, at 248 (quoting *Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949))*. Applying that canon in *Aramco*, we held that the version of Title VII of the Civil Rights Act of 1964 then in force, *42 U.S.C. §§ 2000e to 2000e-17 (1988 ed.)*, did not extend outside the territory of the United States even though the statute contained broad provisions extending its prohibitions to, for example, "'any activity, business, or industry in commerce.'" *Id., at 249* (quoting *42 U.S.C. § 2000e(h)*). We held such "boilerplate language" to be an insufficient indication to override the presumption against extraterritoriality. *Id., at 251*; see also **[****97]** *id., at 251-253*. The Sherman Act contains similar "boilerplate language," and if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here. We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n. 6, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*; see also *United States v. Aluminum **[**2919]** Co. of America, 148 F.2d 416 (CA2 1945)*.

But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: "An act of congress **[*815]** ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy, 6 U.S. 64, 2 Cranch 64, 118, 2 L. Ed. 208 **[***651]** (1804)* (Marshall, **[****98]** C.J.). This canon is "wholly independent" of the presumption against extraterritoriality. *Aramco, supra*, at 264 (Marshall, J., dissenting). It is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. See Restatement (Third) §§ 401-416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law. For example, in *Romero v. International Terminal Operating Co., 358 U.S. 354, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959)*, the plaintiff, a Spanish sailor who had been injured while working aboard a Spanish-flag and Spanish-owned vessel, filed a Jones Act claim against his Spanish employer. The presumption against **[****99]** extraterritorial application of federal statutes was inapplicable to the case, as the actionable tort had occurred in American waters. See *id., at 383*. The Court nonetheless stated that, "in the absence of a contrary congressional direction," it would apply "principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." *Id., at 382-383*. "The controlling considerations" in this choice-of-law analysis were "the interacting interests of the United States and of foreign countries." *Id., at 383*.

[*816] *Romero* referred to, and followed, the choice-of-law analysis set forth in *Lauritzen v. Larsen, 345 U.S. 571, 97 L. Ed. 1254, 73 S. Ct. 921 (1953)*. As previously mentioned, *Lauritzen* also involved a Jones Act claim brought by a foreign sailor against a foreign employer. The *Lauritzen* Court recognized the basic problem: "If [the Jones Act were] read literally, **[****100]** Congress has conferred an American right of action which requires nothing more than that plaintiff be 'any seaman who shall suffer personal injury in the course of his employment.'" *Id., at 576*. The solution it adopted was to construe the statute "to apply only to areas and transactions in which *American law would be considered operative under prevalent doctrines of international law.*" *Id., at 577* (emphasis added). To support application of international law to limit the facial breadth of the statute, the Court relied upon -- of course -- Chief Justice Marshall's statement in *Schooner Charming Betsy*, quoted *supra, at 814-815*. It then set forth "several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim." *345 U.S. at 583*; see *id., at 583-593* (discussing factors). See also *McCulloch v. Sociedad Nacional de **[***652]** Marineros de Honduras, 372 U.S. 10, 21-22, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963)* (applying *Schooner Charming Betsy* principle to restrict application of National Labor Relations Act to foreign-flag vessels).

[**101]** *Lauritzen, Romero*, and *McCulloch* were maritime cases, but we have recognized the principle that the scope of generally worded **[**2920]** statutes must be construed in light of international law in other areas as well.

See, *e.g., Sale* v. *Haitian Centers Council, Inc., ante*, at 178, n. 35; *Weinberger v. Rossi, 456 U.S. 25, 32, 71 L. Ed. 2d 715, 102 S. Ct. 1510 (1982)*. More specifically, the principle was expressed in *United States v. Aluminum Co. of America, 148 F.2d 416 (CA2 1945)*, the decision that established the extraterritorial reach of the Sherman Act. In his opinion for the court, Judge Learned Hand cautioned "we are not to read general words, such as those in [the Sherman] **[*817]** Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'" *Id., at 443*.

More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." See *Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597, 608-615 (CA9 1976)*; **[****102]** *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294-1298 (CA3 1979)*; *Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869-871 (CA10 1981)*; *Laker Airways Limited v. Sabena, Belgian World Airlines, 235 U.S. App. D.C. 207, 236, 731 F.2d 909*, and n. 109, *235 U.S. App. D.C. 207, 731 F.2d 909, 731 F.2d 909, 938, and n. 109 (1984)*; see also *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 131 U.S. App. D.C. 226, 236, 404 F.2d 804*, and n. 31, *131 U.S. App. D.C. 226, 404 F.2d 804, 404 F.2d 804, 814, and n. 31 (1968)*. The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. See J. Story, Commentaries on the Conflict **[****103]** of Laws § 38 (1834) (distinguishing between the "comity of the courts" and the "comity of nations," and defining the latter as "the true foundation and extent of the obligation of the laws of one nation within the territories of another"). Comity in this sense includes the choice-of-law principles that, "in the absence of contrary congressional direction," are assumed to be incorporated into our substantive laws having extraterritorial reach. *Romero, supra, at 382-383*; see also *Lauritzen, supra, at 578-579*; *Hilton v. Guyot, 159 U.S. 113, 162-166, 40 L. Ed. 95, 16 S. Ct. 139 (1895)*. Considering comity in **[*818]** this way is just part of determining whether the Sherman Act prohibits the conduct at issue. [9]

[**104]** **[***653]** In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present cases, I shall rely on the Restatement (Third) for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles (*Lauritzen, Romero*, and *McCulloch*) and in the decisions of other federal courts, especially *Timberlane*. Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable **[**2921]** test that takes account of foreign regulatory interests.

Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Restatement (Third) § 403(1)*. The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the **[****105]** extent to which the activity takes place within the territory [of the regulating state]," *id.*, *§ 403(2)(a)*; "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the **[*819]** activity to be regulated," *id.*, *§ 403(2)(b)*; "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," *id.*, *§ 403(2)(c)*; "the extent to which another state may have an interest in regulating the activity," *id.*, *§ 403(2)(g)*; and "the likelihood of conflict with regulation by another state," *id.*, *§ 403(2)(h)*. Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at

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[9] Some antitrust courts, including the Court of Appeals in the present cases, have mistaken the comity at issue for the "comity of courts," which has led them to characterize the question presented as one of "abstention," that is, whether they should "exercise or decline jurisdiction." *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294, 1296 (CA3 1979)*; see also *In re Insurance Antitrust Litigation, 938 F.2d 919, 932 (CA9 1991)*. As I shall discuss, that seems to be the error the Court has fallen into today. Because courts are generally reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expanding the extraterritorial reach of the Sherman Act.

issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. [10] Great Britain has established a comprehensive regulatory scheme **[****106]** governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity," *id.*, *§ 403(2)(g)*. See *938 F.2d at 932-933*; *In re Insurance Antitrust Litigation, 723 F. Supp. 464, 487-488 (ND Cal. 1989)*; see also J. Butler & R. Merkin, Reinsurance Law A.1.1-02 (1992). Finally, *§ 2(b)* of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in § 3(b) -- suggesting that "the importance **[***654]** of regulation to the [United States]," *Restatement (Third) § 403(2)(c)*, is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

[**107]** **[*820]** It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should "decline to exercise . . . jurisdiction," *ante*, at 798, rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court's conclusion that the issue of the substantive scope of the Sherman Act is not in the cases. See *ante*, at 796, n. 22; *ante*, at 797, n. 24. To be sure, the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute. Parties often do not, as we have observed (and have declined to punish with procedural default) before. See the excerpt from *Lauritzen* quoted *supra*, at 812; see also *Romero, 358 U.S. at 359*. It is not realistic, and also not helpful, to pretend that the only really relevant issue in this litigation is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong. It concludes that no "true **[****108]** conflict " counseling nonapplication of United States law (or rather, as it thinks, United States judicial jurisdiction) exists unless compliance with United States law would constitute a *violation* of another country's law. *Ante*, at 798-799. **[**2922]** That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries -- particularly our closest trading partners.

In the sense in which the term "conflict" was used in *Lauritzen, 345 U.S. at 582, 592*, and is generally understood in the field of conflicts of laws, there is clearly a conflict in this litigation. The petitioners here, like the defendant in *Lauritzen*, were not compelled by any foreign law to take their allegedly wrongful actions, but that no more precludes a conflict-of-laws analysis here than it did there. See *id., at 575-576* (detailing the differences between foreign and **[*821]** United States law). Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, **[****109]** a conflict-of-laws analysis is necessary. See generally R. Weintraub, Commentary on Conflict of Laws 2-3 (1980); *Restatement (First) of Conflict of Laws § 1, Comment c* and Illustrations (1934).

Literally the *only* support that the Court adduces for its position is *§ 403 of the Restatement (Third)* -- or more precisely Comment *e* to that provision, which states:

> "Subsection (3) [which says that a State should defer to another state if that State's interest is clearly **[***655]** greater] applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both . . . ."

The Court has completely misinterpreted this provision. Subsection (3) of *§ 403* (requiring one State to defer to another in the limited circumstances just described) comes into play only after subsection (1) of *§ 403* has been complied with -- *i.e.*, after it has been determined that the exercise of jurisdiction by *both* of the two States is not

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[10] Some of the British corporations are subsidiaries of American corporations, and the Court of Appeals held that "the interests of Britain are at least diminished where the parties are subsidiaries of American corporations." *Id., at 933*. In effect, the Court of Appeals pierced the corporate veil in weighing the interests at stake. I do not think that was proper.

"unreasonable. **[****110]** " That prior question is answered by applying the factors (*inter alia*) set forth in subsection (2) of *§ 403*, that is, precisely the factors that I have discussed in text and that the Court rejects. [11]

[*822] * * *

I would reverse the judgment of the Court of Appeals on this issue, and remand to the District Court with instructions to dismiss for failure to state a claim on the three counts at issue in No. 91-1128.

References

Supreme Court's views as to validity, construction, and application of McCarran-Ferguson Act (15 USCS 1011-1015), concerning regulation of business of insurance by state or federal law

43 Am Jur 2d, Insurance 37; *54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 11*, *225-227*

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:11, 54:115

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 1, *1012(b)*, *1013(b)*

L Ed Digest, Conflict of Laws 45, 97.5; Restraints of Trade, Monopolies, and Unfair Trade Practices 9.7

L Ed Index, Boycotts; Comity; McCarran-Ferguson Act; Sherman Act

ALR Index, Boycotts; Comity; McCarran-Ferguson Act; Restraints of Trade and Monopolies

Annotation References:

Union activities violating the federal antitrust laws--federal cases. *9 L Ed 2d 998, 20 L Ed 2d 1528*.

What constitutes **[****112]** "boycott, coercion, or intimidation" for purposes of 3(b) of McCarran-Ferguson Act (*15 USCS 1013(b)*). 52 ALR Fed 255.

Refusals to deal as violations of the federal antitrust laws (*15 USCS 1*, *2*, *13*). 41 ALR Fed 175.

Extraterritorial application of federal antitrust laws to acts occurring in foreign commerce. 40 ALR Fed 343.

Nonlabor picketing or boycott. 93 ALR2d 1284.

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[11] The Court skips directly to subsection (3) of *§ 403*, apparently on the authority of Comment *j* to *§ 415 of the Restatement (Third)*. See *ante*, at 799. But the preceding commentary to *§ 415* makes clear that "any exercise of [legislative] jurisdiction under this section is subject to the requirement of reasonableness" set forth in *§ 403(2)*. *Restatement (Third) § 415, Comment a*. Comment *j* refers back to the conflict analysis set forth in *§ 403(3)*, which, as noted above, comes after the reasonableness analysis of *§ 403(2)*.

In re Catfish Antitrust Litig.

United States District Court for the Northern District of Mississippi, Delta Division

June 28, 1993, Decided

No. MDL 928, Cause No. 2:92-CV-073-D-O

Reporter

826 F. Supp. 1019 *; 1993 U.S. Dist. LEXIS 9748 **; 1993-2 Trade Cas. (CCH) P70,395

In re CATFISH ANTITRUST LITIGATION

Core Terms

catfish, prices, conspiracy, processed, fish, products, Pride, class action, plaintiffs', class certification, predominance, antitrust, price fixing, certification, defendants', fraudulent concealment, damages, named plaintiff, class member, meetings, Fresh, Farm, processors, motion to dismiss, minimum price, diversity, purchasers, distributors, alleged conspiracy, statute of limitations

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Motions to Dismiss, Failure to State Claim**

A *Fed. R. Civ. P. 12(b)(6)* motion is disfavored, and it is rarely granted. Dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot be dismissed so long as the complaint states a claim. To qualify for dismissal under *Fed. R. Civ. P. 12(b)(6)*, a complaint must on its face show a bar to relief.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Motions to Dismiss, Failure to State Claim**

When a defendant moves to dismiss a complaint, the court focuses solely on the legal sufficiency of the pleadings. The court is restricted to the face of the pleadings and may look only within the four corners of the complaint in evaluating a *Fed. R. Civ. P. 12(b)(6)* motion.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Complaints > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] Complaints, Requirements for Complaint

The sufficiency of a complaint is governed foremost by *Fed. R. Civ. P. 8(a)(2)*, which requires a short and plain statement of the claim showing that the pleader is entitled to relief. It is well settled that the statement of the claim should provide the defendant with fair notice of what the claim is and the grounds upon which it rests.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4[] Antitrust & Trade Law, Sherman Act

In a Sherman Act, *15 U.S.C.S. § 1*, claim, a blanket allegation of a conspiracy is deemed insufficient to place the defendant on notice of the claim in order for defendant to formulate an adequate responsive pleading.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN5[] Motions to Dismiss, Failure to State Claim

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. And in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN6[] Antitrust & Trade Law, Sherman Act

In order to sustain a claim of a conspiracy in violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff will be called upon to prove, (1) that a conspiracy, combination, or agreement (i.e., concerted action) existed, (2) with an aim to restrain trade by suppressing and eliminating competition by fixing prices of a product, and that (3) the plaintiff was injured by such concerted action.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Civil Procedure > ... > Pleadings > Complaints > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN7[] **Tolling of Statute of Limitations, Fraud**

Fraudulent concealment tolls the Clayton Act's, *15 U.S.C.S. § 15*, statute of limitations.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] **Pleadings, Heightened Pleading Requirements**

In ruling upon a motion to dismiss under *Fed. R. Civ. P. 9(b)*, the court must apply *Fed. R. Civ. P. 9(b)*'s requirement in harmony with the simplicity of notice pleading as allowed by *Fed. R. Civ. P. 8*. *Fed. R. Civ. P. 9(b)* does not negate the simplicity and flexibility contemplated by *Fed. R. Civ. P. 8*, and it would be error to focus on *Fed. R. Civ. P. 9(b)*'s particularity requirement in a vacuum.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN9[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) requires that the circumstances of fraud be pled with enough particularity to put the party on notice as to the nature of the claim.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN10[] **Tolling of Statute of Limitations, Fraud**

The doctrine of fraudulent concealment contains two elements which a plaintiff must prove. First, the defendant concealed the conduct complained of; and, second, despite the exercise of due diligence, plaintiff failed to discover the facts that form the basis of his claim. It is generally recognized that the statute of limitations is tolled only if the defendant has engaged in affirmative acts of concealment.

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN11[] Fraud & Misrepresentation, Nondisclosure

Fraudulent concealment can be shown where the acts of concealment are intertwined with the acts of price fixing. Proof of fraudulent concealment is found with any evidence of efforts designed to keep price fixing activities secret.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN12[] Tolling of Statute of Limitations, Discovery Rule

In order to avail the doctrine of fraudulent concealment and its equitable tolling of the statute of limitations, the plaintiffs must show that they failed, despite the exercise of due diligence on their part, to discover the facts that form the basis of their price fixing claim. The statute of limitations is tolled only until such time as the plaintiff, exercising reasonable diligence, could have discovered the facts forming the basis for the claim. The plaintiffs need not have actual knowledge of the facts before the duty of due diligence arises; rather, knowledge of certain facts which are "calculated to excite inquiry" give rise to the duty to inquire. The statute of limitations begins to run once plaintiffs are on inquiry that a potential claim exists.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN13[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(a) establishes four requirements for class certification which must be met before consideration of certification under *Fed. R. Civ. P. 23(b)(2)* or *(b)(3)*.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN14[] Parties, Joinder of Parties

See *Fed. R. Civ. P. 23*.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN15[] **Remedies, Injunctions**

An action may be certified as a class action only if the court finds that it meets all requirements of *Fed. R. Civ. P. 23(a)(1)-(4)*, "numerosity," "commonality," "typicality," and "adequacy"; and *Fed. R. Civ. P. 23(b)(3)*'s additional requirements of "predominance" of common questions and "superiority" of the class method for the fair and efficient adjudication of the controversy are also satisfied.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN16[] **Class Actions, Prerequisites for Class Action**

In ruling upon a motion for class certification, the substantive allegations contained in plaintiffs' complaint are accepted as true. However, the court does not delve into the merits of plaintiffs' substantive claims in ruling upon such a motion. Likewise, a predetermination of the merits of the defense of the suit is also inappropriate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN17[] **Prerequisites for Class Action, Numerosity**

The requirement of numerosity is fulfilled when the potential class is so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN18[] **Class Actions, Prerequisites for Class Action**

Beyond the absence of an adverse interest between the representatives and the class members, a claim by a representative party may be deemed "typical" if it is one which should be "reasonably expected" to be raised by members of the proposed class. Furthermore, in instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN19[] **Class Actions, Prerequisites for Class Action**

The tailored focus on a typicality inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct which is not special or unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN20[] **Class Actions, Prerequisites for Class Action**

Adequate representation turns upon the qualifications and experience of plaintiffs' counsel to conduct the litigation and whether the plaintiffs have any interests antagonistic to the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN21[] **Class Actions, Certification of Classes**

The court's role at the class certification stage in assessing the proposed methods of proving damages is quite limited. The preliminary inquiry is whether or not the proposed methods are so insubstantial that they amount to no method at all.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN22[] **Private Actions, Remedies**

It is generally recognized that some relaxation of the plaintiff's burden of proving damages is tolerated once an antitrust violation and resulting damages have been established. The relaxation for the standard of proof in an antitrust case is a logical and natural result of a willingness to accept some measure of uncertainty due to the difficulty of ascertaining business damages.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN23[] Class Actions, Certification of Classes

In addition to the predominance of common questions, *Fed. R. Civ. P. 23(b)(3)* certification calls upon the court to consider the manageability of a class action and whether or not the class action is superior to other methods of adjudication.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN24[] Relief From Judgments, Altering & Amending Judgments

See *Fed. R. Civ. P. 23(c)(1)*.

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Judges: Davidson

Opinion by: GLEN H. DAVIDSON

Opinion

[*1022] ***MEMORANDUM OPINION***

This litigation presently consists of thirteen individual lawsuits which were filed in various federal district courts throughout the country. While most of the actions were filed here in the Northern District of Mississippi, there were also filings in the Western District of Washington, Eastern District of Pennsylvania, Eastern District of Louisiana, and the Eastern District of Tennessee. In accordance with *28 U.S.C. § 1407*, the Judicial Panel on Multidistrict Litigation has transferred all cases to this district for centralized and consolidated pretrial proceedings.

The named plaintiffs in this litigation are food distributors who purchased catfish and catfish products from 1981 until 1990, from various companies that were engaged in the business of processing and selling farm raised catfish and catfish products. In the consolidated class action complaint which was **[*1023]** filed on October 14, 1992, the named plaintiffs (distributors) invoke section 4 of the Clayton Act (*15 U.S.C. § 15*) [1] as a means to recover treble damages, costs of suit, and attorneys' **[**3]** fees for the defendants' (processors/sellers) alleged violations of *section 1* of the Sherman Act. The sum and substance of the consolidated complaint is that the defendants have engaged in a combination and conspiracy, since at least 1981 through 1990, to suppress and eliminate competition in the catfish industry by fixing prices of catfish and catfish products sold throughout the United States. It is alleged that the defendants agreed to establish minimum prices for catfish and certain catfish products and to adhere to the established minimum prices. As a consequence, plaintiffs allege injury in that the prices paid for catfish were artificially high and at non-competitive levels.

As noted above, the litigation began as thirteen separate actions filed in various districts. [2] **[**6]** However, since all actions have been consolidated under the "master file" for pre-trial **[**4]** treatment, the court had the benefit of consolidated motions, responses, and memorandum briefs which pertain to all actions. The named plaintiffs, on behalf of themselves and a class of all those similarly situated, are as follows: State Fish Distributors, Inc.; Robert Orr-Sysco Food Services Co.; Randle Trout Distributors, Inc.; Farm House Food Distributors, Inc.; and, American Seafood, Inc. The defendants in this case are the following catfish processors: Magnolia Processing, Inc. ("Magnolia"); Delta Pride Catfish, Inc. ("Delta Pride"); Simmons Farm Raised Catfish, Inc. ("Simmons"); Farm Fresh Catfish Company ("Farm Fresh"); Country Skillet Catfish Company ("Country Skillet"); ConAgra; and Southern Pride Catfish Company, Inc. ("Southern Pride"). [3] All defendants, except for Southern Pride, have filed motions to dismiss plaintiffs' third amended class action complaint. The motions to dismiss are advanced under *F.R.C.P. 12(b)(6)*, failure to state a claim upon which relief can be granted, and 9(b), failure to aver fraud with particularity. Also ripe for consideration is the motion by the named plaintiffs to certify a class action pursuant to *F.R.C.P. 23*. In order to better understand **[**5]** the legal issues which the court considers, a brief sketch of the catfish industry is presented before addressing the motions to dismiss.

[*1024] *Background*

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[1] The complaint also seeks injunctive relief pursuant to § 16 of the Clayton Act, *15 U.S.C. § 26 (Supp. 1993)*.

[2] *State Fish Distributors, Inc. v. Magnolia Processing, Inc., et al.,* 2:92-CV-20-D-O, N.D. Miss.; *Farm House Food Distributors, Inc. v. Magnolia Processing, Inc., et al.,* 2:92-CV-030-D-O, N.D. Miss.; *Randle Trout Distributors, Inc. v. Country Skillet Catfish Co., et al.,* 2:92-CV-122-D-O, transfer from W.D. Wash.; *American Seafood, Inc. v. Magnolia Processing, Inc., et al,* 2:92-CV-113-D-O, transfer from E.D. Pa.; *Levy World Limited Partnership v. Magnolia Processing, Inc., et al,* 2:92-CV-114-D-O, transfer from E.D. Pa.; *American Seafood, Inc. v. Southern Pride Catfish Co., Inc.,* 2:92-CV-115, transfer from E.D. Pa.

The following cases were dismissed without prejudice so that plaintiffs might subsequently file a claim in the event a class action suit, pursued by other plaintiffs, is certified: *Rose's Wholesale Seafood, Inc. v. Magnolia Processing, Inc., et al.,* 2:92-CV-026-D-O, N.D. Miss., Notice of Voluntary Dismissal pursuant to *F.R.C.P. 41(a)(1)* entered June 17, 1992; *Lemoyne Cold Storage, Inc. v. Magnolia Processing, Inc., et al.,* 2:92-CV-031-D-O, N.D. Miss., *Rule 41(a)(1)* Stipulation of Dismissal entered August 31, 1992; *Robert Orr-Sysco Food Serv. Co. v. Country Skillet Catfish Co., et al.,* 2:92-CV-044-D-O, N.D. Miss., Order of Dismissal entered April 8, 1993; *J & M Foods, Inc. v. Magnolia Processing, Inc., et al.,* 2:92-CV-053-D-O, N.D. Miss., *Rule 41(a)(1)* Stipulation of Dismissal entered August 31, 1992; *Gilbert Robinson Parent Co. v. Magnolia Processing, Inc., et al.,* 2:92-CV-144-D-O, N.D. Miss., *Rule 41(a)(1)* Stipulation of Dismissal entered November 25, 1992.

The following cases are "tag along" actions which were late transfers to this district: *Schwegmann Giant Super Market v. Delta Pride Catfish, Inc., et al.,* 2:92-CV-175-D-O, transfer from E.D. La., *Rule 41(a)(1)* Order of Dismissal entered May 27, 1993; *Copper Cellar Corp. v. Delta Pride Catfish, Inc., et al.,* 2:92-CV-028-D-O, transfer from E.D. Tenn. (originally filed in Tennessee state court; *Rule 41(a)(1)* Order of Dismissal entered May 17, 1993).

[3] In plaintiffs' memorandum brief, the court is informed that all of the defendants named in this civil suit were also identified as co-conspirators in various Informations which were filed by the United States Department of Justice, Antitrust Division, charging price fixing in the catfish industry. *See U.S. v. Magnolia,* Crim. No. 92-11-1 (E.D. Pa.); *U.S. v. Hinote,* Crim. No. 92-00430 (E.D. Pa.); *U.S. v. Delta Pride,* No. 92 CR 1090 (N.D. Ill.).

Catfish aquaculture experienced growth explosion in the 1980s. The consumer market for catfish expanded beyond its traditional base in the Deep South, and markets were cultivated in regions throughout the country, with particular success in the West. This growth was attributed to aggressive marketing along with a consumer preference for leaner, low-fat meat choices. During the 1980s, catfish sales by processors increased tenfold, and catfish is now a $ 400 million per year business. From 1986 through 1989 alone, ten new processing plants entered the business.

Catfish production begins with young fish, fingerlings, which **[**7]** are raised in hatcheries to a size that can be transported to catfish ponds. Once transferred to the production ponds, the fingerlings may take up to two years to reach harvesting maturity. The defendants purchase farm-raised catfish which they process and then sell to wholesalers and retailers for distribution to final consumers. Once the processors purchase live fish from the producers, the fish go through various stages of processing at processing plants. Initially, the fish are beheaded, eviscerated and skinned. The processor may then sell the whole processed fish, or further processing could occur. For example, the whole fish could be cut into steaks, which are cross-section cuts; filets, which are the boned side of the fish; nuggets, which are small filets cut from below the rib; or strips, finger-size pieces of fish cut from the filets. Once the fish are processed and cut into the desired serving portion, the catfish are either packed in ice or frozen for shipment.

Catfish is a highly concentrated industry. Approximately 80% of the nation's catfish is produced and processed in the Mississippi Delta region, and neighboring Alabama is the second leading producer. Delta **[**8]** Pride, Country Skillet, and Farm Fresh are considered the "big three," in catfish processing; and in 1988, these three processors accounted for more than 70% of the industry's processing capacity. In more recent years, it has been reported that Delta Pride and Farm Fresh have lost some of their market share to new entrants. However, Delta Pride, a farmer-owner cooperative, is, and has always been, the dominant force in the catfish production/processing business.

MOTIONS TO DISMISS

Rule 12(b)(6) Standard

HN1[] A *Rule 12(b)(6)* motion is disfavored, and it is rarely granted. *Clark v. Amoco Production Co., 794 F.2d 967, 970 (5th Cir. 1986)*; *Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981)*. Dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974)*. Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot be dismissed so long as the complaint states a claim. *Clark v. Amoco Production Co., 794 F.2d 967, 970 (5th Cir. 1986)*; **[**9]** *Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984)*. "To qualify for dismissal under *Rule 12(b)(6)*, a complaint must on its face show a bar to relief." *Clark, 794 F.2d at 970*; *see also* *Mahone v. Addicks Utility Dist., 836 F.2d 921, 926 (5th Cir. 1988)*; *United States v. Uvalde Consolidated Ind. School Dist., 625 F.2d 547, 549 (5th Cir. 1980)*, *cert. denied, 451 U.S. 1002, 68 L. Ed. 2d 858, 101 S. Ct. 2341*.

The court accepts the facts alleged by plaintiffs in the complaint as true and views the material allegations of the complaint "as admitted," along with such reasonable inferences that might be drawn in plaintiffs' favor. *Gargiul v. Tompkins, 704 F.2d 661, 663 (2d Cir. 1983)*, *vacated on other grounds, 465 U.S. 1016, 104 S. Ct. 1263, 79 L. Ed. 2d 670 (1984)*; *Murray v. City of Milford, 380 F.2d 468, 470 (2d Cir. 1967)*; *In re Energy Systems Equipment Leasing Securities Litig., 642 F. Supp. 718, 723 (E.D. N.Y. 1985)*. **[**10]** Dismissal is appropriate only when the court accepts as true all well-pled allegations of fact and, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Thomas v. Smith, 897 F.2d 154, 156 (5th Cir. 1989)*, quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 100-02, 2 L. Ed. 2d 80 (1957)*; *see* *Hishon v. King & Spalding, 467 U.S. 69, 73,* ***[*1025]*** *104 S. Ct. 2229, 81 L. Ed. 2d 59, 65 (1984)*; *Mahone v. Addicks Utility Dist., 836 F.2d 921, 926 (5th Cir. 1988)*; *McLean v. International Harvester, 817 F.2d 1214, 1217 n.3 (5th Cir. 1987)*; *Jones v. United States, 729 F.2d 326, 330 (5th Cir. 1984)*.

HN2[] When a defendant moves to dismiss a complaint, the court focuses solely on the legal sufficiency of the pleadings. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90, 96 (1974)*. The court is restricted to the **[**11]** face of the pleadings and may look only within the four corners of the complaint in evaluating a *Rule 12(b)(6)* motion. *Goldman v. Belden, 754 F.2d 1059, 1065 (2d Cir. 1985)*; *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984)*; *In re Energy Systems Litig., 642 F. Supp. 718, 723 (E.D. N.Y. 1986)*.

Motions to Dismiss by Defendants Country Skillet, ConAgra, Magnolia, Farm Fresh, Simmons and Delta Pride

Defendants Farm Fresh, [4] **[**12]** Simmons, [5] and Delta Pride [6] submitted a consolidated memorandum in support of their motions to dismiss. Magnolia Processing [7] joins in the motion to dismiss but relies upon memorandum briefs submitted by other parties. Defendants Country Skillet and ConAgra [8] submitted a separate memorandum brief. In support of the motions to dismiss, all defendants rely upon the same legal arguments; therefore, collective consideration of the motions is possible. However, in the discussion which follows, facts and issues which are pertinent to specific defendants will be duly noted.

There are three issues which the defendants raise for the court's attention in support of **[**13]** their motions to dismiss. The three issues are as follows. First, defendants assert that the plaintiffs' claims of conspiracy are merely conclusory allegations which fail to set forth sufficient details and are therefore insufficient to state a claim upon which relief can be granted. The second and third issues are interrelated. Defendants argue that the plaintiffs have failed to allege fraudulent concealment of the conspiracy with the particularity required by *F.R.C.P. 9(b)*. The issue of fraudulent concealment has a direct impact upon the third argument in support of the motions. Defendants argue that since plaintiffs have not properly pled fraudulent concealment, then the Clayton Act's four year statute of limitations would bar plaintiffs' claims which are based on conduct that allegedly occurred more than four years prior to the filing of the complaint. In turn, the court now considers defendants' arguments in support of the motions to dismiss.

A. Insufficient Allegations of Conspiracy

The first component of defendants' argument is that plaintiffs' allegations of a conspiracy are insufficient to state a claim. Defendants argue that since concerted activity is an indispensable **[**14]** element of a Sherman Act claim, [9] then the claims should be dismissed because the complaint includes insufficient factual allegations of concerted activity against each and every defendant. According **[*1026]** to defendants, "allegations of conspiracy must identify specific acts of each of the alleged conspirators which connect them with the conspiracy." [10]

Regarding the defendants' claim of insufficient allegations of a conspiracy, the plaintiffs' consolidated complaint sets forth the following:

VIII. *OFFENSES CHARGED*

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[4] Farm Fresh Catfish Company is a corporation organized under the laws of the State of Minnesota with its principal place of business in Hollandale, Mississippi. Farm Fresh is wholly-owned by George A. Hormel & Co.

[5] Sons Farm Raised Catfish, Inc., is a Mississippi corporation with its principal place of business in Yazoo City, Mississippi.

[6] Delta Pride Catfish, Inc., is a Mississippi corporation with its principal place of business located at Indianola, Mississippi. In the past, Delta Pride has transacted business under the trade names, "Fishland" and "Crystal Creek."

[7] Magnolia Processing, Inc., is a Mississippi corporation with its principal place of business located at Tunica, Mississippi. In the past, Magnolia Processing has transacted business under the name of "Pride of the Pond."

[8] In 1991, Country Skillet Catfish Co. was incorporated as a wholly-owned subsidiary of ConAgra, Inc. prior to 1991, ConAgra operated Country Skillet as a division. Both companies are Delaware corporations. Country Skillet's principal place of business is in Isola, Mississippi. ConAgra's principal place of business is in Omaha, Nebraska. Plaintiffs named both Conagra and Country Skillet as defendants.

[9] Citing *Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1059 (5th Cir. 1985)*, *cert. denied*, ***474 U.S. 1102, 88 L. Ed. 2d 919, 106 S. Ct. 884 (1986)***; *Pierce v. Ramsey Winch Co., 753 F.2d 416, 425 (5th Cir. 1985)*.

[10] Citing *United States v. North Coast Transportation Co., 7 F.R.D. 491 (D. Wash. 1947)*.

30. Beginning at least as early as 1981, and continuing through at least 1990, the exact dates being **[**15]** unknown to plaintiffs, defendants and their co-conspirators entered into and engaged in a combination, and conspiracy to suppress and eliminate competition by fixing prices of catfish and catfish products directly sold throughout the United States.
31. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix prices of catfish and catfish products, throughout the United States, by among other things:
(a) Agreeing to establish minimum prices for certain catfish products; and
(b) Agreeing to adhere to the established minimum prices.
32. For the purposes of forming and carrying out the charged combination and conspiracy, the defendants and co-conspirators did those things that they combined and conspired to do, including among other things:
(a) Participating in meetings and discussions about the prices of catfish and catfish products;
(b) Agreeing, in the course of those meetings and discussions, on minimum prices for catfish and catfish products;

(c) Agreeing, in the course of those meetings and discussions, that the agreed upon minimum **[**16]** prices should go into effect on a certain date;
(d) Agreeing to adhere to established minimum prices for catfish and catfish products;
(e) Monitoring and enforcing compliance with the agreements to adhere to established minimum prices for catfish and catfish products;
(f) In 1983, defendant Magnolia met with certain other companies including Delta Pride. This meeting was held in Sunflower County, Mississippi. The parties in attendance at this meeting agreed to set minimum prices for future sales of catfish and catfish products and the date such prices would go into effect;

(g) In 1984, at least two additional meetings were held. At the first of these meetings, other processors in addition to Magnolia and Delta Pride were represented, including Simmons and Farm Fresh. At both meetings, the persons present reached an agreement on what prices they should be charging for catfish and catfish products. In addition, at either or both of these meetings, a representative of Delta Pride indicated that Country Skillet, another processor not represented at the meeting, would go along with any agreement reached regarding the prices to charge for various catfish and catfish products; **[**17]**
(h) Thereafter, the President and General Manager of defendant Magnolia, William Gidden, continued to have discussions with a representative of Delta Pride who would inform Gidden of the price the processors had agreed to charge for catfish and catfish products and when those prices were to go into effect. Gidden would then agree to go along with the price changes and would implement those changes on behalf of defendant Magnolia;

(i) Early in 1987, Joseph Glover, Jr., the founder of Southern Pride, received a call from a competitor who said he had talked to a number of other catfish processors and that they had agreed to raise prices. Glover continued to have discussions with competitors during the 1987-1990 time period for the purpose of agreeing to and **[*1027]** fixing prices in the sale of catfish and catfish products;
(j) At least one additional meeting was held in early 1990 which was attended by Southern Pride and top officials of two competitors.

(k) In formulating and effectuating the aforesaid combination and conspiracy, defendants and their co-conspirators did those things which they combined and conspired to do, the substantive terms of which were to artificially raise and fix **[**18]** and maintain prices by establishing minimum prices for various catfish and catfish products, setting the date such prices should go into effect, adhering to such minimum prices and monitoring and enforcing compliance with the agreed upon minimum prices.

Complaint, pgs. 7-10.

HN3[] The sufficiency of a complaint is governed foremost by *Rule 8(a)(2)* which requires a "short and plain statement of the claim showing that the pleader is entitled to relief . . . ." It is well settled that the statement of the claim should provide the defendant with fair notice of what the claim is and the grounds upon which it rests. *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80, 85 (1957)*.

HN4[] In a Sherman Act claim, a blanket allegation of a conspiracy is deemed insufficient to place the defendant "on notice" of the claim in order for defendant to formulate an adequate responsive pleading. *Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383, 1387 (10th Cir. 1980)*; *Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 273 (5th Cir. 1979)*; *California Dump Truck Owners Ass'n v. Associated General Contractors, 562 F.2d 607, 615 (9th Cir. 1977)*. **[**19]** Yet, by the same token, there is no requirement of an "inordinate level of factual specificity." *Mountain View Pharmacy, 630 F.2d at 1388*. In the case *sub judice,* the defendants received much more than a generic allegation of conspiracy, and the complaint more than satisfies *Rule 8(a)(2)* standards. For example, defendants received notice that the plaintiffs allege; a conspiracy among them to establish minimum prices for catfish and catfish products; agreements to adhere to the established minimum prices; agreements to set dates in which minimum prices were to be implemented; and, monitoring and enforcing compliance with the agreed upon minimum prices. As a means to this end, plaintiffs allege that beginning in 1981 and continuing through 1990, company representatives from the defendant companies engaged in meetings and telephone conversations where discussions occurred and decisions were made as to the prices to be charged for catfish and the dates of implementation. In 1983, it is alleged that Magnolia Processing met with other companies, one of which was Delta Pride, in a meeting held in Sunflower County, Mississippi. The complaint alleges **[**20]** that in 1984, at least two additional meetings were held. In addition to Magnolia and Delta Pride, Simmons and Farm Fresh were also represented. After agreeing at the meetings on the prices that should be charged for catfish and catfish products, it is asserted that a representative of Delta Pride indicated that Country Skillet would "go along" with any agreement that was made. Subparagraph "h" of the complaint asserts that William Gidden, President and General Manager of Magnolia, continued to have discussions with Delta Pride officials wherein Delta Pride would inform Gidden of price changes and the dates of implementation. Subparagraph "I" addresses an allegation that Joseph Glover, Jr., the founder of Southern Pride, engaged in discussions with competitors from 1987-1990, regarding an increase in the prices to be charged for catfish. Finally, the complaint alleges that in early 1990, at least one meeting was held between Southern Pride and top officials of two competitors.

Defendants argue that the class action complaint is lacking the "requisite" specificity in the following areas. First of all, the complaint does not identify all of the company representatives who attended **[**21]** all of the alleged meetings, and there is no explanation of any company authority that the representatives might have possessed. Second, the dates and locations of the meetings are not listed, and "the Complaint also fails to identify any substantive facts concerning the alleged agreement such as the type of product **[*1028]** or products involved and the relevant geographic market affected."

The defendants do not cite the court to any authority which demands the rigid level of detail and specificity of antitrust pleading which defendants advance, or "propose," and none exists. To the contrary, a rigid rule of specificity and detail is disfavored in antitrust cases at the pleadings stage:

> We have held that HN5[] 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* (footnote omitted). And in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' *Poller v Columbia Broadcasting, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, **[**22]** dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Hospital Bldg. Co. v. Trustees of the Rex Hosp., 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338, 345 (1976).

ConAgra and Country Skillet take sharp issue with the fact that plaintiffs' complaint does not place a ConAgra/Country Skillet representative at any conspiracy meeting or telephone conversation where price-fixing was discussed, agreed upon, implemented, etc. However, plaintiffs have alleged that in at least one meeting held in 1984, a Delta Pride representative indicated that Country Skillet, not represented at the meeting, would "go along" with any agreement reached regarding the prices to charge for catfish and catfish products. ConAgra and Country Skillet wage an adamant argument that their alleged linkage to any conspiracy appears only in the form of a hearsay statement; and, plaintiffs' failure to identify anything more specific, which would indicate more active participation, is fatal to the claims against them.

The assertion in plaintiffs' complaint regarding Country Skillet's acquiescence to **[**23]** the conspiracy is taken as true. *See Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59, 65 (1984)*; *Thomas v. Smith, 897 F.2d 154, 156 (5th Cir. 1989)*, quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 100-02, 2 L. Ed. 2d 80 (1957)*; *Mahone v. Addicks Utility Dist., 836 F.2d 921, 926 (5th Cir. 1988)*; *McLean v. International Harvester, 817 F.2d 1214, 1217 n.3 (5th Cir. 1987)*; *Jones v. United States, 729 F.2d 326, 330 (5th Cir. 1984)*. Accepting the allegation as true for present purposes on a motion to dismiss, the court finds that the argument advanced by ConAgra and Country Skillet is not well taken. Such acquiescence, or a "meeting of the minds," or "conscious commitment to a common scheme" to achieve an unlawful purpose is sufficient linkage to a claim of civil conspiracy. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 n.9, 79 L. Ed. 2d 775, 786, 104 S. Ct. 1464 (1984)*; **[**24]** *U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 142, 68 S. Ct. 915, 92 L. Ed. 1260, 1285 (1948)*; *See 16 Am. Jur. 2d Conspiracy § 50* (1979) (elements of civil conspiracy). Obviously, whether or not plaintiffs will be able to prove Country Skillet's or any other defendant's involvement in the conspiracy is a separate issue to be saved for another day and time. [11]

In summary, the court observes that ***HN6***[] in order to sustain a claim of a conspiracy in violation of *section 1* of the Sherman Act, **[**25]** *15 U.S.C. § 1*, plaintiffs will be called upon to prove, (1) that a conspiracy, combination, or agreement (i.e., concerted action) existed, (2) with an aim to restrain trade by suppressing and eliminating competition by fixing prices of processed catfish and catfish products, and that (3) plaintiffs were injured by such concerted action. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761-62, 104 S. Ct. 1464, 79 L. Ed. 2d 775, 783-84 (1984)*; *Purity Products, Inc. v. Tropicana Products, Inc., 702 F. Supp. 564, 570 (D. Md 1988)*. Accepting the allegations of the complaint **[*1029]** as true, as the court is required, plaintiffs have stated a claim upon which relief could be granted if eventually successful in carrying their burden of proof.

B. Statute of Limitations Bar & Fraudulent Concealment

The defendants' second component to the motions to dismiss includes an assertion of the affirmative defense of a statute of limitations bar. Plaintiffs' claims are instituted under section 4 of the Clayton Act, codified at *15 U.S.C. § 15* ***[**26]*** *(Supp. 1993)*. *Section 15b* presents a four year statute of limitations. "Any action to enforce any cause of action under *sections 15*, *15a*, or *15c* of this title shall be forever barred unless commenced within four years after the cause of action accrued." *15 U.S.C. § 15b (Supp. 1993)*. Since the first complaint was filed on February 7, 1992, defendants assert that claims which are based on conduct prior to February 1988 should be barred. However, ***HN7***[] fraudulent concealment tolls the Clayton Act's statute of limitations. *State of Texas v. Allan Construction Co., Inc., 851 F.2d 1526, 1528-29 (5th Cir. 1988)*; *In re Beef Industry Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979)*, *reh'g denied*, *616 F.2d 569* (5th Cir.), *cert. denied, 449 U.S. 905 (1980)*; *General Elec. Co. v. City of San Antonio, 334 F.2d 480, 483 (5th Cir. 1964)*; *Rinzler v. Westinghouse Elec. Corp., 333 F.2d 719, 720 (5th Cir. 1964)*. In view of the tolling effect of the statute of limitations on the **[**27]** Clayton Act, defendants argue that plaintiffs' class action complaint does not plead fraud with the particularity required by *F.R.C.P. 9(b)*. [12] "Unless plaintiffs allege fraudulent concealment with the particularity required by *Fed. R. Civ. P. 9(b)*, they cannot avoid the statute of limitations as to those allegations occurring more than four years prior to the initiation of their actions." [13]

HN8[] In ruling upon a motion to dismiss under *Rule 9(b)*, the court must apply *Rule 9(b)*'s requirement in harmony with the simplicity of notice pleading as allowed by *Rule 8*. *Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485, 491 (6th Cir. 1990)*; *Cayman Exploration Corp. v. United Gas Pipe Line, 873 F.2d 1357, 1362 (10th Cir. 1989)*;

[11] Country Skillet also argues that the claim against it does not allege that ConAgra/Country Skillet "went along" with the agreed upon prices, and the failure to allege adherence dooms the claim. The court does not read the complaint so narrowly. The complaint clearly alleges that *all* defendants adhered to the price fixing scheme. Furthermore, the court declines Country Skillet's "invitation" to engage in evidentiary rulings at this stage of the litigation.

[12] "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *F.R.C.P. 9(b)*.

[13] Defendants' Consolidated Memorandum Brief at 8.

Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 679 (6th Cir. 1988); **[**28]** Credit & Finance Corp., Ltd. v. Warner & Swasey Co., 638 F.2d 563, 566 (2d Cir. 1981). Rule 9(b) does not negate the simplicity and flexibility contemplated by Rule 8, and it would be error to focus on Rule 9(b)'s particularity requirement in a vacuum. Michaels Bldg. Co., 848 F.2d at 679; 5 C. Wright & A. Miller, *Fed. Prac. and Proc.* Civil § 1298, at 617 (1990). "Rule 9(b) ***HN9***[] requires that the circumstances of fraud be pled with enough particularity to put the party on notice as to the nature of the claim." J.C. Wyckoff & Assoc. v. Standard Fire Ins., Co., 936 F.2d 1474, 1489 (6th Cir. 1991). The reason for the rule of particularity is to provide fair notice of the substance of the claim so that the defendant may prepare a responsive pleading. Michaels Bldg. Co., 848 F.2d at 679; Ross v. A.H. Robins Co., Inc., 607 F.2d 545, 557 (2d Cir. 1979), *cert. denied, 446 U.S. 946, 100 S. Ct. 2175, 64 L. Ed. 2d 802 (1980)*; Denny v. Barber, 576 F.2d 465, 469 (2d Cir. 1978). **[**29]** Furthermore, the court is guided by a well-reasoned approach which other jurisdictions have taken in similar cases. That is, in cases which implicate corporate or business fraud, plaintiffs cannot be expected to have knowledge of all the details which undergird the alleged fraudulent scheme. Therefore, some relaxation of Rule 9(b)'s particularity requirement is appropriate in instances where such information is in the defendant's hands or control. Craftmatic Securities Litigation v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989); Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989); Michaels Bldg. Co. v. Ameritrust Co., 848 F.2d 674, 680 (6th Cir. 1988); DiVittorio v. Equidyne Extractive Industries Inc., 822 F.2d 1242, 1248 (2d Cir. 1987); Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1439 (9th Cir. 1987). Especially in the early stages of litigation where pleadings are filed before the commencement of discovery, **[*1030]** courts are counseled to exercise caution in granting a motion to dismiss based upon Rule 9(b) **[**30]** where the facts underlying the claims are within the defendant's control. [14] Michaels Bldg. Co., 848 F.2d at 680; Chambers Development Company, Inc. v. Browning-Ferris Industries, 590 F. Supp. 1528, 1539 (W.D. Pa. 1984); Eaby v. Richmond, 561 F. Supp. 131, 137 (E.D. Pa. 1983). However, notwithstanding the "relaxed pleading standard" as discussed above, this court finds that plaintiffs have alleged fraudulent concealment with sufficient particularity to meet the challenge posed by defendants' motions to dismiss under Rule 9(b).

[31]** The court emphasizes that in this stage, the focus is on the sufficiency of the plaintiffs' allegations as a matter of pleading. Allegations concerning what the evidence might prove as a matter of law are premature at this juncture. Therefore, the court's discussion of the doctrine of fraudulent concealment at this point is specifically tailored for an evaluation of the pleadings.

HN10[] The doctrine of fraudulent concealment contains two elements which a plaintiff must prove. First, the defendant concealed the conduct complained of; and, second, despite the exercise of due diligence, plaintiff failed to discover the facts that form the basis of his claim. State of Texas v. Allan Construction Co. Inc., 851 F.2d 1526, 1528 (5th Cir. 1988); Jensen v. Snellings, 841 F.2d 600, 607 (5th Cir. 1988); In re Beef Industry Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979). It is generally recognized that the statute of limitations is tolled only if the defendant has engaged in affirmative acts of concealment. Allan Construction Co. Inc., 851 F.2d at 1528; Hennegan v. Pacifico Creative Serv. Inc., 787 F.2d 1299, 1302 **[**32]** (9th Cir.), *cert. denied, 479 U.S. 886, 107 S. Ct. 279, 93 L. Ed. 2d 254 (1986)*; Berkson v. Del Monte Corp., 743 F.2d 53, 55 (1st Cir.), *cert. denied, 470 U.S. 1056, 105 S. Ct. 1765, 84 L. Ed. 2d 826 (1985)*. However, courts dispense with the requirement of an affirmative act of concealment in instances where the underlying wrong is deemed "self-concealing." In the Fifth Circuit, a self-concealing wrong is one in which, "deception is an essential element for some purpose other than merely to cover up the act." Allan Construction Co., Inc., 851 F.2d at 1530. In *Allan Construction,* the court explained the self-concealment doctrine as follows:

> To steal an antique vase is not a self-concealing wrong; the true owner knows the vase is stolen even if the owner does not know the identity of the thief. On the other hand, to sell a fake vase as if it were an antique is not only fraud, it is a self-concealing wrong. Deception is an essential element of the wrong, and one that is not

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[14] Despite the "non-restrictive application" of Rule 9(b) in cases of corporate fraud, plaintiffs' allegations must include statements of fact upon which the allegations are based and an assertion that the necessary information lies within defendants' control. Craftmatic Securities Litigation v. Kraftsow, 890 F.2d 628, 645 (3d Cir. 1989); Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989); MaDonna v. United States, 878 F.2d 62, 66 (2d Cir. 1989); DiVittorio v. Equidyne Extractive Industries, Inc., 822 F.2d 1242, 1248 (2d Cir. 1987).

> intended merely to cover **[**33]** up the wrong itself. By contrast, to steal a vase and to replace it with a worthless replica is not self-concealing. The wrong is theft of the vase; the replacement is an act separate from the wrong itself and aimed only at concealing the fact that the real vase has been stolen.

Allan Construction Co., 851 F.2d at 1529-30.

In order for a price fixing scheme to be successful, it must be kept secret. It is an illegal endeavor, and public knowledge of its existence spoils the plan. *Allan Construction Co., 851 F.2d at 1531*. However, the sole purpose of the deception is to cover up the illegal act. Thus, the deception is not considered "an essential element of the wrong." [15] *Id.* If the deception is not an essential element of the wrong, then it follows that fraudulent concealment is not inherent in every price-fixing scheme. Consequently, the question comes full circle with the need to prove affirmative acts of concealment.

> **[*1031]** In short, we cannot conclude that Congress, in writing the Clayton Act's four-year statute of limitations, could have intended for the fraudulent concealment doctrine to apply to every **[**34]** price-fixing case. Hence, we reject the State's contention that because the bid-rigging conspiracy was inherently selfconcealing, it need not prove affirmative acts of concealment.

State of Texas v. Allan Construction Co., Inc.,851 F.2d 1526, 1531 (5th Cir. 1988). Despite the need to prove affirmative acts where the wrong is not "self-concealing," such proof is no tall order in most price fixing cases. In pleading/proving affirmative acts of concealment in this circuit, it is not necessary for the fraudulent concealment to be wholly separate from the wrong itself. Stated differently, there is no requirement for the acts of concealment to be independent of the conspiracy. *Allan Construction Co., 851 F.2d at 1532*. ***HN11***[] Fraudulent concealment can be shown where the acts of concealment are intertwined with the acts **[**35]** of price fixing. *Allan Construction Co., 851 F.2d at 1531*; *Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019, 1030 (5th Cir. 1983)*. [16] Proof of fraudulent concealment is found with any evidence of efforts designed to keep price fixing activities secret. *Allan Construction Co., 851 F.2d at 1532*; *Greenhaw, 721 F.2d at 1030*; 2 Areeda & Turner, ***Antitrust Law***, para. 325d, at 124.

Returning now to the facts as alleged in the pleadings for the case *sub judice,* the court finds that the plaintiffs have alleged a pattern of conduct by the defendants which included face-to-face meetings and telephone calls--all conducted under the cloak of secrecy in furtherance **[**36]** of the conspiracy to fix the price of catfish. Such conduct of clandestine meetings and telephone conversations, if proven, is sufficient to establish the requisite "affirmative acts" of fraudulent concealment.

The application of fraudulent concealment is not complete without a discussion of the "due diligence" requirement. ***HN12***[] In order to avail the doctrine of fraudulent concealment and its equitable tolling of the statute of limitations, the plaintiffs must show that they failed, despite the exercise of due diligence on their part, to discover the facts that form the basis of their price fixing claim. "The statute of limitations is tolled only until such time as the plaintiff, exercising reasonable diligence, could have discovered the facts forming the basis for the claim." *Allan Construction Co., 851 F.2d at 1533*. The plaintiffs need not have actual knowledge of the facts before the duty of due diligence arises; rather, knowledge of certain facts which are "calculated to excite inquiry" give rise to the duty to inquire. *Allan Construction Co., 851 F.2d at 1533*; *In re Beef Antitrust Litig., 600 F.2d 1148, 1171 (5th Cir. 1979)*; **[**37]** *Clement A. Evans & Co., Inc. v. McAlpine, 434 F.2d 100, 102 (5th Cir. 1970)*. *cert. denied, 402 U.S. 988, 91 S. Ct. 1660, 29 L. Ed. 2d 153*. The statute of limitations begins to run once plaintiffs are on inquiry that a

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15 For an opposite view, see *New York v. Hendrickson Brothers, Inc., 840 F.2d 1065, 1084 (2d Cir. 1988)*.

16 *Greenhaw* was later overruled on an issue unrelated to its fraudulent concealment analysis. *International Woodworkers v. Champion International Corp., 790 F.2d 1174, 1181 (5th Cir. 1986)*.

potential claim exists. *United Klans of America v. McGovern, 621 F.2d 152, 154 (5th Cir. 1980)*; *Prather v. Neva Paperbacks, Inc., 446 F.2d 338, 341 (5th Cir. 1971)*.

Plaintiffs assert that as soon as the duty of due diligence was triggered, they acted with deliberate speed. Specifically, plaintiffs allege that they learned of the conspiracy only after January 14, 1992, when the United States Department of Justice, Antitrust Division, filed an Information against Magnolia Processing alleging conspiracy to eliminate competition in the catfish industry by fixing prices. Hence, plaintiffs argue that prior to January of 1992, they had no knowledge of the combination and conspiracy; and, therefore, a due diligence duty did not arise until that time.

In any event, whether plaintiffs' duty was triggered before or immediately **[**38]** after January 1992, is a question of fact that need not and should not be decided on a motion to dismiss. *See* *Vanderboom v. Sexton, 422 F.2d 1233, 1241 (8th Cir. 1970)*. The court finds that the pleadings are more than sufficient in this regard. In paragraphs 38 and 39, the plaintiffs assert that because of the **[*1032]** secret, conspiratorial nature of defendants' conduct, plaintiffs and other potential members of the class did not know, and could not have known by the exercise of reasonable diligence, of the price fixing scheme prior to January, 1992. Furthermore, paragraph 40 alleges that when distributors inquired of the processors as to why the price of catfish and catfish products continued to rise in the 1980s, the processors attributed higher prices to increasing kill costs, price increases by farmers, shortages of large fish, and the "off flavor" problem.

In conclusion, the court denies defendants' motions to dismiss in their entirety for the reasons set forth above. The court finds no merit to the motions to dismiss which are based upon *Rule 12(b)(6)* and *9(b)*. Plaintiffs have made legally sufficient allegations of a conspiracy and have pled fraudulent **[**39]** concealment with the requisite degree of particularity that the law requires. The undersigned now proceeds with a discussion of plaintiffs' motion to certify a class. An appropriate Order in regard to the motions to dismiss will accompany this memorandum opinion.

PLAINTIFFS' MOTION TO CERTIFY CLASS

Pursuant to *Rule 23(a)*, *(b)(2)* and *(b)(3) of the Federal Rules of Civil Procedure*, the named plaintiffs have filed a motion to certify a class action on the behalf of:

> All purchasers of processed catfish and catfish products in the United States who at any time during the period 1981 through at least 1990 directly purchased processed catfish and catfish products from one or more of the defendants (but excluding from the class defendants, their parents, subsidiaries, affiliates and governmental entities).

In support of the motion for class certification, the named plaintiffs have submitted a consolidated memorandum of law with accompanying affidavits and exhibits. Defendants Delta Pride, Farm Fresh, and ConAgra/Country Skillet have each submitted separate memorandums in opposition to plaintiffs' motion for class certification.

Rule 23(a) ***HN13***[] establishes four requirements for class **[**40]** certification which must be met before consideration of certification under *Rule 23(b)(2)* or *(b)(3)*. *Rule 23*, in pertinent parts provides as follows:

> ***HN14***[] (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> * * *
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that **[**41]** a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

HN15[] Plaintiffs' action may be certified as a class action only if the court finds that it meets all requirements of *Rule 23(a)(1)-(4)*, "numerosity," "commonality," "typicality," and "adequacy;" and, *Rule 23(b)(3)*'s additional requirements **[*1033]** of "predominance" of common questions and "superiority" of the class method for the fair and efficient adjudication of the controversy are also satisfied. As a counterpart to plaintiffs' section 16 claim of the Clayton Act, certification is also sought under (b)(2)--certification for purposes of appropriate injunctive relief with respect to the class as a whole.

[42]** ***HN16***[] In ruling upon a motion for class certification, the substantive allegations contained in plaintiffs' complaint are accepted as true. *Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975)*, *cert. denied, 429 U.S. 816, 97 S. Ct. 57, 50 L. Ed. 2d 75 (1976)*; *In re Energy Systems Equipment Leasing Securities Litig., 642 F. Supp. 718, 724 (E.D. N.Y. 1986)*. However, the court does not delve into the merits of plaintiffs' substantive claims in ruling upon such a motion. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732, 748 (1974)*; *Transamerican Refining Corp. v. Dravo Corp., 130 F.R.D. 70, 76 (S.D. Tex. 1990)*; *In re Energy Systems Litig., 642 F. Supp. at 724*; *In re Scientific Control Corp. Securities Litig., 71 F.R.D. 491, 505 (S.D. N.Y. 1976)*; *Steinmetz v. Bache & Co., 71 F.R.D. 202, 204 (S.D. N.Y. 1976)*. Likewise, a predetermination of the merits **[**43]** of the defense of the suit is also inappropriate. *Philadelphia Elec. Co. v. Anaconda American Brass, Co., 43 F.R.D. 452, 458 (E.D. Pa. 1968)*; *Siegel v. Chicken Delight Inc., 271 F. Supp. 722, 726 (N.D. Cal. 1967)*; 3B *Moore's Fed. Prac.* (Ma) para. 23.46. "The invitation to pre-try the case through the vehicle of this motion [class certification] must be respectfully declined . . . ." *Siegel, 271 F. Supp. at 726*. Rather, the court's focus on a class certification motion is strictly upon the requirements as articulated in *Rule 23*.

With the exception of the numerosity requirement of *Rule 23(a)(1)*, the various defendants register some objection, in varying degrees, to the remaining elements of *Rule 23(a)*; commonality, typicality, and adequacy. However, the force of defendants' opposition is found in *Rule 23(b)(3)*'s requirement that questions of law or fact common to members of the class predominate over questions which would be applicable to individual members (i.e., predominance). Additionally, defendants attack the asserted predominance of a common impact and injury that a price fixing **[**44]** conspiracy in the catfish industry would cause. Beginning with the elements of *Rule 23(a)(1-4)*, the court now examines plaintiffs' consolidated motion and defendants' objections.

Rule 23(a)

Numerosity

HN17[] The requirement of numerosity is fulfilled when the potential class is so numerous that joinder of all members is Impracticable. *F.R.C.P. 23(a)(1)*. As noted above, numerosity is the only element of *Rule 23(a)* which is uncontested. In plaintiffs' memorandum brief, plaintiffs allege that the direct purchasers of processed catfish and catfish products from the defendants during the period 1981 through 1990, consist of "several thousand" purchasers. Country Skillet and Delta Pride acknowledge that a potential class could include "thousands" of members. Suffice it to say that the potential number of class members is more than sufficient to justify class treatment. [17]

[45]** *Commonality of Fact and Law*

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[17] *See* *In re Plywood Anti-Trust Litigation, 76 F.R.D. 570, 578 (E.D. La. 1976)* (numerosity satisfied when potential class size is "thousands").

The second step of *Rule 23(a)* application calls for an inquiry into whether there are questions of law or fact common to the class. The issue of "commonality" is the target of defendants' primary opposition to the class certification motion. However, the force of defendants' opposition is tailored on the "predominance" (or lack thereof) of common questions of fact and law--which is a consideration for 23(b)(3) application, assuming all elements of 23(a) are met. Out of necessity, the court recognizes that any discussion of 23(a) commonality is likely to involve considerable overlap with 23(b)(3). [18] **[*1034]** Nonetheless, the court perceives that the issues of "commonality" and "predominance" of common issues are separate considerations which play distinct roles in the class certification process.

[46]** Plaintiffs' consolidated complaint alleges a conspiracy among the defendant catfish processors with the illegal object of fixing, implementing, and maintaining the prices of processed catfish and processed catfish products at artificial, supracompetitive levels. As a means to this end, it is alleged that defendants participated in various face-to-face, "clandestine" meetings and telephone conversations wherein decisions about price fixing were made, as well as discussions about implementation. Obviously, any proof regarding the existence of meetings, telephone conversations, or any other means of communication, regarding price fixing in the catfish industry would be applicable to the class as proposed by the plaintiffs. Other elements of common proof are a logical extension from the same set of facts, if proven. For example, any evidence which may be introduced concerning the content and substance of discussions and decisions which might have been made at these alleged meetings are of common interest and an important concern to the entire class. It naturally follows that the proof, if any, which might unfold at trial would impact the application of the elements of a *section 1* **[**47]** Sherman Act claim in the same manner as to all class members. Therefore, the presence of common questions of law are a direct and logical counterpart to the underlying set of facts in the alleged catfish price fixing scheme. Stated differently, all class members share a unity of interest in how the facts, as such will unfold at trial, will "fit" the law of a Sherman Act violation. *Rule 23(a)(2)* is satisfied since all the members of a class, as defined by named plaintiffs, have a potential interest in any proof of a concerted action, conspiracy, agreement, etc., with the aim of restraining trade in the catfish industry by fixing the prices of processed catfish and catfish products. Antitrust price fixing conspiracies, by their nature, raise common questions of fact and law about the existence, scope, and effect of the alleged conspiracy. *Coleman v. Cannon Oil Co., 141 F.R.D. 516, 521 (M.D. Ala. 1992)*; *Davis v. Northside Realty Associates, Inc., 95 F.R.D. 39, 43 (W.D. N.Y. 1982)*; *In re Corrugated Container Antitrust Litig., 80 F.R.D. 244, 247 (S.D. Tex. 1978)*; *In re Sugar Industry Antitrust Litig., 73 F.R.D. 322, 335 (E.D. Pa. 1976)*. **[**48]** Plaintiffs in this case have alleged a single conspiracy spanning a period of approximately nine years by the major players in the catfish processing industry. If each class member proceeded individually, each would have to prove the existence and impact of the identical conspiracy to fix prices. Obviously, individual actions designed to prove identical elements would completely destroy any notions of judicial economy. Hence, there are common issues of fact and law which favor class certification.

Typicality

A class action may be maintained only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *F.R.C.P. 23(a)(3)*. The requirement of "typicality" lends itself to considerable overlap with 23(b)(3), commonality, and 23(a)(4), adequacy of the class representatives. 3B *Moore's Fed. Prac.* (MS) para. 23.06-2. However, there are some considerations which are exclusively generic to 23(a)(3) typicality. The most prominent consideration is that there is an absence of an adverse interest between the representative parties and other members of the class. *Tidwell v. Schweiker, 677 F.2d 560, 566 (7th Cir. 1982)*, **[**49]** *cert.*

[18] A leading treatise on the Federal Rules of Civil Procedure refers to *Rule 23(a)(2)*'s requirement of commonality as "unnecessary" in light of 23(b):

> "An action can be maintained as a class action under *Rule 23* only if it also satisfies the requirements of at least one of the three types of class actions provided for by subdivision (b), and a finding that common questions exist is implicitly required by a finding under either subdivisions (b)(1), (fn omitted) (b)(2), (fn omitted) or (b)(3) (fn omitted)."

3B *Moore's Fed. Prac.* (MB) para. 23.06-1.

denied, 461 U.S. 905, 103 S. Ct. 1874, 76 L. Ed. 2d 806 (1983); *Blake v. Arnett, 663 F.2d 906, 913 (9th Cir. 1981)*; *Fowler v. Birmingham News Co., 608 F.2d 1055, 1058-59 (5th Cir. 1979)*; *Scott v. University of Delaware, 601 F.2d 76, 85 (3d Cir. 1979)*; *In re Arthur Treacher's Franchisee Litig., 92 F.R.D. 398, 425-26 (E.D. Pa. 1981)*. Certainly, typicality does not mean that the claims of class members must be **[*1035]** identical. *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)*; *Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984)*, *cert. denied, 470 U.S. 1004, 105 S. Ct. 1357, 84 L. Ed. 2d 379 (1985)*; *De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)*; *Kennedy v. Tallant, 710 F.2d 711, 717 (11th Cir. 1983)*; *Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982)*, *cert. denied, 460 U.S. 1069, 103 S. Ct. 1524, 75 L. Ed. 2d 947 (1983)*; **[**50]** *Phillips v. Joint Legislative Committee on Performance and Expenditure Review (PEER) of the State of Mississippi, 637 F.2d 1014, 1024 (5th Cir. 1981)*, *cert. denied, 456 U.S. 960, 102 S. Ct. 2035, 72 L. Ed. 2d 483 (1982)*; *Coleman v. Cannon Oil Co., 141 F.R.D. 516, 522 (M.D. Ala. 1992)*; *Bishop v. New York City Dept. Of Hous. Pres. & Dev., 141 F.R.D. 229, 238 (S.D. N.Y. 1992)*. ***HN18***[] Beyond the absence of an adverse interest between the representatives and the class members, a claim by a representative party may be deemed "typical" if it is one which should be "reasonably expected" to be raised by members of the proposed class. *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714, 721 (N.D. Ill. 1968)*. Furthermore, in instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members. *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)*; **[**51]** *Cumberland Farms Inc. v. Browning-Ferris Industries, Inc., 120 F.R.D. 642, 646 (E.D. Pa. 1988)*; *In re U.S. Financial Securities Litig., 69 F.R.D. 24, 35 n.12 (S.D. Cal. 1975)*; *Frankford Hospital v. Blue Cross of Greater Philadelphia, 67 F.R.D. 643, 646 (E.D. Pa. 1975)*.

Defendant Country Skillet/ConAgra asserts that the representative plaintiffs are a diverse assortment of catfish purchasers who are not at all typical of a broad class of absent class members. In essence, Country Skillet asserts that named plaintiff diversity destroys typicality. As the following descriptions demonstrate, the named plaintiffs are a diverse group; however, the court does not accept defendants' claims that their diversity is a poor reflection of the typical claims of absent class members.

State Fish Distributors, Inc., is an Illinois corporation with its principal place of business in Chicago. During the 1980s, State Fish bought an average of 40,000 to 50,000 pounds of processed catfish per week. Purchases were made from ConAgra, Farm Fresh, Delta Pride and Southern Pride. State Fish also buys seafood, **[**52]** but processed catfish filets, nuggets, and processed whole catfish comprise approximately 50%-75% of State Fish's purchase of fish. State Fish has approximately 10-12 employees, and its customers are primarily restaurants, wholesalers, and retailers in the Chicago area, along with some customers in Detroit. State Fish requires that the processors deliver whole processed catfish with a layer of paper between the fish and the packing ice in order to conserve freshness of the product.

American Seafood, Inc., is a New Orleans, Louisiana, food distributor that purchased approximately 1500 pounds of catfish per week, almost exclusively from Delta Pride. American Seafood is a small firm which services New Orleans restaurants, ships, and hotels. American Seafood primarily purchases catfish filets and catfish nuggets.

Randle Trout Distributors Inc., is a corporation that has its principal place of business in Renton, Washington. Randle Trout's customers are located in the Seattle area; and catfish filets, ice packed and frozen, comprise approximately 30%-40% of Randle Trout's purchases. Randle Trout has purchased almost exclusively from Delta Pride, although it did buy some **[**53]** catfish from Farm Fresh for a brief time.

Robert Orr-Sysco Food Services Co., is a Tennessee corporation with its principal place of business in Nashville. Robert Orr-Sysco, a subsidiary of Sysco Corporation, is a large food service distributor. Robert Orr-Sysco employs approximately 700 employees and operates out of a 230,000 square foot distribution facility in Nashville. Robert Orr-Sysco markets in a six state area, and several of its customers are institutional purchasers, such as hospitals, hotels, and schools. Other customers include grocery stores, restaurants, and some retail outlets. The bulk of Robert Orr-Sysco's purchases **[*1036]** include frozen whole fish and catfish filets. On an average of twice per week, Robert Orr-Sysco purchased catfish from Delta Pride, ConAgra, and Country Skillet. Robert Orr-Sysco is a large volume purchaser, and it distributes catfish to its customers under some of its own private labels, such as

Hermitage and Sysco. The defendant processors package the catfish for Robert Orr-Sysco under the company's private label brands, although some catfish products are sold under the processors' own label.

Farm House Food Distributors, Inc., is an **[**54]** Ohio corporation with its principal place of business in Cleveland. Farm House has approximately 35 employees, and its sales are within the Cleveland area. Farm House has purchased frozen filets from Country Skillet, Delta Pride and Farm Fresh. In addition to a wide variety of fish, Farm House's retail sales also include paper goods, grocery items, poultry and meat. Farm House purchased catfish on a monthly basis, and a substantial volume of its catfish purchases were of "wild" catfish rather than farm raised catfish supplied by the defendants.

The court is not persuaded that the diversity which exists among the named plaintiffs should, in some way, diminish or destroy the typicality requirement of *Rule 23(a)(3)*. Collectively, the plaintiffs are typical purchasers, and their diversity can only strengthen their ability to represent absent class members that vary in size, geographical location, and buying patterns. ***HN19***[] The tailored focus on a typicality inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct which is not special or unique to the named plaintiffs, and whether other class members have been injured by the **[**55]** same course of conduct. *Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87, 99 (S.D. N.Y. 1981)*. The fact that some distributors bought more catfish than others, that some liked their catfish shipped on a layer of paper, that some catfish products arrived at the distributor under a private label, etc., is not the sort of diversity which destroys typicality. The claims of the named plaintiffs are typical since they are based upon an identical theory of an alleged conspiracy to fix prices in the catfish industry and injury as a consequence thereof. Further, nothing has been brought to the court's attention which would suggest an antagonistic interest between the named plaintiffs and other class members.

> There has been general agreement that the existence of varying fact patterns to support the claims of individual class members does not mandate a finding of a lack of typicality, as long as the claims arise out of the same legal or remedial theory. *Christy v. Hammel, 87 F.R.D. 381 (M.D. Pa. 1980)*; *In re South Central States Bakery Products, supra.* Since the claims here are based **[**56]** on what appears to be the identical theory and since there are no demonstrated antagonistic interests between the representative parties and the class members, the typicality requirement is satisfied.

In re Alcoholic Beverages Litig., 95 F.R.D. 321, 324 (E.D. N.Y. 1982). As noted above, there is nothing in *Rule 23(a)(3)* which requires named plaintiffs to be clones of each other or clones of other class members. The diversity of named plaintiffs who differ in their methods of operation and conduct is often cited by defendants as an impediment to class certification. However, as long as the substance of the claim is the same as it would be for other class members, then the claims of named plaintiffs are not atypical. *See In re Domestic Air Transp., 137 F.R.D. 677, 699 (N.D. Ga. 1991)* (named plaintiffs' claims stem from same legal theory as class claims notwithstanding that class members purchased tickets at different prices and according to varying conditions); *In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 268, 270 (D. Minn. 1989)* (where representatives had to prove existence, scope, **[**57]** and impact of alleged nationwide conspiracy, such claims were sufficiently typical of entire class); *United Nat. Records, Inc. v. MCA, Inc., 99 F.R.D. 178, 181 (N.D. Ill. 1983)* (while product diversity might impact amount of recoverable damages, it does not negate typicality since all class members share same claim resulting from alleged conspiracy); *In re McDonnell Douglas Corp. Sec. Litig., 98 F.R.D. 613, 619 (E.D. Mo. 1982)*(typicality is met if claim of named plaintiff arises from same act or course of conduct that comprises **[*1037]** basis of claims for other class members); *In re Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302, 304 (E.D. Pa. 1980)*("Typicality is not destroyed because a representative's claim presents a somewhat different factual pattern."); *In re South Central States Bakery Products, 86 F.R.D. 407, 415 (M.D. La. 1980)* (factual variations do not destroy typicality where all purported class members must establish same elements of price fixing claim; existence, scope, efficacy); *Hedges Enterprises, Inc. v. Continental Group, 81 F.R.D. 461, 467 (E.D. Pa. 1979)* **[**58]** (defendant's claim that small size of representative plaintiff's firm was atypical in comparison to other "Fortune 500" claimants was meritless); *Minnesota v. United States Steel Corp., 44 F.R.D. 559, 566 (D. Minn. 1968)* (claims of eight representative parties were typical since proof of conspiracy and price fixing were common to all notwithstanding defendants' argument that claims were atypical because of diverse methods of procuring and producing fabricated steel). Finding that the claims of the named plaintiffs are typical of other class members, the court now proceeds to 23(a)(4) which provides that the representative parties must fairly and adequately protect the interests of the class.

Adequacy

HN20[] Adequate representation turns upon the qualifications and experience of plaintiffs' counsel to conduct the litigation and whether the plaintiffs have any interests antagonistic to the class. *Wetzel in. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975), cert. denied, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679*; *Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 186 (N.D. Ill. 1992)*; **[**59]** *Equal Employment Opportunity Commission v. Printing Industry of Metropolitan Washington, D.C., Inc., 92 F.R.D. 51, 54 (D. D.C. 1981)*. In the case *sub judice,* there is no serious suggestion that plaintiffs' attorneys are anything other than very capable, experienced antitrust counsel. Hence, the defendants take aim at the representative parties and argue that the five named plaintiffs are inadequate, poor representatives for the class. Specifically, defendants attempt to demonstrate that the class representatives are "in the dark" about the scope and objectives of this litigation and are mere pawns in the hands of antitrust counsel. [19] In the absence of a full understanding of the litigation's purpose, defendants assert that the representative parties are poor choices to look out for the interests of their class member colleagues.

[60]** The court has reviewed the considerable volume of deposition testimony of the named plaintiff representatives which was submitted with Country Skillet/ConAgra's brief in opposition to the class certification motion. Upon review of the deposition testimony, the court does not accept defendants' assertions that the named plaintiffs are poor representatives for the class. An antitrust litigant is not expected to appreciate the finer points of the Sherman Act, Clayton Act, or the Federal Rules of Civil Procedure governing class action certification. "To require the class representative to be sophisticated and knowledgeable enough to help counsel in this quest would reduce the class action device, especially in complicated antitrust cases, to an impotent tool." *Chevalier v. Baird Sav. Ass'n., 72 F.R.D. 140, 146 (E.D. Pa. 1976)*. *See Hoffman Elec. Inc. v. Emerson Elec. Co., 754 F. Supp. 1070, 1077 (W.D. Pa. 1991)* (lack of personal knowledge about material facts of securities case is not indicative of inadequate representation); *Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397, 408 (D. N.J. 1990)* **[**61]** (no requirement pursuant to *Rule 23* that named plaintiffs be totally aware of all facts concerning claims in issue); *Foltz v. U.S. News & World Report, Inc., 106 F.R.D. 338, 341 (D. D.C. 1984)* (class representatives are not required to possess detailed knowledge of their lawsuit); *Pellman v. Cinerama, Inc., 89 F.R.D. 386, 389 (S.D. N.Y. 1981)* (plaintiff's unfamiliarity with securities fraud litigation considered "trivial").

[*1038] Despite defendants' suggestion to the contrary, the court perceives nothing remarkable about the representatives' knowledge and understanding of their undertaking as class action representatives in this antitrust suit. Having stated that, the court hastens to add that the undersigned will be monitoring the adequacy of party representation for absent class members as the litigation progress; and, the court will respond accordingly where it perceives instances where active judicial involvement is in the best interest of this litigation. The court is aware of the popular criticism and perception of class action litigation as being a lifeline for legal fees rather than a judicially feasible approach **[**62]** to vindicate multiple wrongs. Regardless of whether such criticism is fact or myth, it goes without saying that the client's interest is first and foremost in the advocacy of this case and in every case. With that stated, the court finds that the class representatives in this litigation are quite adequate.

All four prerequisites of *Rule 23(a)* are satisfied in this case. Consequently, the court's attention turns to *Rule 23(b)* for an assessment of the criteria which is set forth on the maintainability of class actions. As noted above, the sum and substance of defendants' opposition to class certification is predicated on a assertion that the litigation in the case *sub judice* can not satisfy *Rule 23(b)(3)* standards.

Rule 23(b)

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[19] For example, defendant Country Skillet/ConAgra alleges that one representative, an officer from Farm House, knew so little about the case that he appeared to believe that he was being deposed in conjunction with a criminal grand jury investigation. Based on this claim, the court reviewed this testimony with interest. Upon review of the testimony, the court disagrees that the witness was confused in any way or that he did not understand the purpose of the deposition.

Plaintiffs have moved for class certification under 23(b)(2) and 23(b)(3). *Rule 23(b)(2)* certification is appropriate for equitable, injunctive relief, while 23(b)(3) certification sets forth another stage of class certification criteria.

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> * * *
>
> (2) the party opposing the class has acted or **[**63]** refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

F.R.C.P. 23(b).

The defendants launch a well armed defensive strategy with the aim of convincing the court that the catfish processing industry is a highly diverse, fragmented industry which is totally incapable of price fixing, or producing **[**64]** any predominating result or consequence. In the effort to defeat (b)(3) certification, the defendants' arsenal includes the opinions of two expert economists [20] who have offered their opinions and statistical analysis on every A-Z consideration in the catfish processing and marketing industry. Likewise, plaintiffs are equipped with their own expert economist [21] who can refute every opinion, every chart, and every statistic served by the defendants. The court has carefully reviewed all of the affidavits, deposition testimony and exhibits submitted by all three economists. Some of it was helpful to **[*1039]** the court in the consideration of the class certification motion, but most of it was not. [22]

[65]** In reviewing the motion for class certification under the guidelines of *Rule 23(b)(3)*, [23] there appear to be four issues which would logically influence whether or not questions of law or fact common to the class predominate over individual questions and whether the class approach is superior to other methods of adjudication. Plaintiffs and defendants have also identified the following issues as crucial to the "predominance, superiority, manageability" questions: (a) whether evidence of the conspiracy is common to the class; (b) whether evidence of impact and damage is common to the class; (c) if liability is established, does an acceptable mechanism exist for the determination of damages; (4) does the fraudulent concealment issue present a common predominant question for the proposed class. The court's conclusions as to these four issues will, out of necessity, provide insight into the manageability of a class action and the other pertinent considerations of *Rule 23(b)(3)(A-D)*.

[66]** As a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment. 3B *Moore's Fed. Prac.* (MB) para. 23.46. The guiding principle for b(3) certification is that the interests of

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[20] Mr. Michael L. Glassman of Glassman-Oliver Economic Consultants, Inc., Washington, D.C.

Dr. Gordon Rausser, University of California at Berkeley; Law and Economics Consulting Group, Inc., Berkeley, California.

[21] Dr. John C. Beyer, Nathan Associates, Inc., Arlington, Virginia.

[22] Some of the research was organized into a useful format for the court's consumption, but much of it contained some rather bold assertions regarding the merits of plaintiffs' Sherman Act claim. As previously noted, the court takes great pains to caution that a peek into the merits at this stage is very premature and wholly inappropriate. The court is merely interested in the legal criteria for the motions to dismiss and motion for class certification, which are quite specific. It follows then that the court finds no purposeful use for the expert economist conclusions concerning the merits of the case.

[23] The court recognizes that 23(b)(3) factors for class certification will result in some overlap with 23(a) considerations.

the parties can best be served by settling their differences in one single action. 7A Charles A. Wright & Arthur R. Miller, *Fed. Prac. and Proc.* § 1777 1986). However, a mere charge of conspiracy does not mean that common questions predominate, or that product or market diversity, or dissimilar treatment could render a class action unmanageable. The suitability for *Rule 23* certification is, by design and necessity, a fact sensitive process for each case.

Evidence of A Conspiracy Common to The Class

In the case *sub judice,* the court first considers whether evidence of the conspiracy is common to the class. Evidence of a national conspiracy to fix the prices of catfish and processed catfish products would revolve around what the defendants did, and said, if anything, in pursuit of a price fixing scheme. While ownership of catfish processing facilities is geographically diverse in this country, the location and principal places of **[**67]** catfish processing are not. For the most part, the facilities are located in Mississippi and Alabama. In support of their motion for class certification, plaintiffs have submitted the affidavits of Joseph Glover, Jr., President of Southern Pride, and William H. Gidden, President of Magnolia Processing. Mr. Gidden's affidavit refers to at least three meetings in Mississippi with competitors in the catfish processing business and a number of telephone conversations. Mr. Glover's affidavit refers to "numerous conversations with my competitors" about price fixing in the catfish industry. If proven, evidence of any meetings in Mississippi, telephone conversations, or other electronic communications in pursuit and furtherance of the alleged conspiracy would be the most relevant evidence that could be introduced in proving the allegations of plaintiffs' complaint of price fixing. They court does not perceive that evidence of this type would be particular or isolated as to any individual plaintiff. Rather, such evidence would be pertinent and common to all plaintiffs. *See In re Domestic Air Transp., 137 F.R.D. 677, 689 (N.D. Ga. 1991)* (evidence of conspiracy **[**68]** resulted from "common nucleus of operative facts"); *Transamerican Refining Corp. v. Dravo Corp., 130 F.R.D. 70, 75 (S.D. Tex. 1990)* (proof of conspiracy susceptible to generalized proof since focus is on what defendants did and said); *In re South Central States Bakery Products, 86 F.R.D. 407, 419 (M.D. La. 1980)* (court rejected claim that wholesale bakery business was too complex for generalized proof of antitrust conspiracy). **[*1040]** Claims of geographical complexity and product diversity are often asserted as a bar to the predominance analysis of common questions in class certification efforts. *See e.g., In re Domestic Air Transp., 137 F.R.D. 677 (N.D. Ga. 1991)*; *In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 268 (D. Minn. 1989)*; *Fisher Bros. v. Mueller Brass Co., 102 F.R.D. 570 (E.D. Pa. 1984)*; *In re Alcoholic Beverages Litig., 95 F.R.D. 321 (E.D. N.Y. 1982)*; *In re Screws Antitrust Litig., 91 F.R.D. 52 (D. Mass. 1981)*; *In re Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302 (E.D. Pa. 1980)*; **[**69]** *Hedges Enterprises, Inc. v. Continental Group, 81 F.R.D. 461 (E.D. Pa. 1979)*; *In re Corrugated Container Antitrust Litig., 80 F.R.D. 244 (S.D. Tex. 1978)*; *Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34 (S.D. N.Y. 1977)*; *In re Folding Carton Antitrust Litig., 75 F.R.D. 727 (N.D. Ill. 1977)*; *In re Sugar Industry Antitrust Litig.,* 1977-1 Trade Cas. (CCH) para. 61,373 (N.D. Cal. 1976); *In re Master Key Antitrust Litig., 70 F.R.D. 23 (D. Conn. 1975)*. Furthermore, the court is not persuaded that *State of Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309 (5th Cir. 1978)*, supports defendants' argument that complexity in the catfish processing industry defies the feasibility of class certification. *Blue Bird* concerned a price fixing scheme by the manufacturers and distributors of school bus bodies. The Fifth Circuit affirmed the district court's certification of a class of Alabama school bus purchasers; however, the trial court's certification of a national **[**70]** class of school bus purchasers was premature since plaintiffs had failed to establish that, as to the proposed national class, common issues predominated over individual issues. *Blue Bird, 573 F.2d at 321*. "The district court's error in certifying this nationwide class for a determination of liability was in failing to take the steps necessary to determine the manner in which the plaintiffs proposed to prove the antitrust violation." *Id.* In *Blue Bird,* the evidence before the court in the class certification stage only presented the possibility of an Alabama conspiracy. There was nothing to suggest that the conspiracy touched and concerned school bus purchasers outside of Alabama, and the court was unable to determine if plaintiffs intended to proceed state-by-state to establish the existence of a conspiracy in each school bus market. [24] *Id.* This is not the situation in the case *sub judice.* Here, the allegations and proposed proof

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[24] There are substantial differences in the way in which school districts purchase school buses. State product specifications and bidding procedures which are set by state law demand local, individualized inquiries into the various markets. *Blue Bird, 573 F.2d at 313*. However, the Fifth Circuit did not foreclose the possibility of certification of a national class. Instead, the case was

address one national conspiracy by the processors which are localized in Mississippi and Alabama. The case does not entail a segmented approach, state-by-state or market-by-market, to establish whether or **[**71]** not a conspiracy existed.

Additionally, the court is not convinced that regional taste preferences for catfish is the type of diversity which diminishes the predominance of common questions. While catfish is processed as the whole fish, fileted, halved, frozen, packed on ice, cut into steaks, strips, nuggets, shanked, breaded, or marinated in lemon, butter, barbecue, or mesquite, **[**72]** etc., such product diversity does not exclude the sum and substance of plaintiffs' allegations--that the major players in the industry engaged in clandestine activities to fix and maintain prices at higher, artificial levels. Generalized proof of a conspiracy is common to all potential plaintiffs despite their individual tastes and preferences. An alleged conspiracy to fix the price which was charged is the unifying force and the predominant, overriding question.

Is Evidence of Impact and Damage Common to The Class?

The food distributors contend that as a result of agreements to establish and adhere to minimum prices for certain catfish products, the prices which the processors charged were artificially high and at noncompetitive levels. Therefore, each plaintiff experienced the impact of the same type of injury by paying more for catfish products than what would have existed in a truly competitive environment. Plaintiffs allege that a consequence **[*1041]** of the alleged conspiracy is that the artificial minimum price became the benchmark from which catfish prices were negotiated or discounted. *See In re Domestic Air Transp., 137 F.R.D. 677, 689 (N.D. Ga. 1991)* **[**73]** (inflated fares resulted in artificial "base" price which became benchmark for discounted or negotiated fares); *Hedges Enterprises, Inc. v. Continental Group, Inc., 81 F.R.D. 461, 475 (E.D. Pa. 1979)* (despite negotiated or discounted prices, artificial minimum became "base" price). In an illegal price fixing scheme, there is a presumption that all purchasers will be impacted/injured by having to pay the higher price. *In re Alcoholic Beverages Litig., 95 F.R.D. 321, 327 (E.D. N.Y. 1982)*; *In re Cement and Concrete Antitrust Litig.,* 1979-1 Trade Cases para. 62,502 (D. Ariz. 1979); *In re Plywood Antitrust Litig., 76 F.R.D. 570, 584 (E.D. La. 1976)*; *In re Master Key Antitrust Litig., 528 F.2d 5, 12 n11 (2d Cir. 1975)*.

As a result of statistical analyses performed on computerized pride data furnished by the defendants, Dr. John C. Beyer, plaintiffs' expert economist, concluded that there is a structure to prices in the catfish processing industry. According to Dr. Beyer, catfish product prices are strongly related to one another **[**74]** over time, and there is a strong correlation between product prices and the prices of live fish, sometimes referred to as the "bank price."

A correlation coefficient is a statistical measure of the degree of association between two variables. The closer the coefficient is to one (1), the variables are more strongly related and reflect a stronger systematic relationship. [25] In his second affidavit, Dr. Beyer responded to criticism from defendants' economists (Glassman and Rausser) and explained his findings with regard to stable, systematic relationships of catfish product prices to the prices of live fish:

> 22. The extensive body of computerized price data that defendants recently provided demonstrates that there is a structure to prices in the catfish processing industry, that catfish product prices are strongly related to one another over time, and that catfish product prices have strong, stable, and mutually consistent relationships to the price of live fish. There is similarity rather than diversity among the catfish prices analyzed by Mr. Glassman and Dr. Rausser.
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> 24. Chart A on the following page, utilizing Mr. Glassman's average monthly prices for Delta Pride, **[**75]** portrays the very stable relationship between the price of live fish and the price of fresh shank fillet and fresh whole catfish. From the earliest currently available data (April 1985) to the most recent (May 1992), a span of

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remanded to the district court to allow plaintiffs an opportunity to establish the proper predicate of predominance of common questions over individual issues. *Blue Bird, 573 F.2d at 323*.

[25] Beyer Affidavit, para. 23 [fn 30].

over seven years, shank fillet has remained a stable $ 2.00 per pound above the price of live fish, and processed whole fish has remained a stable $ 1.00 per pound above the price of live fish. Of course, the margins are seldom exactly $ 2.00 and $ 1.00; the relationship in average monthly prices varies from month to month. However, this month-to-month variation does not obscure the true underlying relationship among the prices--a stable relationship for more than seven years. There is a strong correlation (.91) between the price of live fish and the price of fresh whole fish, and there is also a strong correlation (.90) between the price of live fish and the price of fresh shank fillet.
25. The same stable relationship between live fish and fresh whole catfish and fresh shank fillet is also reflected in Country Skillet prices, as shown in Chart B. These relationships hold true no matter what scale is used for these charts.

26. As shown in Chart C, **[**76]** the correlation between live fish and frozen whole catfish is .91, and the correlation between live fish and frozen shank fillet is .88. The relationships between fresh and frozen whole and shank prices to one another and to live fish prices are thus mutually consistent and stable.

In the court's opinion, Dr. Beyer's expert conclusion is significantly buttressed by the non-expert statements of Mr. Gidden and Mr. Glover. In his affidavit, Mr. Glover, **[*1042]** President of Southern Pride, stated that the rule of thumb for pricing processed catfish is that whole fresh catfish is priced at $ 1.00 per pound over the bank price, and filets are priced at $ 2.00 per pound over the bank price. In the affidavit of William Gidden, President of Magnolia Processing, Mr. Gidden described some of the methods of the alleged price fixing scheme:

[. . .] The prices stated were per pound prices for different products, such as fillets, strips, steaks, nuggets and whole fish. The prices and **[**77]** effective date were agreed upon by those present. I did not participate in any of the discussions about prices, but merely listened and observed. I don't remember specifically what prices were agreed upon, and I don't know how they were arrived at. I did hear later about a rule of thumb that prices for processed catfish should generally be the live bank price plus one dollar for whole fish and the live bank price plus two dollars for fillets.

Whether or not Dr. Beyer is correct in his assessment of common impact/injury is for the trier of fact to decide at the proper time. *In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 858 (3d Cir. 1990)*; *In re Domestic Air Transp. Litig., 137 F.R.D. 677, 692 (N.D. Ga. 1991)*. For now, the court is persuaded that for the purposes of a class certification motion, plaintiffs have made a threshold showing that a price fixing conspiracy in the catfish processing industry, if proven, would have had a common impact for members of the proposed class. The court rejects the defendants' assertions that the catfish processing industry is too diverse, too complex, and too fragmented to effectively **[**78]** devise and implement a price fixing scheme. [26] Such an assertion flies in the face of common sense and the empirical data and analysis presented by Dr. Beyer. The court reaches this conclusion after a meticulous review of the affidavits of the expert economists, their charts, explanations of economic behavior of catfish pricing, the non-expert affidavits of Glover and Gidden, and the arguments of counsel as submitted in their briefs.

[79]** *Measure of Damages*

HN21[] The court's role at the class certification stage in assessing the proposed methods of proving damages is quite limited. The preliminary inquiry is whether or not the proposed methods are so insubstantial that they amount to no method at all. *In re Industrial Gas Antitrust Litig., 100 F.R.D. 280, 306 (N.D. Ill. 1983)*. Furthermore, ***HN22***[] it is generally recognized that some relaxation of the plaintiff's burden of proving damages is tolerated once an

[26] For one example, a number of theories are offered regarding the impact of a price fixing scheme wherein Delta Pride is allegedly a major participant. Since Delta Pride is a farmer-owned cooperative with a large share of the catfish market, Delta Pride is able to return profits from inflated prices to the member producers in the form of patronage rebates. Hence, defendants claim that Delta Pride's objectives in a price fixing scheme would be different from the remaining defendants which are corporations motivated by the profit margin. The obvious difference exists in who "shares the wealth" as a result of inflated, artificial price levels. In the court's view, this distinction is of no significant consequence. In the plaintiffs' consolidated complaint, it is alleged that the price fixing conspiracy in the catfish food chain existed in the processor-distributor link, *not* producer-processor.

antitrust violation and resulting damages have been established. *Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1579 (11th Cir. 1983)*; *In re Plywood Antitrust Litig., 655 F.2d 627, 635 (5th Cir. 1981)*; *Malcolm v. Marathon Oil Co., 642 F.2d 845, 858 (5th Cir. 1981)*; *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 903* (5th Cir.), *cert. denied, 412 U.S. 923, 37 L. Ed. 2d 150, 93 S. Ct. 2736*. The relaxation for the standard of proof in an antitrust case is a logical and natural result of a willingness to accept some measure of uncertainty due **[**80]** to the difficulty of ascertaining business damages. *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566-67, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*; *Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*; *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946)*. Obviously, certain knowledge of what plaintiff's position would have been in the absence of defendant's antitrust violation is never known. *J. Truett Payne Co., 451 U.S. at 566-67, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*. Hence, the willingness to accept some uncertainty stems **[*1043]** from a simple, equitable notion that the wrongdoer should not be allowed to profit by an insistence upon an unattainable standard of proof.

In his first affidavit, Dr. Beyer explains that the measurement of damages involves a two step process. First, the amount of a percentage overcharge must be determined by which **[**81]** prices were artificially inflated because of the anticompetitive behavior. The second step is merely an arithmetical process in which the overcharge is applied to the class member's purchases. In order to determine the percentage overcharge in the first step, a benchmark price must be identified. The benchmark price is an estimation of what the price would have been absent the price fixing scheme, and Dr. Beyer explains three methods which might be used in determining a benchmark price and percentage overcharge.

> 37. One such approach would involve identifying a base catfish price during a period after the time the alleged conspiracy was affecting defendants' prices (if such a non-conspiracy period is determined to exist). Such an approach would use this base price to estimate processed catfish prices over time by applying various measures of the rates of defendants' cost changes and indices of other changes affecting prices that actually occurred over the damage period. Statistical techniques can be used to isolate the effects of various influences on price, thereby allowing a determination of the impact of any one of the variables, including in this case, the impact of the **[**82]** conspiracy. This approach was used successfully in a class-action antitrust matter involving corrugated containers.
> 38. A second approach would involve a study of individual catfish processing firm or industry profitability, and a determination of the rates of profit that would have existed absent the conspiracy, perhaps by way of comparison to similar industries. As noted above, however, care would have to be taken to ensure proper accounting of catfish profitability, allowing for the transfer of profits from processors to the catfish farmers via live fish prices.
> 39. A third approach would involve an econometric analysis of defendants' prices during the conspiracy--an analysis of how and why prices changed over time. Such insight may provide the ability to develop a benchmark of the price that would have existed for catfish products absent the alleged conspiracy. Some econometric studies of catfish pricing practices have already been conducted. . . .

Beyer Affidavit, No. 1.

The proposed methods for determining damages, in the event that liability is established and the determination of damages is necessary, is not so insubstantial and illusive as to amount to no method **[**83]** at all. *See In re Industrial Gas Antitrust Litig., 100 F.R.D. 280, 306 (N.D. Ill. 1983)*. As noted above, it is recognized that the calculation of business damages necessarily involves some acceptable retrospective estimations of what market behavior would have been, absent certain factors. While the calculation of damages may not be as simple as plaintiffs suggest, the court also doubts that the task would be as impossible as defendants assert. In any event, the approaches suggested by Dr. Beyer appear to be methods which were deemed acceptable in other antitrust litigation. *See In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 268, 272 (D. Minn. 1989)*; *In re Corrugated Container Antitrust Litig., 80 F.R.D. 244, 251 (S.D. Tex. 1978)*.

While an appropriate method for calculating damages may exist, the court also recognizes the obvious. That is, damage amounts are individualized and will vary among plaintiffs. Nonetheless, individual questions of damages are often encountered in antitrust actions, and they are rarely a barrier to certification. *In re Workers'*

Compensation, 130 F.R.D. 99, 110 (D. Minn. 1990). **[**84]** Separate mini-trials, the assistance of a special master, or some later stratification of the class may be utilized to help resolve the issue of damages. *Id.* The difficulties or challenges which may face the court in the damages phase of this litigation, should it proceed that far, are frail obstacles to certification when measured against the substantial benefits of judicial economy achieved by class treatment of the predominating, common issues. The **[*1044]** obstacle of individual damage assessments was placed in its proper perspective by the district court in *Shelter Realty.*

> Finally, defendants contend that the question of damages will require individualized proof by absent class members, and that this is in itself sufficient to preclude class treatment. This point proceeds from the familiar proposition that proof of damages is part of the private antitrust plaintiff's cause of action. See, e. g., *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114, 89 S. Ct. 1562, 23 L. Ed. 2d 129 and n.9 (1969)*. But the conclusion outruns the premise. If defendants' argument were uncritically accepted, there would **[**85]** be little if any place for the class action device in the adjudication of antitrust claims. Such a result should not be and has not been readily embraced by the various courts confronted with the same argument. See, e. g., *In re Sugar Industry Antitrust Litigation, supra,* at p. 70,559. Cf. *Green v. Wolf Corporation, 406 F.2d 291, 301 (2d Cir. 1968)*, cert. denied, *395 U.S. 977, 89 S. Ct. 2131, 23 L. Ed. 2d 766 (1969)*. The predominance requirement calls only for predominance, not exclusivity, of common questions.

Shelter Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 37 (S.D. N.Y. 1977). *See* *In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 154 (E.D. Pa. 1979)* (issue of individual damages should not preclude class treatment where common issues of liability predominate).

Fraudulent Concealment

Finally, the defendants argue that the fraudulent concealment issue would require individual proof from various class members, particularly with regard to the due diligence efforts set forth by each. The undersigned does **[**86]** not agree. Rather than demanding individualized proof of actions by various class members, the court perceives that questions common to the class would predominate the analysis of fraudulent concealment in determining the applicable statute of limitations. For example, any evidence of acts of concealment would be common to the class. Additionally, circumstances which would trigger the duty of due diligence would appear to be applicable to the class of food distributors who purchased catfish products from the processors. However, should events unfold to indicate that certain plaintiffs would fall subject to statutes of limitations not faced by other plaintiffs, then such differences can be ironed out in the separate proceedings to determine damages, if necessary. *See* *In re Plywood Antitrust Litig., 76 F.R.D. 570, 586 (E.D. La. 1976)* (individualized aspects of statute of limitations can be adjudicated in same fashion and same time as individual damages). The court's finding that common issues would predominate over any individual considerations of fraudulent concealment is in accord with the great weight of authority which has considered the same **[**87]** question. *Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 43 (S.D. N.Y. 1990)* (common questions pervade fraudulent concealment inquiry); *In re Wirebound Box Antitrust Litig., 128 F.R.D. 262, 272 (D. Minn. 1989)* (same); *Fisher Bros. v. Mueller Brass Co., 102 F.R.D. 570, 579 (E.D. Pa. 1984)*(same); *In re Screws Antitrust Litig.,* 1981-2 Trade Cas. (CCH) para. 64,211 at p. 73,812 (D. Mass. 1981) (same); *In re Glassine and Greaseproof Paper Antitrust Litig., 88 F.R.D. 302, 307 (E.D. Pa. 1980)* (same); *In re Fine Paper Antitrust Litig., 82 F.R.D. 143, 154-55 (E.D. Pa. 1979)* (same); *In re Independent Gasoline Antitrust Litig., 79 F.R.D. 552, 559 (D. MD. 1978)* (same).

HN23[] In addition to the predominance of common questions, *Rule 23(b)(3)* certification calls upon the court to consider the manageability of a class action and whether or not the class action is superior to other methods of adjudication. *F.R.C.P. 23(b)(3)*. Once it is determined that common issues predominate, **[**88]** then considerations of class management and the advantages of class treatment should fall into their logical place. Nonetheless, all should be advised that the undersigned has considered the "superiority" and "manageability" of class treatment, and only a few additional comments should suffice in this regard.

In light of the large number of potential class members and the strong predominance of common issues, the court concludes, without reservation, that the class action is superior **[*1045]** to other methods of adjudication. [27] The court is convinced that individual actions by claimants would impose a strangling harness on the judiciary, as well as the parties. Separate actions would produce considerable duplication of effort, increase the cost of litigation, create the risk of inconsistent results for parties who are similarly situated, and consume judicial resources to wasteful levels (through duplication) throughout the country. Furthermore, the court is counseled by the possibility that potential claimants with small claims, which would not justify the cost of individual litigation, would simply abandon their claims altogether. The court perceives that the difficulties which may **[**89]** be encountered in the manageability department will be--well--manageable. As noted above, if the litigation proceeds to the stage where individual damage assessment is necessary, then the court will employ reasonable means and methods to streamline individual interests so that notions of judicial economy are well served. In any event, the management of individual interests which may arise are an acceptable trade-off and are not particularly compelling when compared to the advantages of consolidated treatment of common issues of liability.

In conclusion, the court will issue an appropriate order certifying the class as proposed in the plaintiffs' consolidated motion for class certification. Should adjustments or modifications of the class prove necessary, **[**90]** then the court will, in due course, issue such necessary orders as to best achieve the purposes of *Rule 23*. ***HN24***[] "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." *F.R.C.P. 23(c)(1)*. [28] Initial certifications of class actions are not set in stone, and the rules fully contemplate that as discovery progresses and the parties exchange knowledge within their possession, some tailoring may be necessary. [29] 7B Charles A. Wright & Arthur R. Miller, *Fed. Prac. and Proc.* § 1791 (1986). "The act of refining a class definition is a natural outcome of federal class action practice." *In re Domestic Air Transp. Litig., 137 F.R.D. 677, 683 n.5 (N.D. Ga. 1991)*.

[91]** *Rule 23(b)(2) Certification*

Plaintiffs have also moved for *Rule 23(b)(2)* certification which is designed to pave the way for class certification where equitable, injunctive relief is sought with respect to the class.

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> * * *
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
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> * * *

F.R.C.P. 23(b)(2).

In their prayer for relief, plaintiffs have included a demand for equitable relief in addition to their demand for treble damages; and, plaintiffs allege that the demand for equitable relief is an "integral part of the relief for the proposed class." Despite the asserted importance of the demand for injunctive relief, plaintiffs devote less than one page to 23(b)(2) certification in a fifty page brief which they have submitted to the court. Likewise, defendants spend only one paragraph in arguing against 23(b)(2) certification. Therefore, **[**92]** the court cannot help but wonder how "integral" certification for injunctive relief might be in this litigation. In any event, the court will also certify the proposed class pursuant to *Rule 23(b)(2)* for final injunctive relief or corresponding declaratory relief with respect to

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[27] The court also considers that the majority of the individual actions as listed in footnote two were filed in this district, and it appears that key events which will be in issue are alleged to have taken place in this district. *See F.R.C.P. 23(b)(3)(A-D)*.

[28] *See F.R.C.P. 23(c)(4)* & *23(d)*.

[29] For example, the exact dates of the alleged conspiracy are unknown. Plaintiffs allege that the conspiracy began "at least as early as 1981" and continued "through at least 1990, the exact dates being unknown to plaintiffs . . . ."

the class as a **[*1046]** whole. In doing so, the court recognizes that in the past, certification under 23(b)(2) was not deemed appropriate where treble money damages under the Clayton Act was the primary relief sought. *See Wilcox Development Co. v. First Interstate Bank of Oregon, 97 F.R.D. 440, 446 (D. Or. 1983)*; *Krehl v. Baskin Robbins Ice Cream Co., 78 F.R.D. 108, 117 (C.D. Cal. 1978)*. However, more recent trends in *Rule 23(b)(2)* utilization appear to favor a broader application of equitable relief certification; and, 23(b)(2) certification has been ordered where the primary relief sought was clearly money damages pursuant to 23(b)(3). *See In re Domestic Air Transp. Litig., 137 F.R.D. 677, 696 (N.D. Ga. 1991)*; *Northwestern Fruit Co. v. A. Levy & J. Zentner Co., 116 F.R.D. 384, 388 (E.D. Cal. 1986)*. **[**93]**

Catfish processing is a relatively young industry in this country. The plaintiffs have alleged the existence of a price fixing conspiracy which, if true, began with the inception of this industry and has lasted until recently. To say the least, the existence of an illegal antitrust conspiracy in this new industry would be met with extreme disappointment. Hence, it is this fact which counsels the court that 23(b)(2) certification would present no harm or hardship on the industry.

Conclusion

In summary, the motions to dismiss which were filed by the individual defendants will be denied based on the reasons stated in this memorandum opinion. Furthermore, the plaintiffs' consolidated motion for class certification will be granted. The court, pursuant to *F.R.C.P. 23(a)* and *23(b)(2)* and *23(b)(3)*, finds that this litigation meets the requisites for class certification and class treatment. In accord with the spirit of *Rule 23* and the necessity of effective class management, the court is available to the parties, of course, to review any proceedings and to issue appropriate orders which the court deems in the best interest of the litigation. Regarding the notice provisions of **[**94]** *Rule 23(c)(2)* in light of 23(b)(3) certification, the parties will find an order from the court which accompanies this memorandum opinion. As explained in the order, the court expects recommendations from the parties regarding the content, timing, and method of providing effective notice to potential class members. Accompanying this memorandum opinion, the court will issue appropriate orders to address the pending motions which are consistent with this memorandum opinion and any other procedural matters that might need attention.

THIS 28th day of June, 1993.

Glen H. Davidson

United States District Judge

United States v. Rubin

United States Court of Appeals for the Seventh Circuit

March 31, 1993, Argued ; June 30, 1993, Decided

Nos. 93-1076, 93-1077

Reporter

999 F.2d 194 *; 1993 U.S. App. LEXIS 16080 **; 1993-1 Trade Cas. (CCH) P70,290

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IRVING RUBIN, ROBERT BONCZYK, and JAMES HEFFERNAN, Defendants-Appellants.

Subsequent History: As Amended August 25, 1993.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 91 CR 44. George W. Lindberg, Judge.

Core Terms

Guideline, mail fraud, sentencing, price-fixing, counts, district court, drums, steel, conspiracy, Offenses, prices, conceal, price list, indictment, Antitrust, violations, convicted, aptly, defendants', analogy

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Penalties

HN1[] **Sentencing, Sentencing Guidelines**

In sentencing a defendant, a district court must determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *U.S. Sentencing Guidelines Manual § 1B1.2(a)* (1989).

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Penalties

HN2[] **Sentencing, Sentencing Guidelines**

A defendant convicted of mail fraud can be sentenced under a different U.S. Sentencing Guideline if the conduct comprising the mail fraud is "more aptly" punished under another U.S. Sentencing Guideline, even one not listed in the Statutory Index for the convicted offense.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > Sentencing > Ranges

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

HN3[] **Sentencing, Sentencing Guidelines**

U.S. Sentencing Guideline Manual commentary that interprets or explains a guideline is authoritative unless it violates the U.S. Const. or a federal statute, or is inconsistent with, or a plainly erroneous reading of, the guideline. In particular, Commentary which functions to interpret a guideline or explain how it is to be applied controls, and if failure to follow, or a misreading of, such commentary results in a sentence selected from the wrong guideline range, that sentence would constitute an incorrect application of the sentencing guidelines under *18 U.S.C.S. § 3742 (f)(1)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN4[] **US Department of Justice Actions, Criminal Actions**

It is true of any price-fixing conspiracy that it must remain concealed to be successful. Because price-fixing is illegal, public knowledge of the activity usually ends the agreement. This deceptive aspect of the conspiracy is intended solely to cover up the illegal act.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN5[] **Sentencing, Sentencing Guidelines**

See *U.S. Sentencing Guidelines Manual § 2C1.7(c)(4)*.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Penalties

HN6[] **Sentencing, Sentencing Guidelines**

In the Statutory Index to the U.S. Sentencing Guidelines Manual and to the current U.S. Sentencing Guidelines Manual (Manual), Manual *§§ 2C1.7* and *2F1.1* are the only two Guideline sections noted under violations of *18 U.S.C.S. § 1341* (Mail Fraud).

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

HN7[] **Fraud Against the Government, Mail Fraud**

Where the alleged fraud consists solely of the concealment of a more specific crime--and where such concealment is inherent in the nature of the crime--then under either *U.S. Sentencing Guidelines Manual § 2C1.7(c)(4)* or Application Note 13 the court should apply the guideline relating to the underlying offense.

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Judges: Before CUDAHY, MANION, and TIMBERS, [*] Circuit Judges.

Opinion by: MANION

Opinion

[*194] MANION, *Circuit Judge.*

The United States of America ("government") charged Irving Rubin, Robert Bonczyk, and James Heffernan ("defendants") with one count of criminal antitrust conspiracy under *15 U.S.C. § 1* for fixing the prices of new steel drums used to store liquid products and with two counts **[**3]** of mail fraud under **[*195]** *18 U.S.C. § 1341* for concealing and making false statements to cover their collusion. The district court determined that *Sentencing Guidelines section 2R1.1* ("Antitrust Offenses") applied to the price-fixing count and that *section 2F1.1* ("Offenses Involving Fraud or Deceit") applied to the mail fraud counts. After grouping the offenses, the district court sentenced

[*] Hon. William H. Timbers of the United States Court of Appeals for the Second Circuit is sitting by designation.

the defendants under *section 2F1.1*, which gave them a greater penalty than they would have received had the court applied *section 2R1.1* to each of the three counts. On appeal, the defendants challenge only the court's application of *section 2F1.1* to their mail fraud counts. We vacate the sentences and remand for further sentencing consistent with this opinion.

I. Background

The defendants worked in the steel drum manufacturing business. The drums the defendants manufactured were used mainly for the packaging of chemical and petroleum products. The drums ranged in size from thirteen to fifty-seven gallons. Rubin was Chairman of the Board and Chief Executive Officer of Container Products, Inc., and Bonczyk was its Executive Vice President. Heffernan was Vice President **[**4]** of Sales and Marketing of Astro Container Company.

In a superseding indictment, the government charged the defendants and others with one count of criminal price-fixing and with two counts of mail fraud. In count one, the government charged the defendants with entering into and engaging in "a combination and conspiracy . . . to suppress competition by fixing prices of new steel drums offered for sale to customers in Ohio, Michigan, western New York, western Pennsylvania, and West Virginia" (the "East Central Region"). This conspiracy to fix prices began in October 1988 and lasted through March 1990. To form and execute their conspiracy, the government charged that the defendants, among other things:

(a) agreed to increase prices of new steel drums;
(b) agreed to adopt published list prices for new steel drums;
(c) exchanged with one another price lists and other price information;
(d) issued price announcements, price lists, bids and quotations in accordance with agreements reached;

(e) met in a Holiday Inn in the Cleveland, Ohio area on or about December 21, 1988, at a Radisson Hotel in the Columbus, Ohio area on or about January 26, 1989, at the Union League Club **[**5]** in Chicago, Illinois on or about February 10, 1989, and elsewhere and at other times, for the purpose of discussing and agreeing upon prices and price lists for new steel drums;
(f) telephoned or otherwise contacted one another to discuss, agree upon, and convey agreements regarding prices, price lists, bids and quotations for new steel drums, and to implement and police such agreements; and
(g) organized and maintained a trade association known as the Midwest Steel Drum Manufacturer's Association for the purpose of promoting, facilitating, policing, concealing, covering-up, and otherwise furthering, aiding and abetting the aforesaid combination and conspiracy.

In counts two and three, the government charged the defendants with devising, intending to devise, and participating "in a scheme and artifice to defraud purchasers of new steel drums offered for sale [in the East Central Region] and to obtain money and property from such purchasers, by means of false and fraudulent pretenses and representations." The government charged that part of the defendants' scheme and artifice to defraud was to engage in the same type of conduct, enumerated above as (a) through (g), that they **[**6]** had engaged in their price-fixing scheme. The government further charged that the defendants and their co-schemers "made false statements and representations to purchasers of new steel drums in the East Central Region, and failed to inform such purchasers, about the noncompetitive and collusive nature of prices, price lists, bids and quotations for new steel drums." Lastly, the government charged that the defendants and their co-schemers knowingly caused to be mailed a price list to a customer and one to another co-schemer.

[*196] Rubin and Bonczyk pleaded guilty to all counts. Heffernan went to trial, and the jury found him guilty as charged. The defendants do not appeal their convictions or the application of *section 2R1.1* to count one. They appeal only their sentences under the two counts for mail fraud.

At the sentencing hearing, the defendants argued that the district court should apply the Antitrust Offenses *Guideline, section 2R1.1*, to their mail fraud counts, rather than the Fraud or Deceit *Guideline, section 2F1.1*, because the conduct involved in the mail fraud counts was incidental to the price-fixing and designed to conceal their conspiracy. Relying on Application Note 13 to *section **[**7]** 2F1.1*, the defendants argued that because the underlying conduct in the mail fraud counts essentially dealt with their anticompetitive scheme, *section 2R1.1*, and not *section 2F1.1*, "more aptly" applied to their underlying conduct. In contrast, the government argued chiefly that the Sentencing Guidelines as a whole and Application Note 13 required the district court to apply the Guideline section that covered the more serious offense committed. Because mail fraud is a more serious offense than price-fixing, the government asserted that the district court should apply *section 2F1.1* because it yielded a higher offense level and a greater sentence. The district court agreed with the government's analysis of the issue. The court concluded that the defendants committed a price-fixing violation and two mail fraud violations. It applied *section 2R1.1* to the price-fixing count and *section 2F1.1* to the mail fraud counts. After grouping the counts, the court sentenced the defendants under *section 2F1.1*, not *section 2R1.1*. *Section 2F1.1* provided a greater term of imprisonment than did *section 2R1.1*.

II. Analysis

On appeal, the government has abandoned for the most part the main argument it made **[**8]** to the district court at sentencing that, in selecting the appropriate Guideline, the court should apply the Guideline that resulted in the "more onerous" sentence; the district court relied on that argument in reaching its sentencing decision. The government now agrees with the defendants that the sole issue on appeal is whether the district court erred in applying the Fraud and Deceit *Guideline, section 2F1.1*, instead of utilizing Application Note 13 and applying the Antitrust Offenses *Guideline, section 2R1.1*, to the conduct with which the government charged the defendants in counts two and three of the indictment. We have jurisdiction pursuant to *28 U.S.C. § 1291* to consider this issue.

HN1[] In sentencing a defendant, a district court must "determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (i.e., the *offense conduct* charged in the count of the indictment or information of which the defendant was convicted)." United States Sentencing Commission, *Guidelines Manual, § 1B1.2(a)* (Nov. 1989) ("U.S.S.G.") (emphasis added). In this case, the defendants were convicted of two counts **[**9]** of violating *18 U.S.C. § 1341* (Mail Fraud). The Statutory Index to the 1989 Guidelines (the Guidelines under which the district court sentenced the defendants) listed only one Guideline provision as applicable to the offense of violating *section 1341*: *section 2F1.1* for "Offenses Involving Fraud or Deceit." U.S.S.G. App. A at A.12 (Nov. 1989). Although the Guideline listed in the Statutory Index is ordinarily applied at sentencing, id. App. A, intro. (Nov. 1989), Application Note 13 to *section 2F1.1* states that if the indictment "establishes an offense more aptly covered by another guideline, apply that guideline rather than *§ 2F1.1*." Id. *§ 2F1.1*, comment. (n.13) (Nov. 1989) (emphasis added). [1] Thus, according to Application **[*197]** Note 13, ***HN2***[] a defendant convicted of mail fraud can be sentenced under a different Guideline if the conduct comprising the mail fraud is "more aptly" punished under another Guideline, even one not listed in the Statutory Index for the convicted offense. *Cf. United States v. Carrillo-Hernandez, 963 F.2d 1316, 1317-18 (9th Cir. 1992)* (applying Application Note 13); *United States v. Castaneda-Gallardo, 951 F.2d 1451, 1452-53* **[**10]** (5th Cir.) (same), *cert. denied, 118 L. Ed. 2d 587, 112 S. Ct. 1990 (1992)*; *United States v. Obiuwevbi, 962 F.2d 1236, 1242 (7th Cir. 1992)* (same).

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[1] Application Note 13 states in full:

> Sometimes, offenses involving fraudulent statements are prosecuted under *18 U.S.C. § 1001*, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 would be more apt, and false statements to a customs officer, for which § 2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in *§ 1B1.2(a)*) establishes an offense more aptly covered by another guideline, apply that guideline rather than *§ 2F1.1*. Otherwise, in such cases, *§ 2F1.1* is to be applied, but a departure from the guidelines may be considered.

United States Sentencing Commission, *Guidelines Manual, § 2F1.1*, comment. (n.13) (Nov. 1989) ("U.S.S.G.") (emphasis added). Application Note 13 conveys the Sentencing Commission's recognition that the broad nature of such general fraud statutes as *18 U.S.C. § 1001* (False Statements) and *18 U.S.C. § 1341* (Mail Fraud) sometimes apply to offense conduct that "is also covered by a more specific statute." *Id.*

[11]** Until recently, the authoritative weight a court needed to give the commentary to the Guidelines was disputed among the various courts of appeals. Unlike some other circuits, we recognized that "application notes are entitled to substantial weight and should be followed unless they conflict with the text" of the Guidelines. *United States v. Woods, 976 F.2d 1096, 1102 (7th Cir. 1992)* (citations omitted). The United States Supreme Court has now resolved the conflict among the circuits: ***HN3***[] Guideline commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, the guideline." *Stinson v. United States, 123 L. Ed. 2d 598, 113 S. Ct. 1913, 1915 (1993)*. In particular,

> Commentary which functions to "interpret [a] guideline or explain how it is to be applied" controls, and if failure to follow, or a misreading of, such commentary results in a sentence "selected . . . from the wrong guideline range," that sentence would constitute "an incorrect application of the sentencing guidelines" under *18 U.S.C. § 3742* **[**12]** *(f)(1)*.

Id. at 1917-18 (citations omitted). What has remained unchanged is that a "district court's determination of which Guideline section to apply is a question of law we review de novo." *United States v. Johnson, 965 F.2d 460, 468 (7th Cir. 1992)*.

Based on the authoritative nature of Application Note 13, we determine that although the district court properly selected the Fraud and Deceit *Guideline, section 2F1.1*, from the Statutory Index, it erred in not applying the Antitrust Offenses *Guideline, section 2R1.1*, which more aptly covers the conduct with which the government charged the defendants in counts two and three of the indictment. Even though the defendants pleaded guilty, or were convicted, of mail fraud under counts two and three, the defendants' fraud in those two counts was designed to conceal and further their price-fixing scheme. The mail fraud was not separable from the price-fixing conspiracy as it would have been, for example, had the defendants made fraudulent statements in letters concerning the quality or capacity of the new steel drums. In this case, the line between price-fixing and mail fraud is blurred **[**13]** because the government charged the defendants with almost the identical conduct in all three counts. Specifically, the government charged the defendants in the price-fixing count with, among other things, issuing price lists to customers, exchanging price lists with each other, and taking steps to cover-up and conceal their price-fixing scheme. These charges are reflected almost identically in the two mail fraud counts.

The intent of the defendants was to fix prices. The nature of their price-fixing scheme was to set a price for the new steel drums, to sell the new steel drums at that fixed price, and to keep secret their agreement to fix those prices. To achieve those ends, the defendants had to advertise their prices--hence the mailings--and had to conceal their collusion--hence the misrepresentations. As the Supreme Court has noted in **[*198]** the past: "For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces." *Grunewald v. United States, 353 U.S. 391, 402, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957)*; **[**14]** *see also* *Texas v. Allan Constr. Co., 851 F.2d 1526, 1530-31 (5th Cir. 1988)* ("***HN4***[] It is true of any price-fixing conspiracy that 'it must remain concealed to be successful.' Because price-fixing is illegal, public knowledge of the activity usually ends the agreement. This deceptive aspect of the conspiracy is . . . intended solely to 'cover up' the illegal act."); 2 Phillip Areeda & Donald F. Turner, ***Antitrust Law*** P 325, at 124 (1978) (stating that the participants to most clear-cut pricefixing agreements make elaborate efforts to disguise their activity, which is started and continued outside of the public's view). As such, the mail fraud allegations in this case directly relate to the price-fixing allegations; they are a natural extension of the conspiracy to fix the prices of the new steel drums and are not a separate offense.

In their briefs on appeal and at oral argument, the defendants raised an analogy argument between Application Note 13 and *Guidelines section 2C1.7* ("Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions"). *U.S.S.G. § 2C1.7* **[**15]** (Nov. 1991). *Section 2C1.7* was added to the Guidelines in 1991 after the defendants' offense conduct and does not apply to their charged offenses; the defendants concede that, but raise the argument to further support their position that Application Note 13 should be applied in this case. The government never fully responded to this analogy argument.

HN5[] Section 2C1.7(c)(4) provides: "If the offense is covered more specifically under § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), or § 2C1.3 (Conflict of Interest) [than it is under section 2C1.7], apply the offense guideline that most specifically covers the offense." Id. § 2C1.7(c)(4) (Nov. 1991) (emphasis added). HN6[] In the Statutory Index to the 1991 Guidelines and to the current Guidelines, section 2C1.7 and section 2F1.1 are the only two Guideline sections noted under violations of 18 U.S.C. § 1341 (Mail Fraud). Id. App. A at 400 (Nov. 1992); id. App. A at 390 (Nov. 1991). According to the defendants, section 2C1.7(c)(4) adopts for "intangible rights" fraud the same principle that **[**16]** Application Note 13 adopts for all other violations of section 1341.

In advancing their analogy argument, the defendants contend: "HN7[] where the alleged fraud consists solely of the concealment of a more specific crime--and where such concealment is inherent in the nature of the crime--then [under either section 2C1.7(c)(4) or Application Note 13] the court should apply the guideline relating to the underlying offense." We find merit to the analogy argument for two reasons. First, it helps resolve the contention the government makes on appeal that the Antitrust Offenses Guideline, section 2R1.1, cannot apply here because price-fixing and mail fraud have different elements. Under section 2C1.7(c)(4), a district court can apply a more specific Guideline to an "intangible rights" fraud charge, even though the applied Guideline addresses conduct involving elements different from the offense of conviction. Second, the analogy argument helps resolve the assertion the government made at sentencing that the district court should apply the Guideline that produces the "more onerous" sentence. Under section 2C1.7(c)(4), the application of a more specific Guideline may result in a lower sentence **[**17]** than the one imposed for "intangible rights" fraud. Application Note 13 does not preclude a similar result in either of these two situations. [2]

[*199] In sum, we hold that the defendants' mail fraud was directly related to the price-fixing scheme and was not a separate course of conduct. It had no other purpose except to maintain and continue the price-fixing conspiracy. The nature of the conduct charged in counts two and three dealt with price-fixing rather than with mail fraud. Therefore, Application **[**18]** Note 13 requires that the defendants be sentenced under the Antitrust Offenses Guideline, section 2R1.1, and not under the Fraud or Deceit Guideline, section 2F1.1, even though the Statutory Index lists section 2F1.1 as the ordinarily applicable Guideline for offenses under 18 U.S.C. § 1341. U.S.S.G. § 2F1.1, comment. (n.13) (Nov. 1989); see also id. App. A, intro., at A.1 (Nov. 1989) (noting that in atypical cases the Guideline listed in the Statutory Index will be inappropriate because of the particular conduct involved in the underlying offense; in such a case, the district court should "use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted").

We stress that our holding in this case is not a bright-line ruling applicable to all indictments that charge price-fixing and mail fraud. Our focus here has been on this indictment and the acts with which the government charged the defendants. Under a different indictment charging price-fixing and mail fraud, a district court could conceivably consider Application Note 13 and properly determine that section 2F1.1 more aptly **[**19]** covers the conduct charged as mail fraud.

III. Conclusion

The district court erred in applying section 2F1.1 to the mail fraud counts. Section 2R1.1 more aptly covers the type of conduct with which the government charged the defendants in those two counts. Consequently, the defendants' sentences are VACATED, and the matter is REMANDED for resentencing under section 2R1.1.

End of Document

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[2] We also note the government's reliance on Application Note 5 to Guidelines section 1B1.1: "Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level." U.S.S.G. § 1B1.1, comment. (n.5) (Nov. 1989). Application Note 5 does not apply here because § 2R1.1 and § 2F1.1 are not "equally applicable" to the mail fraud counts. In light of Application Note 13, § 2R1.1 applies and § 2F1.1 does not.

Genentech, Inc. v. Eli Lilly & Co.

United States Court of Appeals for the Federal Circuit

July 1, 1993, Decided

91-1249

Reporter

998 F.2d 931 *; 1993 U.S. App. LEXIS 16127 **; 27 U.S.P.Q.2D (BNA) 1241 ***; 1993-2 Trade Cas. (CCH) P70,297; 93 Daily Journal DAR 8900

GENENTECH, INC., Plaintiff-Appellant, v. ELI LILLY AND COMPANY, Defendant, and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant-Appellee.

Subsequent History: Petition for Rehearing Denied September 13, 1993, Reported at: *1993 U.S. App. LEXIS 23532*. Petition for Rehearing Denied and In Banc Suggestion Declined September 23, 1993, Reported at: *1993 U.S. App. LEXIS 24768*.

Prior History: **[**1]** Appealed from: U.S. District Court for the Southern District of Indiana. Judge McKinney

Disposition: AFFIRMED IN PART, VACATED IN PART, and REMANDED

Core Terms

patent, immunity, declaratory, abrogation, infringement, antitrust, counts, counterclaims, patent infringement, district court, federal court, state immunity, declaratory judgment, state law, recoupment, Public Law, violations, defenses, patent law, declaration, licensing, charges, argues, rights, cases, actual controversy, general rule, waived, state action, first-filed

LexisNexis® Headnotes

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN1[] **Judgments, Declaratory Judgments**

See *28 U.S.C.S. § 2201*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

HN2[] Standards of Review, Abuse of Discretion

The use of the word "may" in the Declaratory Judgment Act, 28 U.S.C.S. § 2201, is interpreted as meaning both that the court is authorized to declare legal rights and relations, and that in appropriate circumstances the court may decline to do so. However, the declaratory action is not a permissive action that may be heard or dismissed in absolute judicial discretion. The exercise of discretion in a declaratory judgment must have a basis in sound reason.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Appellate Review

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] Federal Declaratory Judgments, Appellate Review

An abuse of discretion under the Declaratory Judgment Act, 28 U.S.C.S. § 2201, may occur when the trial court's decision to hear or dismiss an action is based on an incorrect conclusion of law or clearly erroneous findings of fact, is devoid of any evidence in the record upon which the court rationally could have based its decision, or is clearly unreasonable or arbitrary.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Immediacy

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN4[] Case & Controversy Requirements, Actual Controversy

To meet the requirements of the Declaratory Judgment Act, 28 U.S.C.S § 2201, there must be a "case of actual controversy." The case must be of sufficient immediacy and reality to warrant declaratory relief.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Patent Law > Infringement Actions > Infringing Acts > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

HN5[] Case & Controversy Requirements, Actual Controversy

Determination of whether there is an actual controversy in patent actions generally entails the two part inquiry of (1) whether the declaratory plaintiff has acted in a way that the patentee asserts infringes the patent, or is preparing to act in such a way; and (2) whether the patentee has created, in the declaratory plaintiff, a reasonable apprehension of suit for infringement.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Patent Law > Remedies > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN6[] **Case & Controversy Requirements, Actual Controversy**

When there is an actual controversy and a declaratory judgment would settle the legal relations in dispute and afford relief from uncertainty or insecurity, in the usual circumstance the declaratory action is not subject to dismissal.

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN7[] **Venue, Multidistrict Litigation**

Although the federal circuit applies the procedural law of the regional circuit in matters that are not unique to patent law, and although matters of procedure do not always carry substantive weight, the regional circuit practice need not control when the question is important to national uniformity in patent practice.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN8[] **Declaratory Judgments, Federal Declaratory Judgments**

When suits are filed in different federal forums, the general rule favors the forum of the first-filed action, whether or not it is a declaratory action. Exceptions, however, are not rare, and are made when justice or expediency requires, as in any issue of choice of forum.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

HN9[] Federal & State Interrelationships, State Sovereign Immunity

See U.S. Const. amend. XI.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Governments > Federal Government > Claims By & Against

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN10[] Federal & State Interrelationships, State Sovereign Immunity

Without the state's consent a federal court is without power to entertain a suit by a private person against the state.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > Abrogation of Immunity

Transportation Law > Interstate Commerce > Federal Powers

Constitutional Law > State Sovereign Immunity > General Overview

Governments > Legislation > Interpretation

HN11[] Federal & State Interrelationships, State Sovereign Immunity

Abrogation of state immunity under U.S. Const. amend. XI must be explicit and unambiguous, and must show clearly that Congress intended to subject the states to suit in federal court.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Constitutional Law > State Sovereign Immunity > Waiver > Consent

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Waiver of Immunity

Constitutional Law > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > Waiver > General Overview

HN12[] State Sovereign Immunity, State Immunity

A state may waive its immunity under U.S. Const. amend. XI in its entirety or as to any specified agency, action, or event. Waiver by a state can be effected by state statute or state constitution or by clear state conduct.

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Governments > Legislation > Interpretation

HN13[] **Constitutional Law, State Sovereign Immunity**

When the purpose of a federal statute is to abrogate a state's immunity from suit, that abrogation must be explicit and unequivocal.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Patent Law > Infringement Actions > General Overview

HN14[] **Federal & State Interrelationships, State Sovereign Immunity**

See *35 U.S.C.S. § 271(h)*.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN15[] **Federal & State Interrelationships, State Sovereign Immunity**

See *35 U.S.C.S. § 296*.

Governments > Legislation > Interpretation

HN16[] **Legislation, Interpretation**

The words of a statute are deemed to have their plain meaning in the lexicon of the subject matter of the legislation. When the statutory text is clear, when the legislative intent is unmistakable, and when the legislative intent is implemented by the statute, that ends the inquiry.

Governments > Legislation > Interpretation

HN17[] **Legislation, Interpretation**

Only in the rare case, when the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, should a statute be construed in departure from its plain language.

Governments > State & Territorial Governments > Claims By & Against

Governments > Legislation > Interpretation

HN18[] State & Territorial Governments, Claims By & Against

A statute must be interpreted to give effect to each of its provisions.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN19[] Declaratory Judgments, Federal Declaratory Judgments

A declaratory action neither confers nor constrains jurisdiction or immunity. The Declaratory Judgment Act, *28 U.S.C.S. § 2201*, does not provide a substantive right; it provides a procedure whereby an aggrieved person may obtain a declaration of legal rights and relations.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Governments > Legislation > Interpretation

HN20[] Federal & State Interrelationships, Choice of Law

A court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

HN23[] **Federal & State Interrelationships, State Sovereign Immunity**

When a state maintains a claim in federal court it thereby consents to the exercise of federal judicial authority over that claim to the full extent required for its complete determination. The principles of federalism underlying *U.S. Const. amend. XI* do not prevent a person from defending against an action by a state.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Torts > Public Entity Liability > Immunities > Judicial Immunity

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN24[] **Pleadings, Counterclaims**

When a governmental entity has waived its immunity from federal judicial authority by taking legal action in federal court, the person charged can raise all counterclaims that arise from the same transaction or events.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN25[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Recoupment is an established remedy based on the principle that neither sovereign immunity nor the principles of federalism prevents a private person from raising, in defense and setoff, claims that arise from the same transaction or occurrence on which the state is seeking to recover damages.

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN26[] **Counterclaims, Compulsory Counterclaims**

A counterclaim must be "compulsory" in order to be raised as of right in an area of law in which the state is otherwise immune from suit. *Fed. R. Civ. P. 13(a)*.

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN27[] **Counterclaims, Compulsory Counterclaims**

A compulsory counterclaim is one that arises out of the same transaction or occurrence as the opposing party's claim.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Governments > Native Americans > Authority & Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

HN28[] **Supplemental Jurisdiction, Ancillary Jurisdiction**

A compulsory counterclaim is usually within the court's ancillary jurisdiction and an independent basis for federal jurisdiction is not necessary. However, ancillary jurisdiction alone may not override the *Eleventh Amendment*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

HN29[] **Exemptions & Immunities, Parker State Action Doctrine**

The State Action doctrine provides immunity or exemption from federal competition laws when the state is performing official acts, whether or not these acts are anticompetitive in effect.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > State & Territorial Governments > General Overview

Transportation Law > Interstate Commerce > Market Participant Doctrine

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > General Overview

Constitutional Law > State Sovereign Immunity > General Overview

Governments > Legislation > Interpretation

HN30[] **Exemptions & Immunities, Parker State Action Doctrine**

To warrant State Action immunity, the anticompetitive acts must be taken in the state's sovereign capacity, and not as a market participant in competition with commercial enterprise. If the allegedly anticompetitive acts are not explicitly ordered by a legislative arm of state government, they must be conducted pursuant to legislative authorization that contemplates such acts.

Counsel: Salem M. Katsh, Weil, Gotshal & Manges, of New York, New York, argued for plaintiff-appellant. With him on the brief were Ira M. Millstein, Howard B. Comet, Edmund J. Fish and Patrick A. Fraioli, Jr. Also on the brief were Hugh E. Reynolds and David T. Kasper, Locke, Reynolds, Boyd & Weisell, of Indianapolis, Indiana.

Thomas D. Nevins, III, Broad, Schulz, Larson & Wineberg, of San Francisco, California, argued for defendant-appellee. With him on the brief was Paula L. Baca. Also on the brief were Allen B. Wagner, Office of the General Counsel to the Regents of the University of California, of Oakland, California and Susan B. Tabler, Ice Miller Donadio & Ryan, of Indianapolis, Indiana.

Judges: Before NEWMAN, Circuit Judge, SKELTON, Senior Circuit Judge, and LOURIE, Circuit Judge.

Opinion by: NEWMAN

Opinion

[*1242]** **[*935]** NEWMAN, *Circuit Judge.*

Genentech, Inc. appeals the judgment of the United States District Court for the Southern District of Indiana [1] dismissing, as to the Regents of the University of California ("the University"), the declaratory judgment action brought by Genentech against **[**2]** the University and Eli Lilly and Company ("Lilly"). We affirm in part, vacate in part and remand for further proceedings.

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[1] *Genentech, Inc. v. Eli Lilly & Co.,* No. IP 90-1679-C (S.D. Ind. Mar. 7, 1991).

This is one of several lawsuits filed in the federal courts of Indiana and California involving these parties, [2] relating to recombinant DNA technology as used for the production of human growth hormone ("hGH"), a product having medicinal and therapeutic properties. The patent here involved is United States Patent No. 4,363,877 entitled "Recombinant DNA Transfer Vectors", granted December 14, 1982, inventors Howard M. Goodman, John Shine, and Peter H. Seeburg ("the '877 patent"). The patent is owned by the University.

[3]** The legal issues raised in this declaratory action relate to the infringement, validity, and enforceability of the '877 patent, and include charges by Genentech of violation of federal antitrust laws and state tort and contract laws based on certain patent licensing arrangements between the University and Lilly. The activities of the University are relevant to a threshold question in this appeal: whether the University, viewed as an arm of the state, is entitled, as to some or all of the charges made by Genentech, to *Eleventh Amendment* immunity under the Constitution of the United States or to State Action immunity. The University's activities are also relevant to another threshold question: whether the district court properly exercised its discretion in dismissing this declaratory judgment action as to the University.

The district court decided these questions under *Federal Rules of Civil Procedure 12(b)(1)* (lack of jurisdiction over the subject matter) and 12(b)(6) (failure to state a claim upon which relief can be granted), on motions made by the University following the filing of Genentech's complaint. Therefore the premises and allegations of Genentech's complaint are accepted **[**4]** as true for the purpose of deciding these threshold questions.

Genentech filed this declaratory action against Lilly and the University in the Southern District of Indiana, requesting judicial declaration that the '877 patent is invalid and not infringed. Genentech also sought declaration that the '877 patent is unenforceable for inequitable conduct, Genentech alleging that a Certificate of Correction was obtained through false or misleading representations by the University to the Patent and Trademark Office. Genentech also alleged that a waiver from the Department of Health, Education & Welfare (herein "HEW", now the Department of Health and Human Services), that permitted the University to grant an exclusive license to Lilly, was obtained through false representations to HEW and omissions of fact. Genentech also asserted that certain contractual obligations estopped the University from enforcing **[***1243]** the '877 patent against Genentech. In addition, Genentech raised antitrust and patent misuse counts and state law tort counts as grounds of patent invalidity, unenforceability, and other relief.

The day after Genentech filed this declaratory action the University filed a patent infringement **[**5]** suit against Genentech in the United States District Court for the Northern District of California. The University then moved in the Indiana district court to dismiss this declaratory action as to the University. The Indiana court granted the motion on the ground that the suit was barred by the University's immunity and, alternatively, on exercise of the court's discretion to decline to entertain this declaratory action. The suit as to Lilly was not dismissed.

As we shall discuss in Part I, the district court erred in declining to hear this action against the University under the Declaratory Judgment Act. As we shall discuss in Part II, the University is not immune from suit as **[*936]** to the patent counts and certain other counts of the complaint. Thus, the suit was improperly dismissed under *Rules 12(b)(1)* and *12(b)(6)*.

I

THE DECLARATORY ACTION

We review first the dismissal under the Declaratory Judgment Act, for if that ruling is sustainable the questions of constitutional and State Action immunity need not be addressed.

The Declaratory Judgment Act provides:

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[2] Pending litigation, summarized in *In re Regents of the University of California, 964 F.2d 1128, 1130-31, 22 USPQ2d 1748, 1750-51 (Fed. Cir. 1992)*, included five lawsuits.

> 28 U.S.C. § 2201. HN1[] In a case of actual controversy within its jurisdiction, except with **[**6]** respect to Federal taxes . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

HN2[] The use of the word "may" in § 2201 has been interpreted as meaning both that the court is authorized to declare legal rights and relations, and that in appropriate circumstances the court may decline to do so. *E.g.,* Minnesota Mining and Mfg. Co. v. Norton Co., 929 F.2d 670, 672, 18 USPQ2d 1302, 1304 (Fed. Cir. 1991). However, the declaratory action is not a permissive action that may be heard or dismissed in absolute judicial discretion. *See* 10A Charles A. Wright *et al., Federal Practice and Procedure* § 2759, at 655-56 (2d ed. 1983 & Supp. 1992) ("The discretion of the trial court is not absolute and the court cannot refuse to entertain a declaratory judgment action on a whim"); Edwin Borchard, *Declaratory Judgments,* 293-94 (2d ed. 1941) (although **[**7]** the court is granted discretion, it is "a judicial discretion, hardened by experience into rule, and its exercise is subject to appellate review"). The exercise of discretion in a declaratory judgment must have a basis in sound reason. Samuel Goldwyn, Inc. v. United Artists Corp., 113 F.2d 703, 709 (3d Cir. 1940).

HN3[] An abuse of discretion may occur when the trial court's decision was based on an incorrect conclusion of law or clearly erroneous findings of fact, was devoid of any evidence in the record upon which the court rationally could have based its decision, or was clearly unreasonable or arbitrary. Minnesota Mining, 929 F.2d at 672-73, 18 USPQ2d at 1304-05. *See also* Charter Financial Sav. Bank v. Office of Thrift Supervision., 976 F.2d 203, 208 n.8 (4th Cir. 1992) (noting that most circuits give plenary review to the question of exercise of jurisdiction in a declaratory action); 6A James W. Moore *et al., Moore's Federal Practice* P 57.08[2] at 57-36 (2d ed. 1993) ("The determination of the trial court may, therefore, be reversed where, though not arbitrary or capricious, **[**8]** it was nevertheless erroneous"). Indeed, the district court in this case, although it declined to entertain the declaratory action, did not do so arbitrarily. However, we conclude that it did so incorrectly.

A

The Case of Actual Controversy

HN4[] To meet the requirements of the Declaratory Judgment Act there must be a "case of actual controversy", as the Constitution requires for any invocation of federal judicial authority. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-40, 81 L. Ed. 617, 57 S. Ct. 461 (1937). The case must be "of sufficient immediacy and reality" to warrant declaratory relief. Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941).

HN5[] Determination of whether there is an actual controversy in patent actions generally entails the two part inquiry of (1) whether the declaratory plaintiff has acted in a way that the patentee asserts infringes the patent, or is preparing to act in such a way; and (2) whether the patentee has created, in the declaratory plaintiff, a reasonable apprehension of suit for infringement. Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, **[***1244]** 735-36, 6 USPQ2d 1685, 1688-89 (Fed. Cir. 1988). **[**9]** When the patentee has explicitly charged that a current activity of the **[*937]** declaratory plaintiff is an infringement, "certainty has rendered apprehension irrelevant, and one need say no more." *Id.* at 736, 6 USPQ2d at 1689.

The University does not dispute that it charged Genentech with infringement of the '877 patent. Thus the case of actual controversy requirement was met.

B

The Tempco Electric Case

HN6[] When there is an actual controversy and a declaratory judgment would settle the legal relations in dispute and afford relief from uncertainty or insecurity, in the usual circumstance the declaratory action is not subject to dismissal. *See* Borchard, *supra,* at 299 (discussing criteria guiding policy in favor of rendering declaratory judgments). In this case the district court based its dismissal as to the University on the subsequent filing of a patent infringement suit by the University. The district court relied on *Tempco Electric Heater Corp. v. Omega Engineering, Inc., 819 F.2d 746, 2 USPQ2d 1930 (7th Cir. 1987)*, which held that an action for declaration of noninfringement of a **[**10]** trademark should give way to a later-filed suit for trademark infringement. The court in *Tempco Electric,* dismissing the declaratory action, reasoned that the action served no useful purpose because the declaratory defendant soon thereafter filed a trademark infringement suit.

The question of whether a properly brought declaratory action to determine patent rights should yield to a later-filed suit for patent infringement raises the issue of national uniformity in patent cases, and invokes the special obligation of the Federal Circuit to avoid creating opportunities for dispositive differences among the regional circuits. Thus, ***HN7***[] although the Federal Circuit applies the procedural law of the regional circuit in matters that are not unique to patent law, *Allen Organ Co. v. Kimball Int'l, Inc., 839 F.2d 1556, 1563, 5 USPQ2d 1769, 1774 (Fed. Cir.)*, *cert. denied, 488 U.S. 850, 102 L. Ed. 2d 104, 109 S. Ct. 132 (1988)*, and although matters of procedure do not always carry substantive weight, the regional circuit practice need not control when the question is important to national uniformity in patent practice. We incidentally take note that the **[**11]** rule of *Tempco Electric* is not followed for trademark cases in all circuits.

We decline to apply *Tempco Electric* to patent cases. Such a rule would automatically grant the patentee the choice of forum, whether the patentee had sought -- or sought to avoid -- judicial resolution of the controversy. This shift of relationship between litigants is contrary to the purpose of the Declaratory Judgment Act to enable a person caught in controversy to obtain resolution of the dispute, instead of being forced to await the initiative of the antagonist. *See* Borchard, *supra,* at 803-04; 6A Moore *et al., supra,* P 57.08[2] (discretion to render declaratory judgments should be exercised to effectuate the purposes of the Declaratory Judgment Act).

We prefer to apply in patent cases the general rule whereby the forum of the first-filed case is favored, unless considerations of judicial and litigant economy, and the just and effective disposition of disputes, require otherwise.

C

The General Rule

HN8[] The general rule favors the forum of the first-filed action, whether or not it is a declaratory action. *See* Borchard, *supra,* at 818-20. Exceptions, however, are not rare, **[**12]** and are made when justice or expediency requires, as in any issue of choice of forum. *See* *Kahn v. General Motors Corp., 889 F.2d 1078, 1081-83, 12 USPQ2d 1997, 1999-2001 (Fed. Cir. 1989)* (discussing the general rule, the "customer suit" exception, and other factors that overcome "the presumptive right of the first litigant to choose the forum").

The general rule as applied to patent cases was discussed in *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 92 USPQ 1, 96 L. Ed. 200, 72 S. Ct. 219 (1952)*. "If [the alleged infringer] is forehanded, subsequent suits against him by the patentee can within the trial court's discretion be enjoined pending determination of the declaratory judgment suit . . . ." *Id. at* ***[*938]*** *185, 92 USPQ at 3*. As the Court recognized, the trial court's discretion tempers the preference for the first-filed suit, when such preference should yield to the forum in which all interests are best served. *Id. at 184, 92 USPQ at 2*. There must, however, be sound reason that would make it unjust or inefficient **[**13]** to continue the first-filed action. Such reason may be the convenience and availability of witnesses, or absence of jurisdiction over all necessary or desirable parties, or the possibility of consolidation with related litigation, or considerations relating to the real party in interest. *Kahn, 889 F.2d at 1081-83, 12 USPQ2d at 1999-2001*. **[***1245]** [3] The Court cautioned against "rigid mechanical solutions" to questions of

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[3] Although there are other reasons, equitable and legal in nature, why a declaratory judgment action may not be entertained in the court's sound discretion, *see, e.g.,* *Steffel v. Thompson, 415 U.S. 452, 460-62, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974)* (when a state proceeding is pending, considerations of equity, comity and federalism may counsel against exercise of federal jurisdiction), none is here raised.

forum, stressing the importance of conservation of judicial resources and the comprehensive disposition of litigation. Kerotest, 342 U.S. at 183, 92 USPQ at 2.

[14]** The considerations affecting transfer to or dismissal in favor of another forum do not change simply because the first-filed action is a declaratory action. When the declaratory action can resolve the various legal relations in dispute and afford relief from the controversy that gave rise to the proceeding, and absent sound reason for a change of forum, a first-filed declaratory action is entitled to precedence as against a later-filed patent infringement action. In this case, the district court's dismissal of the University from the action in Indiana due to the filing of a subsequent suit by the University in California, while retaining the action in Indiana against Lilly, has led to a redundancy of litigation on some of the issues involving these three parties. The purpose of "preventing multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters", Southern Construction Co. v. Pickard, 371 U.S. 57, 60, 83 S. Ct. 108, 9 L. Ed. 2d 31 (1962), is as valid for declaratory action as any other. The Court remarked that the compulsory counterclaim rule is particularly directed against the failure of a party to assert a counterclaim **[**15]** in one action, followed by the institution of a second action wherein the counterclaim is the basis of the complaint. *Id.; see also* Fed. R. Civ. P. 13(a) (all issues between the parties arising from the same transaction or occurrence are required to be raised in the same suit). This is the pattern that here occurred.

The only stated reason for the district court's discretionary dismissal of the University from Genentech's declaratory action against the University and Lilly was that the University subsequently brought suit against Genentech elsewhere. That reason, as we have discussed, is insufficient to warrant refusal to entertain the action. We are not unmindful that this declaratory action was filed in Indiana only one day before the California infringement action. However, the rule favoring the right of the first litigant to choose the forum, absent countervailing interests of justice or convenience, is supported by "[reasons] just as valid when applied to the situation where one suit precedes the other by a day as they are in a case where a year intervenes between the suits." Martin v. Graybar Elec. Co., 266 F.2d 202, 205 (7th Cir. 1959) (quoting **[**16]** *Crosley Corp. v. Westinghouse Elec. & Mfg. Co., 130 F.2d 474, 475 (3d Cir. 1942))*.

The University points out that first-filed suits have sometimes been dismissed when forum shopping was the only motive for the filing. That exception was recognized in Kahn, 889 F.2d at 1081, 12 USPQ2d at 1999. In this case, however, there were sound reasons presented for Genentech's choice of the Indiana forum, for in its suit Genentech joined Lilly, an Indiana company, and sought consolidation with suits already pending in Indiana. We do take note that the Judicial Panel on Multidistrict Litigation has determined that there is considerable overlap among this declaratory action in Indiana, the action filed in California by the University, and three other actions involving various **[*939]** combinations of these parties in Indiana and California district courts. The Multidistrict Panel, hearing the arguments of all three parties on the choice of forum, ordered consolidation of these five actions for purposes of discovery and assigned coordination to the Indiana district court. That order was affirmed in In re Regents of the University of California, 964 F.2d 1128, 22 USPQ2d 1748 (Fed. Cir. 1992). **[**17]** Although both sides now argue the merits of the Indiana versus the California forums, resolution of that question is not before us. Upon completion of the consolidated discovery, consideration should be given to further avoidance of duplicative litigation.

Conclusion

We conclude that it was incorrect to apply the *Tempco Electric* rationale to patent actions. Absent sound reason presented for dismissal of the University from the Indiana action in favor of a later-filed suit in California, dismissal as to the University was improper on discretionary grounds.

We thus reach the alternate grounds of dismissal, based on the Eleventh Amendment and the doctrine of State Action immunity.

II

STATE IMMUNITY FROM SUIT

The University is a public corporation of the State of California. The California Constitution **[***1246]** established the University as "a branch of the state government equal and coordinate with the legislature, the judiciary, and the executive." 30 Ops. Cal. Atty. Gen. 162, 166 (1957). *See BV Engineering v. University of California, 858 F.2d 1394, 1395, 8 USPQ2d 1421, 1422 (9th Cir. 1988)*, *cert. denied,* **[**18]** *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989)* (describing the University of California and the Board of Regents as instrumentalities of the state).

The district court treated the University as an arm of the state, with the same immunity as one of the United States. Although Genentech states that it does not concede this point, it was not placed at issue and for the purposes of this appeal the University position is accepted.

A

The Constitutional Plan

The district court held that this suit against the University is prohibited by the *Eleventh Amendment to the Constitution*:

> ***HN9***[] The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Genentech argues that the *Eleventh Amendment* does not bar this action.

State immunity from suit in federal court is founded upon the fundamental relationship and constitutional balance between the federal government and the states. *Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98-99, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984)*. In **[**19]** general, ***HN10***[] without the state's consent a federal court is without power to entertain a suit by a private person against the state. *Employees of Dep't of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279, 284, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973)* (discussing the federal/state relationship). As it was explained in The Federalist No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961): "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ." (Emphasis in original.)

There are qualifications to the reach of the *Eleventh Amendment*, again in implementation of the constitutional plan. Thus Congress has legislatively abrogated state immunity in specific circumstances, based variously on the enforcement provision of § 5 of the Fourteenth Amendment (granting Congress authority to enforce "by appropriate legislation" the provisions of the *Fourteenth Amendment*), *Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)* (statute abrogated state **[**20]** **[*940]** immunity from suit for employment discrimination); *Hutto v. Finney, 437 U.S. 678, 693-94, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978)* (statute abrogated state immunity from award of attorney's fees), or on the authority of the *Commerce Clause*, wherein the states are deemed to have consented to suit on congressionally created causes of action against a state, *Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-23, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989)* (plurality). ***HN11***[] Such abrogation of immunity must be explicit and unambiguous, and must show clearly that Congress intended to subject the states to suit in federal court. *Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)*; *Union Gas, 491 U.S. at 7-13*.

HN12[] A state may waive its immunity, in its entirety or as to any specified agency, action, or event. "The Court consistently has held that a State may consent to suit against it in federal court." *Pennhurst, 465 U.S. at 99*. "The immunity from suit belonging to a State, which is respected and protected by the Constitution . . . is a personal privilege which it may waive at pleasure[.]" *Clark v. Barnard, 108 U.S. 436, 447, 27 L. Ed. 780, 2 S. Ct. 878 (1883).* **[**21]** Waiver by a state can be effected by state statute or state constitution or by clear state conduct. A state statute may be construed to waive *Eleventh Amendment* immunity. *Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 109 L. Ed. 2d 264, 110 S. Ct. 1868 (1990)* (reference in state statute to "judicial district, established . . . by the United States" shows intent to include suit in federal court in statutory waiver). A state may by its actions be deemed to have waived its immunity as to a specific cause. Clark v. Barnard, 108 U.S. at 436 (state's filing of a claim in federal court waived Eleventh Amendment immunity as to the subject matter of that claim). The Court in *Atascadero State Hospital,* stressing the need for specificity in waiver by the state, held that Article III, § 5 of the California Constitution, which provides that "suits may be brought against the State in such manner and in such courts as shall be directed by law", is not a general waiver of immunity in federal court. 473 U.S. at 241.

The California Constitution also contains a specific waiver of immunity for the University. Through its Regents the **[**22]** University is "vested with the legal title and the management and disposition of the property of the university", and is granted "all the powers necessary or convenient for the effective administration of its trust, including the power **[***1247]** to sue and to be sued". Cal. Const. art. IX, § 9(f). However, an authorization to an arm of the state to sue and be sued is not presumed to include suit in federal court. Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54, 88 L. Ed. 1121, 64 S. Ct. 873 (1944); Atascadero State Hosp., 473 U.S. at 241.

In addition to abrogation and state waiver of immunity, state officials may be sued as individuals in certain circumstances. Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). Genentech sought to amend its complaint to include the individual Regents of the University, upon the district court's holding of Eleventh Amendment immunity. Genentech appeals from the denial of that request. We need not reach this question for, as we next discuss, the University's immunity has been abrogated as to the major issues in suit.

B

Public Law 102-560

Genentech argues that since patent rights can be enforced only **[**23]** in federal court, and the University has used its power to sue and be sued for the purpose of conducting and threatening patent litigation in federal court, the University has waived its immunity from suit in federal court. It has become unnecessary to decide this question broadly, for in legislation enacted October 28, 1992 Congress abrogated state immunity from suit for violation of patent law. Patent and Plant Variety protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992). The Patent Clause, the Commerce Clause, and § 5 of the Fourteenth Amendment were mentioned as authority for this legislation. S. Rep. No. 280, 102d Cong., 2d Sess. 7-8 **[*941]** (1992) *("Senate Report").*

HN13[] When the purpose of a federal statute is to abrogate a state's immunity from suit, that abrogation must be explicit and unequivocal. Atascadero State Hosp., 473 U.S. at 243; Union Gas, 491 U.S. at 7. Thus, the following provisions were added to Title 35 of the federal code:

> 35 U.S.C. § 271(h). **HN14**[] As used in this section, the term "whoever" includes any State, any instrumentality of a State, **[**24]** and any officer or employee of a State or instrumentality of a State acting in his official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.
>
> 35 U.S.C. § 296. Liability of States, instrumentalities of States, and State officials for infringement of patents.
>
> **HN15**[] (a) IN GENERAL.--Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for infringement of a patent under section 271, or for any other violation under this title.
>
> (b) REMEDIES.--In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a **[**25]** suit against any private entity. Such remedies include damages, interest, costs, and treble damages under section 284, attorney fees under section 285, and the additional remedy for infringement of design patents under section 289.

Pub. L. No. 102-560, *§§ 2(a)(1)* and *2(a)(2)*, 106 Stat. 4230 (1992).

The University does not seriously dispute that this enactment abrogated an area of state immunity. The University argues, however, that this enactment relates only to patent infringement by the state; that it does not encompass declaratory actions against the state; that it does not abrogate the University's immunity from Genentech's antitrust and state law tort and contract claims; and that the enactment does not apply to the action at bar.

1. Infringement and Other Violations Under the Patent Law.

The University argues that it is incorrect to apply Public Law 102-560 to any violation under Title 35 other than patent infringement by the state. Thus the University asserts that none of the issues of Genentech's declaratory complaint is subject to suit by virtue of this enactment.

The University states that the new *35 U.S.C. § 271(h)* merely **[**26]** addresses the definition of "whoever" for purposes of infringement actions under the existing *§ 271*, and that the caption of *35 U.S.C. § 296* makes clear the intended limitation of that provision to infringement by the state. The University argues that Congress did no more than overrule *Chew v. California, 893 F.2d 331, 13 USPQ2d 1393 (Fed. Cir.)*, *cert.* ***[***1248]*** *denied, 498 U.S. 810, 112 L. Ed. 2d 20, 111 S. Ct. 44 (1990)* and *Jacobs Wind Electric Co. v. Florida Department of Transportation, 919 F.2d 726, 16 USPQ2d 1972 (Fed. Cir. 1990)*, for in *Chew* and *Jacobs Wind* this court held that the *Eleventh Amendment* provides the states with absolute immunity from suit for patent infringement.

Genentech argues that Public Law 102-560 by its terms is not limited to infringement by the state, and that the words "or for any other violation under this title" in *§ 296(a)* leave no doubt that the abrogation applies to all violations under Title 35 by the state. Genentech points to the plain language of the statute, its explicit statement of intent, and the absence of exceptions **[**27]** in either the statute or the legislative history.

The starting point in interpreting any act of Congress is the text of the statute itself. ***HN16***[] The words of a statute are deemed to have their plain meaning in the lexicon of the subject matter of the legislation. *United* ***[*942]*** *States v. Rutherford, 442 U.S. 544, 551-52, 61 L. Ed. 2d 68, 99 S. Ct. 2470 (1979)* (plain language of statute controls unless it leads to "'absurd results', or consequences obviously at variance with the policy of the enactment as a whole"). When the statutory text is clear, when the legislative intent is unmistakable, and when the legislative intent is implemented by the statute, that ends the inquiry.

Should the statutory text be afflicted by ambiguity in meaning or in application to a particular case, the legislative history can often provide useful guidance. ***HN17***[] Only in the rare case, when "the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters", should a statute be construed in departure from its plain language. *Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 73 L. Ed. 2d 973, 102 S. Ct. 3245 (1982)*. This is not such a rare case.

Public Law 102-560 explicitly **[**28]** abrogates state immunity from suit for all violations under Title 35, unlimited to the factual situation of *Chew* and *Jacobs Wind* where the only violation was infringement by the state. ***HN18***[] A statute must be interpreted to give effect to each of its provisions. *United States v. Nordic Village, Inc., 117 L. Ed. 2d 181, 112 S. Ct. 1011, 1015 (1992)* ("settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *Colautti v. Franklin, 439 U.S. 379, 392, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979)* (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *United States v. Menasche, 348 U.S. 528, 538-39, 99 L. Ed. 615, 75 S. Ct. 513 (1955)* ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.") (Citations and quotations omitted.) Thus the words "or for any other violation under this title" can be neither judicially excised nor judicially ignored. Indeed, the legislative history shows the intent of **[**29]** Congress that states not be immune from the federal laws governing intellectual property. *Senate Report* at 11.

The University position is supported in the observation that the headings of *35 U.S.C. §§ 271* and *296* mention only infringement. Headings are often helpful in interpreting an ambiguous text. *Immigration and Naturalization Serv. v. National Ctr. for Immigrants' Rights, 116 L. Ed. 2d 546, 112 S. Ct. 551, 556 (1991)*. However, there is

> the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. . . . But they cannot undo or limit that which the text makes plain.

Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-29, 91 L. Ed. 1646, 67 S. Ct. 1387 (1947) (citations omitted). The text of Public Law 102-560 is not ambiguous. The text does not contradict the section headings, although it is broader than the headings. Headings can not of themselves operate to take a significant portion of the textual subject matter out of the statute. It would **[**30]** be incorrect to apply these headings to nullify the clause "or for any other violation under this title."

The conclusion that Public Law 102-560 is not limited to infringement by the state is reinforced by the explicit statement, in each section of the enactment, that its purpose is to place the states in the same position as nongovernmental entities as to the patent law. *35 U.S.C. §§ 271(h)*, *296(a)* and *(b)*. That purpose would not be achieved by the University's interpretation, for if the states were to continue to be immune from suit for violation of all provisions of Title 35 other than infringement, the states would not be coequal with nongovernmental entities. In introducing this legislation Senator DeConcini stressed that "States continue to take advantage of the sovereign immunity loophole that remains in the Patent Code". 137 Cong. Rec. S4046 (daily ed. Mar. 21, 1991). It would be incorrect to truncate the statute which as written achieves the legislative purpose, thereby to reopen the loophole that the statute was designed to close.

[*943] We conclude that Public Law 102-560 includes, in its abrogation of state immunity, all violations under **[**31]** Title 35 with respect to a patent owned by the state. **[***1249]**

2. The Declaratory Action.

The University points out that declaratory action against a state is not mentioned in Public Law 102-560, and argues that state immunity was not abrogated for suit by declaratory action. Genentech states that the University never had immunity from declaratory action when the University itself created the case of actual controversy, and in all events that since the University violated the Patent Act by obtaining and enforcing an invalid, unenforceable, and uninfringed patent, the statutory abrogation of immunity clearly includes this declaratory action.

HN19[] A declaratory action neither confers nor constrains jurisdiction or immunity. The Declaratory Judgment Act does not provide a substantive right; it provides a procedure whereby an aggrieved person may obtain a declaration of legal rights and relations. *See* *Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72, 94 L. Ed. 1194, 70 S. Ct. 876 (1950)* (the declaratory judgment statute is not an independent basis for jurisdiction); *Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240, 81 L. Ed. 617, 57 S. Ct. 461 (1937)* (the Declaratory Judgment **[**32]** Act is procedural only); 6A Moore *et al., supra,* P 57.05 (the Declaratory Judgment Act is remedial and procedural in nature, creates no substantive rights, and neither augments nor diminishes federal jurisdiction). It is the Patent Act that states the law; the declaratory judgment procedure may be invoked when there is a controversy concerning an assertion of substantive rights under the Patent Act. To determine jurisdiction or immunity as to a particular cause of action it is necessary to look to the substantive violation and other relevant criteria, not to the procedure for obtaining relief.

An action seeking declaration of patent invalidity arises under the patent law, *C.R. Bard, Inc. v. Schwartz, 716 F.2d 874, 879-80, 219 USPQ 197, 201-03 (Fed. Cir. 1983)*, as do actions seeking declaration of infringement, *see* *Lang v. Pacific Marine & Supply Co., 895 F.2d 761, 763-64, 13 USPQ2d 1820, 1821 (Fed. Cir. 1990)*, and declaration of noninfringement, *see* *Cordis Corp. v. Medtronic, Inc., 835 F.2d 859, 862-63, 5 USPQ2d 1118, 1120-21 (Fed. Cir. 1987).* **[**33]** *See generally* Borchard, *supra,* at 808 (declaratory actions on infringement or validity, initiated by a patentee or alleged infringer, arise under the patent law).

Title 35 contains a variety of provisions that are subject to violation. *E.g., Chemcast Corp. v. Arco Indus. Corp., 913 F.2d 923, 930, 16 USPQ2d 1033, 1039 (Fed. Cir. 1990)* (discussing violation of requirement of § 112 to disclose the best mode); *J.A. LaPorte, Inc. v. Norfolk Dredging Co., 787 F.2d 1577, 1583, 229 USPQ 435, 439 (Fed. Cir.), cert. denied, 479 U.S. 884, 93 L. Ed. 2d 250, 107 S. Ct. 274 (1986)* (discussing violation of § 102(b) based on on-sale activity); *Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555, 1571, 24 USPQ2d 1401, 1412 (Fed. Cir. 1992)* (discussing violation of utility requirement of § 101).

Although claims of patent invalidity are not actionable absent an actual controversy, *International Medical Prosthetics Research Assocs., Inc. v. Gore Enter. Holdings, Inc., 787 F.2d 572, 576, 229 USPQ 278, 281 (Fed. Cir. 1986),* **[**34]** in this case the actual controversy arose when the University accused Genentech of patent infringement. *Arrowhead, 846 F.2d at 735-36, 6 USPQ2d at 1688-89*; *C.R. Bard, 716 F.2d at 881-82, 219 USPQ at 204*. The issues of invalidity and noninfringement that were raised by Genentech in seeking resolution of that controversy are encompassed by the legislative abrogation of state immunity. Public Law 102-560, abrogating states' immunity from suit under the patent statute, necessarily includes permitting the states to be a defendant in a suit asserting that the patent is in violation of the law. There is no exception in Public Law 102-560 that preserves state immunity depending on the procedure by which issues are raised. Indeed, such an exception would contravene the legislative purpose of conferring equal status on states and nongovernmental entities under the patent law.

[*944] We conclude that Genentech's declaratory action against the University is within the statutory abrogation of state immunity, for the counts of the complaint that arise under the patent law.

3. The Effective Date.

The University **[**35]** argues that even if its immunity were abrogated by Public Law 102-560, that abrogation does not apply to this case. The Act states:

Sec. 4. Effective Date.

> The amendments made by this Act shall take effect with respect to violations that occur on or after the date of the enactment of this Act.

Pub. L. No. 102-560, § 4, 106 Stat. 4230, 4232 (1992). Since the Act does not abrogate immunity for violations that occurred before October 28, 1992, the University asserts that it does not apply to cases filed before that date.

Genentech invokes the general rule that changes in law apply to cases that are pending before the courts, unless the interest of justice, or the law itself, requires otherwise. ***HN20***[] "[A] court is to apply the law in effect at the **[***1250]** time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd., 416 U.S. 696, 711, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974)*; *see Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 607-08, 56 L. Ed. 2d 570, 98 S. Ct. 2002 n.6 (1978)* (applying statute enacted while appeal was pending). This general rule has been applied to congressional **[**36]** abrogations of state immunity. *E.g., Pennsylvania v. Union Gas Co., 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989)* (Superfund amendments, enacted while petition for certiorari pending, applied to abrogate state's *Eleventh Amendment* immunity); *United States v. Alabama, 362 U.S. 602, 604, 4 L. Ed. 2d 982, 80 S. Ct. 924 (1960)* (Civil Rights Act of 1960, enacted shortly before the Supreme Court heard the case, applied to abrogate state immunity for past violations). Thus a suit that may have been subject to state immunity at the time it was filed can continue to be prosecuted when the immunity is legislatively lifted. Requiring dismissal "would be wasteful to both the parties and the courts . . . for [the case] could be at once refiled." *Sandefur v. Cherry, 718 F.2d 682, 684-85 (5th Cir. 1983)*. In the absence of "manifest injustice", *Bradley, 416 U.S. at 711*, we apply Public Law 102-560 to this case.

Public Law 102-560 provides in effect that there shall be no recovery for violations that occurred before October 28, 1992. This accords with the general rule that "a retrospective operation will not be given to a statute . . **[**37]** . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." *Union Pac. R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199, 58 L. Ed. 179, 34 S. Ct. 101 (1913)* (citations and quotations omitted). Since Genentech's suit is for a declaration of rights and relationships, and not for recovery of damages for past violations under Title 35, and since violations of patent rights are continuing events, it appears to be unnecessary to decide whether there was an earlier non-statutory waiver of University immunity with respect to the patent counts. We thus do not reach the question of whether the University by its conduct had waived any immunity it may have had from suit under the patent law. It is, however, necessary to consider the disposition of the antitrust and state law counts of Genentech's declaratory complaint, for these counts are not within the statutory abrogation, and all of the counts were dismissed on the basis of state immunity.

C

The Antitrust and State Law Counts

Genentech's complaint as amended included charges that various agreements between Lilly and the University, and certain actions taken by the University **[**38]** at the behest of Lilly, constituted violations of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, as amended. [4] Genentech also charged that the **[*945]** University's agreements and actions violated state laws relating to unfair competition, fraud, breach of contract, breach of third party obligations, and tortious interference with contract. Genentech also claimed that its 1980 contract with the University estops the University from charging Genentech with infringement. Genentech states that these actions render the '877 patent unenforceable against it, and also serve to recoup any damages that Genentech might incur for infringement. Genentech thus argues that inclusion of the antitrust and state law counts in this litigation is necessary to avoid injustice, and to resolve all of the issues between the parties.

[39]** The district court's dismissal of these counts was grounded on the University's asserted *Eleventh Amendment* and State Action immunities. Review of this dismissal, which was in terms of Federal *Rules 12(b)(1)* and *12(b)(6)*, requires that the factual premises and allegations of Genentech's complaint be deemed established. We outline some of the facts, undisputed for this purpose, that are relevant to the antitrust and state law counts:

Lilly provided funding for certain research at the University relating to the subject matter of the '877 patent, and had the option to acquire from the University the exclusive license to any patent that resulted from the Lilly-funded research. Certain other research was funded by HEW, and was subject to the requirement that any patent resulting from HEW-funded research would be made available to qualified applicants by non-exclusive license. The University had in 1980 entered into an agreement with Genentech that provided, *inter alia,* that the University would notify Genentech if Lilly exercised its option for an exclusive license, so that, according to Genentech, it could obtain a mandatory sublicense. Genentech states that at **[***1251]** the behest of Lilly **[**40]** the University obtained, through misrepresentations and omissions of fact, a waiver of HEW's licensing requirement, and the University and Lilly then entered into an exclusive license, with payment by Lilly of a royalty to the University. Among other terms, this license provided that the University would at Lilly's request enforce the '877 patent against infringers, and that if the University did not take such requested legal action it would forfeit the royalty payments.

Genentech premised its antitrust and state law tort and contract charges on these and related events. The district court dismissed the antitrust and state law counts as barred by the *Eleventh Amendment*, and the antitrust counts as barred by the State Action doctrine. In view of the abrogation of immunity for violation of patent law, Public Law 102-560, we first consider the relation of these counts to the patent counts.

1. Defenses.

Genentech points out that the University must plead its charge of patent infringement in response to Genentech's action for declaration of noninfringement, lest the University's charge be barred as *res judicata. See Fed. R. Civ. P.*

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[4] *15 U.S.C. § 1* (in part). ***HN21***[] 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.

15 U.S.C. § 2 (in part). ***HN22***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

13(a); Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469, 41 L. Ed. 2d 243, 94 S. Ct. 2504 n.1 (1974); **[**41]** Southern Constr. Co. v. Pickard, 371 U.S. 57, 60, 9 L. Ed. 2d 31, 83 S. Ct. 108 (1962). Genentech states that its antitrust and state law claims are an integral part of its defense to the University's charge of patent infringement, and therefore that these claims are appropriately raised in the declaratory judgment complaint. *See* Foster v. Hallco Mfg. Co., 947 F.2d 469, 479, 20 USPQ2d 1241, 1249 (Fed. Cir. 1991) (the "claim" of a declaratory judgment action is based on the patent owner's charge of infringement; the declaratory complaint raises anticipatory defenses to this charge). The University's position is that it is irrelevant whether any of the antitrust and state law claims are defenses or counterclaims to the charge of patent infringement, for they were not included in any abrogation or waiver of the University's immunity from **[*946]** suit in federal court. Thus the University asserts that these claims can not be raised against it in this action.

HN23[] When a state maintains a claim in federal court it thereby consents to the exercise of federal judicial authority over that claim "to the full extent required for its complete determination." **[**42]** Clark v. Barnard, 108 U.S. at 448. The principles of federalism underlying the Eleventh Amendment do not prevent a person from defending against an action by a state. *See* In re Regents, 964 F.2d at 1134, 22 USPQ2d at 1754 (the Eleventh Amendment is not designed to give procedural advantage to state claimants); In re Greenstreet, Inc., 209 F.2d 660, 664 (7th Cir. 1954) (when the government initiates legal action it thereby "consents to the jurisdiction of the court to entertain any defensive plea").

The University's charge of patent infringement is the claim that creates the controversy which supports the declaratory judgment action. The Eleventh Amendment does not bar the raising by Genentech of its defenses to the University's charge of patent infringement, whether these defenses arise under federal or state law. Thus the counts that are defenses to the charge of patent infringement, such as the defense of contract-based estoppel and the defense of unenforceability based on antitrust violation, are as available to the accused infringer as are the defenses of patent invalidity **[**43]** and noninfringement.

Although the University argues that it has not consented to the adjudication of any state law theories in federal court, consent is not required as to defenses to the University's charge of patent infringement. The University asserts that *Pennhurst* prohibits a private party from maintaining any state law claim against a state in federal court. *See* 465 U.S. at 106 ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"). In *Pennhurst* the petitioner sought to coerce state action. There was no issue of defending against state charges or threatened charges by invoking state law. The affront to principles of federalism addressed in *Pennhurst* is not present here.

Genentech also states that the University committed fraud in the patent office in obtaining a Certificate of Correction under conditions that Genentech alleges did not meet the requirements of 35 U.S.C. § 255. Such acts if proved would in any event violate the patent law, and to that extent state immunity was abrogated **[**44]** by Public Law 102-560, which applies to "the eleventh amendment [or] any other doctrine of sovereign immunity". 35 U.S.C. § 296(a).

2. Counterclaims.

Nor is the University's consent required for those counterclaims that are properly raised in recoupment of the University's charges. The general rule, although not without debate, is that **HN24**[] when a governmental entity has waived its immunity from federal judicial authority by taking legal action in federal court, the person charged can raise **[***1252]** all counterclaims that arise from the same transaction or events. *E.g.,* Livera v. First Nat'l State Bank, 879 F.2d 1186, 1195-96 (3d Cir.), *cert. denied, Livera v. Small Business Admin., 493 U.S. 937, 107 L. Ed. 2d 322, 110 S. Ct. 332 (1989)* ("a defendant may assert by way of recoupment *any claim* arising out of the same transaction or occurrence . . . in order to reduce or defeat the government's recovery") (emphasis in original). The summary by Professor Wright with respect to the federal government is applicable to states:

> Despite the sovereign immunity doctrine and the language of Rule 13(d), when the United States institutes **[**45]** an action, defendant may assert by way of recoupment any claim arising out of the same transaction or occurrence as the original claim in order to reduce or defeat the government's recovery.

> However, if defendant's claim arises from a different transaction or occurrence, then it is in effect an independent suit and it may be asserted as a setoff or counterclaim only if the government has waived its sovereign immunity.

6 Charles A. Wright *et al., Federal Practice and Procedure* § 1427 (2d ed. 1990) (footnotes **[*947]** omitted). *See also* *In re Monongahela Rye Liquors, Inc., 141 F.2d 864, 869 (3d. Cir. 1944)* (recoupment rule applies to states); 3 James W. Moore & Richard D. Freer, *Moore's Federal Practice* P 13.19[2.-2] (2d ed. 1992) (recoupment by counterclaims against a state) (collecting cases).

Cases applying this rule are highly fact-dependent, as the courts have considered whether an issue that was raised by counterclaim is suitable for recoupment of damages assessed in favor of the state. *E.g., United States v. Montrose Chem. Corp., 788 F. Supp. 1485, 1492-94 (C.D. Cal. 1992)* (chemical company's state law counterclaims **[**46]** arising out of the same events as state's CERCLA action in federal court, with recovery limited to recoupment, does not violate *Eleventh Amendment* or sovereign immunity); *New York v. Johnstown, 701 F. Supp. 33, 37-38 (N.D.N.Y. 1988)* (state law compulsory counterclaims seeking recoupment against state-brought CERCLA claim do not violate state immunity); *Burgess v. M/V Tamano, 382 F. Supp. 351, 355-56 (D. Me. 1974)* (requiring that state law counterclaims arise out of the event underlying state's claim for damages); *Alaska v. O/S Lynn Kendall, 310 F. Supp. 433, 434 (D. Alaska 1970)* (limiting to recoupment defendant's potential recovery on state law counterclaims).

Depending on the particular facts, precedent is mixed as to whether the cause of action raised by counterclaim must be of the same category as the state's claim. For example, a tort claim has been held effective to recoup damages against a contract claim.*E.g., United States v. Irby, 618 F.2d 352, 356-57 (5th Cir. 1980)*. The controlling factor is whether the counterclaim arose out of the same transaction **[**47]** or occurrence. *E.g., In re Monongahela Rye Liquors, 141 F.2d at 869* (trustee's claim for money due for liquor sold to state manifestly unrelated to state's tax claim against the bankrupt estate).

Certain of Genentech's state law counts are properly viewed not as defenses but as counterclaims against the University's charge of infringement, such as the claims for tortious interference with contract and unfair competition. whether these counterclaims are deemed "compulsory" determines whether they may be pursued in this action for purposes of recoupment of the University's claims against Genentech. Absent consent to suit or waiver or abrogation of immunity, affirmative relief beyond recoupment is not available on such claims. *See, e.g., United States v. Shaw, 309 U.S. 495, 501-02, 84 L. Ed. 888, 60 S. Ct. 659 (1940)* (rejecting the contention that when the sovereign voluntarily seeks the aid of the courts it thereby takes the form of a private suitor and fully subjects itself to any claim). ***HN25***[] Recoupment, however, is an established remedy based on the principle that neither sovereign immunity nor the principles of federalism prevents a private person from **[**48]** raising, in defense and setoff, claims that arise from the same transaction or occurrence on which the state is seeking to recover damages.

HN26[] A counterclaim must be "compulsory" in order to be raised as of right in an area of law in which the state is otherwise immune from suit. *See Fed. R. Civ. P. 13(a)* ***HN27***[] (a compulsory counterclaim is one that arises out of the same transaction or occurrence as the opposing party's claim); *see generally* 3 Moore & Freer, *supra,* P 13.13 (discussing transaction or occurrence requirement of *Rule 13(a)*). ***HN28***[] Such a counterclaim is usually "within the court's ancillary jurisdiction and an independent basis for federal jurisdiction is not necessary." 6 Wright *et al., supra,* § 1409 at 49. However, ancillary jurisdiction [5] alone may not override the *Eleventh Amendment*. *County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 251, 84 L. Ed. 2d 169, 105 S. Ct. 1245 (1985)* (noting the *Clark* exception to *Pennhurst); Chemehuevi Indian Tribe v. California State Bd. of Equalization,* ***[***1253]*** *757 F.2d 1047, 1053 (9th Cir.)*, *rev'd on other grounds, 474 U.S. 9, 88 L. Ed. 2d 9, 106 S. Ct. 289 (1985)*. In this case the University must bring **[**49]** its charges of patent infringement against Genentech or be forever barred from doing so. The University's immunity as to the patent counts having **[*948]** been abrogated, Genentech is now permitted to bring compulsory counterclaims that are suitable for recoupment of damages that may be assessed against it.

[5] The concepts of ancillary and pendent jurisdiction are now termed "supplemental jurisdiction". Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113-14 (codified at *28 U.S.C. § 1367*).

Should the University choose to forego charging Genentech with infringement, these counterclaims would be subject to dismissal.

Although Genentech states that the University did not dispute that Genentech's antitrust and state law claims arose from the same transaction and events and thus are compulsory counterclaims, that is an overstatement. On the summary proceedings on which this case was decided, this question did not require decision by the district court. It is inappropriate **[**50]** for us to decide the issue *ab initio,* for neither the particular facts, nor the application of law to those facts, was developed in the district court. We hold only that on the basis of the pleading the dismissal of all of Genentech's antitrust and state law defenses and counterclaims was unwarranted under *Rules 12(b)(1)* and *12(b)(6)*. When proceedings are reopened the district court may determine which of Genentech's antitrust and state law counts meet the criteria of defenses and compulsory counterclaims to the University's charge of patent infringement, and thus are properly raised in this proceeding.

3. Antitrust Claims.

The district court held that the State Action doctrine provides immunity from the asserted violations of federal ***antitrust law***. The principal antitrust issue raised in Genentech's pleading relates to the University's licensing activities. Genentech's position is that the University conspired with Lilly to exclude Genentech from the hGH market, in violation of the Sherman Act.

The State Action doctrine, although grounded on general principles of federalism, relates specifically to state sovereignty in state legislatively authorized activity. ***HN29***[] The doctrine **[**51]** provides immunity, or "exemption" as it is sometimes called, from federal competition laws when the state is performing official acts, whether or not these acts are anticompetitive in effect. As explained in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, a case where California state officials were administering a legislatively-mandated program that had the purpose of restricting competition among raisin producers in California:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

Parker, 317 U.S. at 350-51. The district court, applying this principle, dismissed Genentech's antitrust claims against the University.

HN30[] To warrant *Parker* immunity the anticompetitive acts must be taken in the state's "sovereign capacity", and not as a market participant in competition with commercial enterprise. *Community Communications Co. v. Boulder, 455 U.S. 40, 52, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*. If the allegedly anticompetitive acts are not explicitly ordered by a legislative arm of state **[**52]** government, they must be conducted pursuant to legislative authorization that contemplates such acts. *Hoover v. Ronwin, 466 U.S. 558, 567-68, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984)*. As discussed in *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*, *Parker* immunity permits the state to impose anticompetitive restraints "as an act of government." *435 U.S. at 391* (quoting *Parker).*

However, the policies underlying *Parker* do not extend to circumstances where the state acts not in a legislative/regulatory capacity but as a "commercial participant in a given market." *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344, 1351 (1991)*. *See* *South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 102, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984)* (Rehnquist, J., dissenting) ("the antitrust laws apply to a State only when it is acting as a market participant"); *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Lab., 460 U.S. 150, 154, 74 L. Ed. 2d 882, 103 S. Ct. 1011 (1983)* (state university's participation in private retail markets renders it subject to Robinson-Patman **[**53]** Act); *Union Pacific R.R. v. United States, 313 U.S. 450, 85* ***[*949]*** *L. Ed. 1453, 61 S. Ct. 1064 (1941)* (rebates and concessions made by city-run produce market integrated with railroad facilities violated the Elkins Act). *Cf.* *Reeves, Inc. v. Stake, 447 U.S. 429, 436, 65 L. Ed. 2d 244, 100 S. Ct. 2271 (1980)* (the distinction between the state as a market participant and the state as a market regulator "makes good sense and sound law" in *Commerce Clause* cases); *Employees of Dep't of Public Health & Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 284, 36 L. Ed. 2d 251,* *93 S. Ct. 1614 (1973)* (state activity was not of a proprietary, commercial nature, and was protected by principles of state sovereignty).

Genentech alleges that the University was not acting under state legislative or regulatory authority when the University assertedly violated the Sherman Act. Genentech states that the University has neither regulatory **[***1254]** interest nor sovereign authority in the national market for hGH, and simply engaged in profit-making commercial activity. The University responds that it was merely exercising its authority and obligation to manage the property of the University. The University states **[**54]** that it does not participate in the hGH market; that it is not in competition with private enterprise; and that the licensing of a patent based on University research is not commercial activity but is part of a university's normal functions, serving the public purpose of aiding the movement of scientific research toward practical application.

We need not decide whether the University's licensing activities establish a market participant exception to State Action immunity, for Genentech has not pled facts which if proved constitute violation of the antitrust laws. The patenting and licensing of the results of University research is not a violation of antitrust principles, and the grant of an exclusive license is a lawful incident of the right to exclude provided by the Patent Act. The University's right to select its licensees, the decision to grant exclusive or non-exclusive licenses or to sue for infringement, and the pursuit of optimum royalty income, are not of themselves acts in restraint of trade. Although Genentech presses the position that the University and Lilly conspired to exclude Genentech from the hGH market, Genentech's pleading does not allege more substance than the **[**55]** University's grant of an exclusive license to Lilly; thus it is unnecessary to consider the applicability of the statement in *City of Columbia* that there is no "conspiracy exception" to State Action immunity. *111 S. Ct. at 1351*.

For these reasons, the charge of antitrust violation in the licensing arrangement was correctly dismissed under *Rule 12(b)(6)*. Accordingly, we do not reach the question of whether State Action immunity protects the challenged activities. [6]

Summary

Dismissal of the declaratory action is vacated. Absent sound reason favoring a different forum, a first-filed suit is entitled to precedence against a subsequent suit.

The University is not immune from suit as to the patent counts, and as to those other counts that are defenses and compulsory **[**56]** counterclaims to the charge of patent infringement. Dismissal on these grounds is vacated. On remand the district court may determine which counts are thus properly asserted.

The dismissal of the antitrust count is affirmed.

No costs.

AFFIRMED IN PART, VACATED IN PART, and REMANDED

End of Document

[6] We take note that in *City of Columbia* the Court expressly left open the question of whether antitrust action may be brought against a state when there is no *Parker* immunity. We too do not reach that question.

[Osborn v. Bell Helicopter Textron](#)

United States District Court for the Northern District of Texas, Fort Worth Division

July 3, 1993, Decided ; August 5, 1993, Filed

CIVIL ACTION NO. 4:91-CV-118-Y

Reporter

828 F. Supp. 446 *; 1993 U.S. Dist. LEXIS 10954 **; 27 Fed. R. Serv. 3d (Callaghan) 408; 1993-2 Trade Cas. (CCH) P70,345

WILLIAM O. OSBORN v. BELL HELICOPTER TEXTRON, INC.

Core Terms

Worldwide, summary judgment, antitrust, employees, infliction of emotional distress, amended complaint, antitrust claim, communications, allegations, helicopters, Customer, partial summary judgment, tortious interference, motion to dismiss, non-competition, depositions, termination, infliction, SANCTIONS, relations

Counsel: **[**1]** Hal Keith Gillespie, David Kohlman Watsky, GILLESPIE, ROZEN & TANNER, Dallas, Texas 75247, for plaintiff.

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Judges: MEANS

Opinion by: TERRY R. MEANS

Opinion

[*448] ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT, GRANTING MOTION FOR SANCTIONS, AND DENYING MOTION TO DISMISS

Pending before the Court is a Motion to Dismiss and Motion for Partial Summary Judgment filed by defendant Bell Helicopter Textron, Inc. ("BHT") on April 7, 1992, and a Motion for Sanctions filed by BHT on May 26, 1992. BHT seeks summary judgment or dismissal of Plaintiff's claims under the Texas Free Enterprise and Antitrust Act of 1983, *Tex. Bus. & Com. Code §§ 15.01*-.51 and various common law claims asserted in Plaintiff's First Amended Complaint. After careful consideration of said motions, responses, reply, surreply, and all evidence submitted in support thereof, this Court is of the opinion that the motion for partial summary judgment and motion for sanctions are meritorious and should be GRANTED, and that because the Court looks to matters outside the pleadings, the motion to dismiss should be **[**2]** DENIED.

I. SUMMARY JUDGMENT STANDARD

Pursuant to *Fed. R. Civ. P. 56*, summary judgment is appropriate if the movant establishes, through the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. BHT has supported its motion for summary judgment with pleadings; the affidavit of K. Roger Williams; excerpts from the depositions of George Powell, Ray Kennedy, K.

Roger Williams, and William O. Osborn; portions of business records of Schick Shadel Hospital; and various documents of BHT.

When the moving party has carried its summary judgment burden, the respondent "must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 89 L. ED. 2D 538, 106 S. CT. 1348, 475 U.S. 574, 586 (1986)*. The respondent must produce evidence, not merely argument, in response to a movant's properly supported motion for summary judgment. See *Foval v. First Nat'l Bank of Commerce, 841 F.2d 126, 129 (5th Cir. 1988)*; **[**3]** *Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987)*. The introduction of a mere scintilla of evidence is not sufficient to avoid summary judgment. Rather, the non-movant must come forward with sufficient evidence that, if admitted at trial, a verdict in his favor would be possible. See *Spiller v. Ella Smithers Geriatric Ctr., 919 F.2d 339, 343 (5th Cir. 1990)*. Plaintiff, the non-moving party, has responded to Defendant's motion by presenting his pleadings on file; excerpts from the depositions of Osborn, George Powell, and K. Roger Williams; and the declaration of William O. Osborn.

[*449] II. SUMMARY OF THE FACTS

Because this Court set out a detailed description of the facts of this case in its June 24, 1993 memorandum opinion and order, only a summary of the facts is provided here. Defendant BHT, headquartered in Tarrant County, Texas, is in the business of manufacturing, distributing, and servicing helicopters worldwide. Its customers are both military and commercial users of helicopters. BHT employed plaintiff William O. Osborn in its Customer Service and Support Division. Osborn's job duties required **[**4]** him to plan, budget, staff, train, and direct a worldwide staff of customer support representatives ("CSRs").

Prior to 1989, BHT employed as many as 46 CSRs throughout the world. In 1987, three persons, including Osborn, shared supervisory responsibility over the CSRs. By June 1989, BHT determined that it could function efficiently with only one supervisor over the CSRs. This decision was made for two reasons: 1) BHT's continuing efforts to streamline its operations, and 2) the number of CSRs had shrunk to just 23 or 24.

On June 2, 1989, BHT terminated Osborn and retained Vaughn Corneby as the sole supervisor of the CSRs. Shortly after Osborn's separation from BHT, he formed two businesses, Worldwide Helicopters, Inc. ("Worldwide") and Centralized Procurement Services. Each business was intended to market products and services to owners and prospective purchasers of helicopters. Osborn then contacted CSRs who were still employed by BHT and sought to enlist them as sales representatives on behalf of his own company.

Osborn's communications to the CSRs were sent without BHT's knowledge or approval and were transmitted via BHT's "Quik-Com" computer system. Quik-Com is a communications **[**5]** network, established at Osborn's initiative while he was working at BHT, to transmit and access messages worldwide at BHT-established terminals. During August and September 1989, Osborn admits sending at least fifteen to twenty unauthorized communications to CSRs through the Quik-Com system in the Middle East, Far East, and elsewhere, for the purpose of inducing BHT employees to breach their duty of loyalty to BHT and represent Osborn's new business. In October 1990, BHT learned of Osborn's unauthorized communications and notified its CSRs that company policy prohibited them from representing other interests while dealing with BHT customers.

Osborn re-applied for a position with BHT in November 1990, but did not receive an offer of employment. This Court issued summary judgment against Plaintiff's age discrimination and retaliation claims in a June 24, 1993 opinion and order. Remaining are Plaintiff's antitrust and common law claims, as well as Defendant's counterclaims (only Plaintiff's claims are addressed in this opinion).

III. NO GENUINE ISSUE OF MATERIAL FACT IN DISPUTE

A. Antitrust Claim

Osborn purports to bring a claim against BHT under the Texas Free Enterprise and Antitrust **[**6]** Act of 1983, *Tex. Bus. & Com. Code § 15.01*-.51, apparently for damages suffered by the businesses in which he holds or held an ownership interest. Osborn alleges that BHT "entered into and attempted to enforce an agreement not to compete which is a restraint of trade." Osborn's claim, however, fails for several reasons. First, the law is clear that Osborn lacks standing to bring an antitrust claim on behalf of Worldwide. *Solinger v. A & M Records, Inc., 718 F.2d 298, 299 (9th Cir. 1983)*. Even Assuming that Worldwide, a business in which Osborn has or held ownership interests, were in competition with BHT, this corporation, not Osborn personally, would be the party suffering any antitrust injury for which a suit might be brought. Shareholders, officers, and directors cannot personally assert antitrust claims against a corporation's competitors.

> The convenience and immunities that arise from doing business through corporate entities carry with them the cost of having these corporate entities seek their remedies in court for injuries to their business **[*450]** or property interests. A shareholder of a corporation injured by antitrust violations has no standing **[**7]** to sue in his or her own name. . . .

Solinger, 718 F.2d at 299.

Moreover, Osborn's antitrust claim is without merit even if Osborn intended, as he now argues in his response, to assert the antitrust allegations on behalf of Centralized Procurement Services, which he owns as a sole proprietor. For several alternative reasons, the antitrust claim is invalid: the parties never had a contract not to compete; if they did have a contract, it was reasonable; if it was unreasonable, Plaintiff has not shown harm.

First, the BHT policy found in its personnel rules, denominated "Post-Employment Conflicts of Interest Applicable to Former BHTI Employees" ("the Policy"), is not a non-competition agreement; in fact, it is not even an agreement. It is not a non-competition agreement because the Policy does not relate in any way to competition with BHT; it states only a prohibition against former employee involvement with sales to BHT for a period of two years. The Policy has not been shown to be a binding legal agreement by evidence of either a signed contract or a verbal covenant. It appears to be no more than a statement of policy applicable to former employees. **[**8]** In addition, an agreement not to compete, like any contract, must be supported by consideration. Under *Tex. Bus. & Com. Code § 15.50(1)*, a covenant not to compete must be ancillary to an otherwise enforceable agreement, or if "executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration." Id. Thus, Plaintiff must present evidence of either an ancillary agreement or independent consideration. Neither has been presented, which leaves the Court to assume that the only agreement between Plaintiff and Defendant was that of at-will employment. At-will employment which includes a non-competition agreement does not constitute an "otherwise enforceable agreement" within the meaning of *§ 15.50*. See *Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 659* (Tex. App.-Dallas 1992) ("employment-at-will contract is not otherwise enforceable agreement") (citations omitted) (dicta). The Court finds, therefore, that a non-competition contract did not exist between Plaintiff and Defendant.

In addition, even if the Court found a contract between the parties, Plaintiff must raise a genuine **[**9]** issue of material fact as to the reasonableness of the agreement. Subsection (2) of *§ 15.50* provides that a non-competition agreement may be valid if it "contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." Id. The business interest of Defendant's policy is to prevent former employees from capitalizing on personal contacts and inside information gained during BHT employment. The Court finds that this is a legitimate business interest, and that as a matter of law the Policy's two-year restriction on post-employment involvement with sales to BHT does not impose a greater restraint than is necessary to protect that interest.

Lastly, Plaintiff does not allege any harm resulting from the Policy. The pertinent provision of the Policy states that "for two years after ceasing employment with BHTI, [former employees are] prohibited from selling to BHTI." Several examples of "selling," both directly and indirectly, are provided, as well as examples of what is not considered selling. Nowhere does Plaintiff allege that **[**10]** he sought to sell to BHTI, but was prevented from doing so because of the Policy.

B. Tortious Interference with Contractual & Business Relations

Osborn's claim of tortious interference with contractual and business relations also fails for lack of standing. Osborn admits that the business allegedly interfered with was that of Worldwide: "Defendant interfered with plaintiff's efforts to do business through the Worldwide Helicopter Support Inc. and attempted to enforce a no-competition **[*451]** agreement with plaintiff." This claim, like the antitrust claim, belongs to Worldwide and not Osborn. Accordingly, Osborn cannot sue upon it.

In addition, BHT did not owe Osborn a duty to permit him to solicit BHT employees to market products on his behalf or on behalf of his companies. In his complaint, Osborn alleges that he "communicated with Defendant's Customer Service Representatives at their field locations through the use of Defendant's private communication system, which he had helped set up." The undisputed facts reveal that Osborn's purpose in these communications was to solicit BHT employees to market, on his behalf, products sold by Osborn's companies. The CSRs would be compensated for marketing **[**11]** products and services similar to BHT's. The facts also reveal that, in response to Osborn's unauthorized efforts, BHT reminded its employees that they owe exclusive loyalty to BHT and that company policy prohibits them from marketing on behalf of other companies while employed by BHT. This Court finds that BHT has no duty to permit another business to access its employees, through BHT's private communication system or otherwise. BHT's failure to promote such access by means of its own communications systems cannot be tortious.

C. Infliction of Emotional Distress

Finally, this Court finds that Osborn's allegations of intentional infliction of emotional distress and negligent infliction of emotional distress are without merit. One of the elements of the tort of intentional infliction of emotional distress is the performance of an "outrageous act." As a matter of law, the mere discharge of an employee is not an outrageous act. *Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991)*; *Guthrie v. Tifco Indus., 941 F.2d 374, 378 (5th Cir. 1991)*, cert. denied, *117 L. Ed. 2d 495, 112 S. Ct. 1267 (1992)*. As a **[**12]** result, Plaintiff has no intentional infliction claim relating to his termination. Plaintiff's allegations that Defendant's conduct subsequent to his termination amounts to intentional infliction of emotional distress are also completely without merit. Those claims stem from Plaintiff's contention that Defendant "informed all customer service representatives not to conduct any business with Plaintiff." Plaintiff has produced no evidence to support this allegation. Defendant's October 26, 1989 letter to all CSRs, upon which Plaintiff's contention is presumably based, simply advises CSRs that to assist other companies in selling products and services related to BHT's is against company policy. This can hardly be considered outrageous conduct.

Osborn also alleges that BHT was negligent in terminating his employment and that such negligence caused him emotional distress. No cause of action exists in Texas for the negligent infliction of emotional distress. *Valenzuela v. Aquino, 853 S.W.2d 512 (Tex. 1993)*; *Boyles v. Kerr, No. D-0963, 1993 Tex. LEXIS 58* (Tex. May 5, 1993). Even prior to these recent cases clarifying an admittedly **[**13]** volatile area of Texas law, it was clear that no cause of action existed for negligent infliction in the context of employer--employee relations. *Conaway v. Control Data Corp., 955 F.2d 358, 361* (5th Cir.), cert. denied, *121 L. Ed. 2d 131, 113 S. Ct. 186 (1992)*, citing *Fiorenza v. First City Bank-Central, 710 F. Supp. 1104, 1105 (E.D. Tex. 1988)*; *Williams v. Sealed Power Corp., 1990 U.S. Dist. LEXIS 3629* (N.D. Tex. Jan. 8, 1990); accord *Wood v. Usco Distribution Svcs. Inc, 1992 U.S. Dist. LEXIS 8204* (N.D. Tex. January 23, 1992). The recent Texas Supreme Court cases hold that although there is no general duty not to negligently inflict emotional distress, mental anguish damages may be recovered in connection with the breach of some other legal duty. Because this Court finds, pursuant to this order as well as that issued June 24, 1993, that as a matter of law Defendant has not breached a legal duty owed to Plaintiff, the claim for negligent infliction must fail.

IV. RULE 11 SANCTIONS

Fed. R. Civ. P. 11 "places three duties on counsel: (1) counsel must **[**14]** make a reasonable investigation into the factual basis of any pleading, motion, or other paper; (2) counsel must make a reasonable inquiry into the law; and (3) counsel must not sign a **[*452]** pleading, motion, or other paper intended to delay proceedings, harass another party, or increase the costs of litigation." *St. Amant v. Bernard, 859 F.2d 379, 382 (5th Cir. 1988)*. All of the above obligations are independent duties of the signing attorney, so Rule 11 is violated if any one of them is breached. *Thomas v. Capital Sec. Services, Inc., 812 F.2d 984, 988 (5th Cir. 1987)*, aff'd on reh'g, *836 F.2d 866 (5th Cir. 1988)* (en banc).

On November 25, 1991, Osborn filed his motion for leave to file his first amended complaint and attached his proposed amended complaint as an exhibit to the motion. Included among the amendments to his complaint were alleged violations of Texas ***antitrust law*** and a common law claim for tortious interference with business relations. On December 12th, BHT responded to Osborn's motion and, with regard to the two counts noted above, pointed out that Osborn could not sue personally **[**15]** for injuries to Worldwide, for such claims could only be asserted by the corporation itself. Worldwide was not, and currently is not, a party to this lawsuit. BHT cited two cases that clearly reference this well-settled principle. Notwithstanding these authorities, Osborn filed a reply brief insisting upon his right to file his amended complaint. BHT responded again, once more urging that Osborn lacked standing to sue for injuries to Worldwide. On February 17, 1992, Osborn filed his first amended complaint and jury demand which contained the identical antitrust and tortious interference claims referenced above. BHT argues that Osborn signed and filed his first amended complaint which improperly asserts claims belonging only to Worldwide in knowing violation of Rule 11 and *28 U.S.C. § 1927*.

On April 7, 1992, BHT filed its motion to dismiss and motion for partial summary judgment, again attacking Osborn's lack of standing to assert claims on behalf of Worldwide. On April 28th, counsel for BHT traveled from Dallas to Austin at significant expense for the purpose of deposing George Morgan, a former vice president and treasurer of Worldwide, regarding **[**16]** the claims asserted by Osborn on behalf of Worldwide. On May 11th, Osborn responded to BHT's motion to dismiss and motion for partial summary judgment and admitted that "plaintiff's complaint contains an error in the entity to which the damage has been inflicted upon." This Court finds that Plaintiff's attorney's continued assertion of frivolous claims rises to the level of a Rule 11 violation.

Notwithstanding BHT's repeated reference to legal authorities that Osborn lacked standing to assert Worldwide's claims, Osborn stubbornly filed his amended complaint and thereby knowingly advanced frivolous claims. Only after these motions became ripe, BHT had gone to the expense of deposing George Morgan, and the Court had expended resources considering the issues, did Osborn seek leave of Court to replead the causes of action on behalf of Centralized Procurement Services. Based on the foregoing, this Court can only infer that Osborn toyed with the Court and BHT for over a year, first knowingly asserting a frivolous claim belonging to a non-party and then, to avoid dismissal, repleading his case on behalf of a new entity in hopes of keeping his case alive. Such gamesmanship offends the Rules, **[**17]** places in question the merit of Osborn's case, and demonstrates a cavalier lack of candor with this Court. Accordingly, Defendant is awarded expenses incurred in connection with the deposition of George Morgan in the amount of $ 3,010.87 plus postjudgment interest.

IV. CONCLUSION

It is, therefore, ORDERED that Defendant's motion for summary judgment on Plaintiff's claims under the Texas Antitrust Act, tortious interference with business relations, intentional infliction of emotional distress and negligent infliction of emotional distress is GRANTED, and the motion to dismiss is DENIED.

It is further ORDERED that Defendant's motion for sanctions is GRANTED and that Osborn shall pay costs incurred by BHT in connection with the deposition of George Morgan on April 28, 1992 in the amount of $ 3,010.87 plus postjudgment interest of 3.58 percent per annum from the date of this judgment until paid.

SO ORDERED.

SIGNED this 3d day of July, 1993.

TERRY R. MEANS

UNITED STATES DISTRICT JUDGE

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PPG Indus. v. Pilkington PLC

United States District Court for the District of Arizona

July 9, 1993, Decided ; July 9, 1993, Filed

No. CIV 92-753-TUC-WDB

Reporter

825 F. Supp. 1465 *; 1993 U.S. Dist. LEXIS 9524 **; 1993-2 Trade Cas. (CCH) P70,368

PPG INDUSTRIES, INC., a Pennsylvania corporation, Plaintiff, v. PILKINGTON plc, an English corporation; LIBBEY-OWENS-FORD CO., a Delaware corporation, Defendants.

Core Terms

arbitration, monopolization, license agreement, asserts, glass, allegations, disputes, anti trust law, argues, float, monopoly power, provisions, flat, parties, License, choice-of-law, antitrust claim, markets, arbitration clause, technology, cases, antitrust, regional, courts, words, world market, terms, motion to dismiss, law of england, probability

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN1[] **Sherman Act, Claims**

One of the essential elements of a Sherman Act *§ 2*, *15 U.S.C.S. § 2*, monopolization claim is the existence of monopoly power in the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN2[] **Attempts to Monopolize, Elements**

One of the essential elements of a Sherman Act *§ 2*, *15 U.S.C.S. § 2*, attempted monopolization claim is the existence of a dangerous probability of monopolization.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN3[] Motions to Dismiss, Failure to State Claim

The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the pleadings. It is not a procedure for resolving a contest about the facts or the merits of the case. Thus, the pleadings are viewed in the light most favorable to the nomnovant, with every doubt resolved in his behalf, and his allegations taken as true. The rule is that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] Motions to Dismiss, Failure to State Claim

In an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws. Thus, under *Fed. R. Civ. P. 12(b)(6)*, the court can properly dismiss for failure to state a claim for relief only if it is clear that no relief could be granted under any set of facts that could be proved consistent with its allegations.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

HN5[] Sherman Act, Scope

Antitrust defendants may not be held liable for attempted monopolization under the Sherman Act *§ 2*, *15 U.S.C.S. § 2*, absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize. The dangerous probability of monopolization requires inquiry into the relevant product and geographic market and the defendant's economic power in that market.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN6[] Private Actions, Remedies

A claimant must, as a minimum, sketch the outline of an antitrust violation with allegations of supporting factual detail. In an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws.

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

International Trade Law > General Overview

HN7[] **Arbitration, Federal Arbitration Act**

The Federal Arbitration Act, at *9 U.S.C.S. § 3*, states in part that if any suit be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit is referable to arbitration under such an agreement, shall upon application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Foreign Arbitral Awards

International Law > Dispute Resolution > Arbitration & Mediation > Arbitration Awards

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > International Trade Law > Dispute Resolution > International Commercial Arbitration

HN8[] **Arbitration, Foreign Arbitral Awards**

The Federal Arbitration Act, at *9 U.S.C.S. § 206*, requires courts to refer parties to arbitration outside of the United States if their agreement provides for arbitration in a foreign country. The United States has ratified The Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Congress, at *9 U.S.C.S. § 201*, has provided for the enforcement of such awards in United States courts.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Foreign Arbitral Awards

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > International Trade Law > Dispute Resolution > International Commercial Arbitration

HN9[] **Contract Conditions & Provisions, Arbitration Clauses**

The Federal Arbitration Act, *9 U.S.C.S. §§ 1-16*, 201-208, leaves no place for the exercise of discretion by a district court, but instead mandates that the district court shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. Therefore, the district court can only determine whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms. Thus, the court's role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Foreign Arbitral Awards

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > International Trade Law > Dispute Resolution > International Commercial Arbitration

HN10[] **Arbitration, Arbitrability**

In making the above determinations under the Federal Arbitration Act, *9 U.S.C.S. §§ 1-16*, 201-208, the court is to apply the federal substantive law of arbitrability, which is applicable to any arbitration agreement within the coverage of the Act. That body of law counsels that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. The Federal Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability. Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN11[] **Arbitration, Arbitrability**

The scope of the arbitration clause must be interpreted liberally.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

HN12[] **Contract Conditions & Provisions, Arbitration Clauses**

A dispute "involving" a contract is simply not as restrictive as one "arising under," "arising hereunder," or "arising out of." The word "involving" is the functional equivalent of the words "relating to." The phrase "arising out of or relating to" is construed as creating a broad arbitration clause. Further, the use of the words "meaning, interpretation, application or violation of" do not narrow the scope of the clause. Rather, these words, too, are expansive in nature.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

International Law > Dispute Resolution > General Overview

International Trade Law > Dispute Resolution > General Overview

HN13[] **Contract Conditions & Provisions, Arbitration Clauses**

The most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN14[] **Alternative Dispute Resolution, Mandatory ADR**

Potential complexity should not suffice to ward off arbitration. In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal. Moreover, it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense within manageable bounds that prompts them mutually to forgo access to judicial remedies.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

International Law > Dispute Resolution > General Overview

International Trade Law > Dispute Resolution > General Overview

HN15[] **Alternative Dispute Resolution, Arbitration**

There is no reason to assume at the outset of a dispute that international arbitration will not provide an adequate forum.

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Judges: Browning

Opinion by: WILLIAM D. BROWNING

Opinion

[*1467] ORDER

Pending before the Court are: (1) the December 18, 1992 Motion of Defendant Pilkington plc ("Pilkington") to Dismiss Counts Four and Five; and (2) Pilkington's December 18, 1992 Motion to Stay Proceedings and Compel Arbitration or Dismiss.

ORDER AND OPINION

I. Factual and Procedural Background

Plaintiff, PPG Industries, Inc. ("PPG"), has filed a Complaint alleging antitrust violations by Defendants Pilkington and Libbey-Owens-Ford Company ("LOF"). The allegations describe "a wheel-like scheme in which Pilkington operates at the hub to monopolize the **[**2]** markets for float process technology and for flat glass." PPG's November 4, 1992 Memorandum in Support of its Application for Temporary Restraining Order, at 2. *See* Complaint P 20.

In the late 1950s, Pilkington developed and patented the first commercially successful float process for manufacturing flat glass. In 1962, it licensed its technology to PPG among others. Plaintiff states that "Pilkington operates or has licensed more than ninety-five percent of the existing float glass manufacturing plants worldwide." *Id.* at 3. Pilkington states that it has entered into more than 50 separate agreements under which 150 float glass manufacturing plants operate in some 35 countries.

In the middle 1970s, PPG patented another float process technology known as the "LB process." Subsequently, PPG and Pilkington have had a number of disputes concerning PPG's efforts to license, develop, construct, and operate float glass manufacturing plants using the LB process. Pilkington has maintained that the LB process was derivative of its technology and, thus, fell under its 1962 licensing agreement with PPG. Thus, Pilkington has sought to prevent PPG from licensing its LB process except as authorized **[**3]** by Pilkington by initiating the arbitration of its claims. [1]

In the middle 1980s, the most recent dispute arose. PPG attempted to participate in the construction and operation of a float glass manufacturing plant based on the LB process in the People's Republic of China. In 1985, Pilkington again responded by initiating arbitration proceedings in London. In July or August 1992, the arbitrators issued their decision. According to PPG, they found that most of the float process technology items claimed as confidential by Pilkington were public knowledge, [2] and that PPG would have developed its LB process, without using Pilkington's technology, by the time PPG attempted to participate in the Chinese venture. Nonetheless, the arbitrators **[**4]** awarded Pilkington with a "notional" royalty on PPG's use of the LB process in China.

II. Defendants' Motion to Dismiss Counts Four and Five

A. Pilkington's Argument

Count Four of PPG's Complaint is a monopolization claim. Count Five is an attempted monopolization claim. Pilkington argues that PPG's allegations supporting each count are defective and do not state a claim for relief under *Section 2* of the Sherman Act. *15 U.S.C. § 2 (1988)*.

HN1[] One of the essential elements of a *Section 2* monopolization claim is the existence of monopoly power in the relevant market. According to Pilkington, "to state a claim for monopolization (Count Four), PPG must allege, *inter alia,* facts that, if true, establish that Pilkington currently possesses monopoly power in the production and sale of flat glass." Motion, at 2 (citing *Oahu Gas Serv., Inc. v. Pacific Resources Inc., 838 F.2d 360, 363* **[**5]** (9th Cir.), *cert. denied, 488 U.S. 870, 102 L. Ed. 2d 149, 109 S. Ct. 180 (1988))*.

[*1468] ***HN2***[] One of the essential elements of a *Section 2* attempted monopolization claim is the existence of a dangerous probability of monopolization. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1491*

[1] The 1962 license imposes an irrevocable, royalty-free grant-back license, which permits Pilkington to use or sub-license any technological improvements developed by the licensee, and requires that all disputes arising under the license to be arbitrated in London under English law.

[2] PPG concedes that the arbitrators also found that some of the items were covered by the 1962 license.

n. 8 (9th Cir. 1991) (citing McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)). Thus, Pilkington argues that, "to state a claim for attempted monopolization (Count Five), PPG must allege, *inter alia,* facts that, if true, establish the presence of a dangerous probability of monopolization by Pilkington." Motion, at 2.

Pilkington notes that courts may not condemn unilateral conduct, such as that which PPG targets in Counts Four and Five, absent the existence or impending threat of monopoly power. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984); Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 541 (9th Cir. 1991), *cert. denied, 118 L. Ed. 2d 316, 112 S. Ct. 1603 (1992)*.

According to Pilkington, "PPG's only cognizable **[**6]** factual allegation relating to Pilkington's 'monopoly power' in the production and sale of flat glass is that Pilkington enjoys an 'approximately 20 percent' share of a 'worldwide' market for flat glass." Motion, at 3 (citing PPG's Complaint PP 1, 10). Pilkington asserts, in a footnote, that PPG's attempt to "preserve" claims of monopolization in smaller geographic markets fails because PPG did not allege facts supporting monopoly power in these markets. *Id.* at 3 n. 2. Thus, it argues that a 20 percent share of the world market "is insufficient, as a matter of law, to support PPG's claims either of monopolization or attempted monopolization under Section 2 of the Sherman Act." *Id.* at 3.

Pilkington states that, "in order to survive a motion to dismiss a monopolization claim when the only relevant fact that plaintiff has alleged is a specific market share, the alleged market share must be 'at least above some level . . . [such that] an inference [of monopoly power] is not implausible on its face.'" [3] Id. at 6 (quoting Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied, 450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981))*. **[**7]** Pilkington then contrasts PPG's allegation that Pilkington has a 20 percent world market share with Ragu's 65 percent share found to be sufficient to state a claim in *Hunt-Wesson.* Pilkington asserts that an allegation of a 20 percent share is "implausible on its face" and, thus, that PPG's allegation is not "sufficient, as a matter of pleading, to withstand a motion for dismissal." *Id.*

[8]** As support for its attack on Count Four, Pilkington cites a "legion" of cases supporting the proposition that, as a matter of law, a market share of 20 percent is insufficient to support a monopolization claim. *See* United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 742 (2nd Cir. 1989) (appeal of summary judgment); Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516, 529 (5th Cir. 1982), *cert. denied, 460 U.S. 1082 (1983)* (appeal of trial court's ruling on motion for judgment notwithstanding the verdict); Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347, 1367 (5th Cir. 1976), *cert. denied, 429 U.S. 1094, 51 L. Ed. 2d 540, 97 S. Ct. 1108 (1977)* (appeal of directed verdicts); Twin Cities Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975), *cert. denied, 459 U.S. 1009, 74 L. Ed. 2d 400, 103 S. Ct. 364 (1982)* (appeal of trial court judgment); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 566 F. Supp. 1104, 1111 (N.D. Cal. 1983) (entry of summary **[**9]** judgment). *See also* Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n. 18 (10th Cir. 1989), *cert. denied, 498 U.S. 972, 112 L. Ed. 2d 424, 111 S. Ct. 441* ***[*1469]*** *(1990)* (appeal of denial of motions for judgment notwithstanding the verdict and for new trial); Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986), *cert. denied, 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876* and *479 U.S. 1034 (1987)* (appeal of ruling on motion for judgment notwithstanding the verdict).

Pilkington states that "PPG resorts to a tortured analysis to convert the 20 percent worldwide market share . . . into something more by referencing Pilkington's position in a different alleged market, . . . 'the development,

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[3] The Ninth Circuit stated that:

> While market share is just the starting point for assessing market power, we think that market share, at least above some level, could support a finding of market power in the absence of contrary evidence. Where such an inference is not implausible on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal. With nothing but Hunt's complaint before us, we cannot say that allegations that Ragu had a 65 per cent market share, and that the share of the market was increasing, could not under any market conditions provide a basis for inferring the requisite market power.

Hunt-Wesson, 627 F.2d at 925.

construction, and licensing of float process plants.'" Motion, at 7 (quoting PPG's Complaint P 13). Pilkington asserts that PPG alleges that Pilkington uses its monopoly control of the float process technology through licensing agreements to dictate who may enter the market for the production and sale of flat glass. Pilkington argues that "the law does not permit **[**10]** PPG to graft Pilkington's position in this second 'market' onto Pilkington's position in the alleged market for the production and sale of flat glass" thereby creating a *Section 2* attempted monopolization claim. *Id.* at 7 (citing *Alaska Airlines, 948 F.2d at 547*). According to Pilkington, the Ninth Circuit has rejected the use of this "monopoly leveraging" theory to create a *Section 2* violation. *Id.*

Because market share is the "chief barometer" for assessing market power, Pilkington asserts that PPG's allegation that Pilkington possesses a 20 percent world market share is likewise insufficient to support its allegation that there exists a dangerous probability of success by Pilkington. *See, e.g., Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982)* (appeal of directed verdicts); *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 271 (7th Cir. 1981)*, *cert. denied, 455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)* (appeal of district court's findings after bench trial); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co., 614 F.2d 832, 841 (2nd Cir. 1980)*; **[**11]** *United States v. Empire Gas Corp., 537 F.2d 296, 305 (8th Cir. 1976)*, *cert. denied, 429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)* (appeal of trial court judgment).

B. PPG's Opposition

PPG states that "rather than attempting to attack the actual allegations made in Counts Four and Five . . ., Pilkington has instead effectively rewritten Counts Four and Five and confines itself to an attack on this rewritten version of the complaint." Opposition, at 1. Contrary to Pilkington's alleged mischaracterization of its Complaint, PPG states that it actually alleged that Pilkington has established and maintained monopoly power in an interrelated regional set of markets. *See* Complaint PP 17, 18, 35, 38. It disputes Pilkington's assertion that it alleged that Pilkington has monopolized a world market for flat glass or relied on Pilkington's 20 percent market share as evidence of market power. PPG asserts that, given modern notice pleading, its Complaint could not be disposed of on a preliminary motion before discovery and the presentation of evidence.

PPG states that it did not allege that there is a single, world market for flat glass. Paragraph **[**12]** 13 of the Complaint states that "Pilkington holds monopoly power over the worldwide market for the development, construction and licensing of float process plants and the related markets for the sale of flat glass." As to the particular, regional markets, PPG asserts that the precise geographical market boundaries, Pilkington's share of those markets, and consequent monopoly power can only be ascertained through discovery. It further states that:

> Pilkington's sales are not evenly distributed throughout the world. Pilkington adopted a strategy of licensing its technology in certain regions of the world, carefully delimiting the production, and in some cases the sale, of glass by these licensees to specific regions *[see* Complaint, para. 20], while expressly and intentionally reserving for itself other regions *(e.g.,* Argentina and Australia). In those reserved regional markets, Pilkington has enjoyed as much as 100 percent of the region's glass production, and has excluded other competitors by a variety of exclusionary practices, some of which are described in paragraph 18 of the complaint.
>
> **[*1470]** Contrary to the assertions made in Pilkington's present motion, PPG's complaint **[**13]** contains not only a general allegation of Pilkington's monopolization of regional markets, but, by way of example, allegations that Pilkington and its co-conspirators have monopolized flat glass sales in two of the interrelated markets for the sale of flat glass, Argentina and Australia.
> In Argentina, PPG has alleged that Pilkington's sole licensee and co-conspirator, Vidoieria Argentina S.A. ("Vasa"), of which Pilkington owns 65 percent, possesses monopoly power. [See Complaint, para. 18(a)]
> . . . .
> Similarly, PPG has alleged that, in Australia, Pilkington (Australia) Limited is the sole float manufacturer. [See Complain, para. 18(b)]

Opposition, at 6-7 (emphasis in original). [4] Thus, PPG argues that its allegations are sufficient to state a claim under Section 2 of the Sherman Act. *See* Fox Chem. Co. v. Amsoil, Inc., 445 F. Supp. 1355, 1360 (D. Minn. 1978), *cited with approval by* Hunt-Wesson, 627 F.2d at 925.

[14]** In regard to Pilkington's "monopoly leveraging" argument, PPG argues that the principles stated in *Alaska Airlines* do not support the dismissal of Counts Four and Five. It states that:

> The monopoly leveraging theory at issue in *Alaska Airlines* was first enunciated in Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979, *cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. In both cases, the relevant issue was whether a Section 2 violation could be made out under circumstances in which a defendant was using "monopoly power in one market to gain a competitive advantage in another." Id. at 275; *accord* Alaska Airlines, 948 F.2d at 546. However, both courts expressly distinguished cases in which monopoly power in the first market is used to "attempt to *monopolize* the second market." Id. at 275 (emphasis added); *accord* Alaska Airlines, 948 F.2d at 546.

Opposition, at 13. PPG asserts that it has alleged that Pilkington has used its monopoly power over the float process technology in an attempt to create or maintain **[**15]** monopolies in regional markets for the production and sale of flat glass.

C. Pilkington's Reply

Pilkington cites a recent Supreme Court case, Spectrum Sports v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993), for the proposition that in an attempted monopolization case "the demands that Section 2 places on a plaintiff are 'plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics,' but 'require[] inquiry into the relevant product and geographic market and the defendants's economic power in that market.'" Reply, at 2 (quoting Spectrum Sports, 113 S. Ct. at 892). Pilkington characterizes this holding of the Supreme Court as creating a "monopoly power screen" for attempted monopolization cases. Reply, at 2.

D. Discussion

(1) Rule 12(b)(6) Standard

HN3[] The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the pleadings. 5A Wright & Miller, *Federal Practice and Procedure* § 1356, at 294 (2d ed. 1990). It is not "a procedure for resolving a contest about the facts or the merits of the case." *Id.* Thus, the pleadings at issue are viewed **[**16]** in the light most favorable to the nomnovant, with every doubt resolved in his behalf, and his allegations taken as true. Abramson v. Brownstein, 897 F.2d 389, 391 (9th Cir. 1990). The rule is that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Abramson, 897 F.2d at 391.

[*1471] "In **HN4**[] an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws." Newman v. Universal Pictures, 813 F.2d 1519, 1522 (9th Cir. 1987), *cert. denied, 486 U.S. 1059, 100 L. Ed. 2d 931, 108 S. Ct. 2831 (1988)*. Thus, under Fed. R. Civ. P. 12(b)(6), the Court could properly dismiss Counts Four and Five for failure to state a claim for relief "'only if it is clear that no relief could be granted under any set of facts that could be proved

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[4] PPG also cites documentary evidence, such as Pilkington's 1992 Annual Report, and declarations of counsel to support its allegations. But because this a Rule 12(b)(6) motion, the Court will simply take PPG's allegations as true and not look beyond the Complaint. Therefore, the Court will not consider this documentary evidence in reaching its decision.

consistent with [its] allegations.'" Id. at 1521-22 **[**17]** (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)).

(2) Analysis

The Court will deny Defendants' Motion to Dismiss. The Court finds that PPG's allegations regarding monopoly power and the existence of a dangerous probability thereof are sufficiently well pleaded to withstand a Rule 12(b)(6) motion. *See* Newman, 813 F.2d at 1522.

Most of the cases cited by Pilkington do not address Rule 12(b)(6) motions in antitrust cases. There is a distinct difference between the elements that must be satisfied to prove a defendant liable for a Section 2 violation and Fed. R. Civ. P. 8(a)(2)'s requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief." *Spectrum Sports* is an example. Pilkington cites *Spectrum Sports* for the proposition that the Supreme Court has recently imposed a "monopoly power screen" in attempted monopolization cases. Although the case makes it clear that a defendant may not be held liable for attempted monopolization without proof of a dangerous probability of monopolization in a relevant market, *see* Spectrum Sports, 113 S. Ct. at 892, **[**18]** the Court questions its utility on a motion to dismiss for failure to state a claim.

Spectrum Sports does not deal with the district court's ruling on a motion to dismiss. After a jury verdict finding that the defendants had violated Section 2, the issue in the Supreme Court was whether the district court correctly instructed the jury on the elements of attempted monopolization. Id. at 887. The district court defined the elements correctly under applicable Ninth Circuit precedent, but this precedent conflicted with the law announced in the other circuits. Id. at 889. The Supreme Court strongly disapproved of the prior Ninth Circuit precedent and defined the elements of an attempted monopolization claim in accordance with the rest of the circuits. Id. at 891 ("We are not at all inclined . . . to embrace *Lessig's* interpretation of § 2, for there is little if any support for it in the statute or the case law, and the notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman **[**19]** Act."). [5] Thus, the Supreme Court held that ***HN5***[] antitrust defendants "may not be held liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize." Id. at 892. The dangerous probability of monopolization "requires inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Id.* Thus, although the Supreme Court may have imposed a "monopoly power screen" for liability, in terms of a Rule 12(b)(6) motion, *Spectrum Sports* merely eliminates the possibility that allegations of "clearly exclusionary conduct" would suffice to state a claim for attempted monopolization in the absence of allegations of a dangerous probability of monopolization.

[20]** With the exception of *Hunt-Wesson,* the "legion" of cases cited by Pilkington to support its argument that an allegation of a 20% world market share is insufficient to state a claim for monopolization and attempted monopolization concern determinations on summary judgment motions, motions for directed verdicts, and post-trial motions. As such, they are of little use to the Court. The Court, of course, does not question that an allegation of a 20% market share in a relevant **[*1472]** market would fail to state claim under Rule 12(b)(6). The Court finds, however, that PPG's allegations sufficiently allege that Pilkington possesses market power in several regional markets for the sale of flat glass. See PP 17, 18(a), 18(b), 35, 38. 39. PPG does allege that Pilkington has monopolized the world market for float glass technology. However, when describing Pilkington's conduct and power in regard to the production and sale of flat glass, PPG refers to regional markets. When the Court reads PPG's allegations describing Pilkington's market power in "world markets," it views the pleadings at issue in the light most favorable to PPG and with every doubt resolved in its behalf. Brownstein, 897 F.2d at 391. **[**21]** *See also* Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989). Thus, the Court finds that these allegations do not describe a single world market for the production and sale of flat glass.

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[5] The Supreme Court was referring to Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied,* ***377 U.S. 993 (1964)***, and its progeny.

The Court is mindful that "a ***HN6***[] claimant must, as a minimum, sketch the outline of the antitrust violation with allegations of supporting factual detail." *Les Shockley Racing, 884 F.2d at 508*. However, the Court finds that PPG's allegations contained in paragraphs 18(a) and 18(b), describing the existence of monopoly power or the dangerous probability of monopolization in the Australian and Argentinean markets, fulfill this requirement. *See* *Newman, 813 F.2d at 1522* ("In an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws."). Here, the Court cannot conclude that "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id. at 1521-22* (quoting *Hishon, 467 U.S. at 73*).

[22] III. Motion to Stay Proceedings and Compel Arbitration or Dismiss**

The determinative questions are: (1) whether PPG's antitrust claims are arbitrable under the 1962 License Agreement; and (2) if so, whether the 1962 License Agreement's choice-of-forum and choice-of-law provisions operate as a prospective waiver of these claims by precluding the application of United States ***antitrust law***.

A. Whether PPG's Claims Are Arbitrable Under the 1962 License Agreement

(1)Pilkington's Argument

Article XII of the 1962 License Agreement provides, in pertinent part, under the heading of "Arbitration" that:

> **Any dispute involving the meaning, interpretation, application or violation of the provisions of this agreement** which cannot be settled by discussion and mutual accord **shall be settled by arbitration** by three arbitrators of whom one shall be nominated by [Pilkington], one by [PPG], and a third by the two arbitrators to be nominated.
> . . . .
> The seat of the arbitration shall be in London, and the arbitration shall be in accordance with the laws of England.
> The decision of the arbitrators shall be final and binding on the parties.

1962 License Agreement, **[**23]** Article XII (emphasis added). Article XIII of the 1962 License Agreement provides, under the heading of "Construction," that "the Agreement shall be governed by the laws of England."

Pilkington notes that it brings this Motion pursuant to the Federal Arbitration Act ("FAA"), *9 U.S.C. §§ 1-16*, 201-208, and that the FAA embodies an "emphatic federal policy in favor of arbitral dispute resolution[,]" . . . which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)*. ***HN7***[] The FAA, in pertinent part, states that:

. . . .

> If any suit . . . be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, **upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement, shall upon application of one of the parties stay the [*1473] trial of the action until such arbitration has been had** in accordance with the terms of the agreement. . . .

9 U.S.C. § 3 **[**24]** (emphasis added). ***HN8***[] The FAA also requires courts to refer parties to arbitration outside of the United States if their agreement provides for arbitration in a foreign country. *See* *9 U.S.C. § 206*. The United States has ratified The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and Congress has provided for the enforcement of such awards in United States courts. *See* *9 U.S.C. § 201*.

"The [***HN9***] FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that the district court *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean, Witter Reynolds v. Byrd, 470 U.S. 213, 218, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985)* (emphasis in original). "'Therefore, the district court *can only* determine whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms.'" *Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 475 (9th Cir. 1991)* (quoting *Howard Elec. & Mech. Co., Inc. v. Frank Briscoe Co., 754 F.2d 847, 849 (9th Cir. 1985))*, **[**25]** *cert. denied, 112 S. Ct. 1294 (1992)* (emphasis in original). Thus, the Court's "role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator." *Standard Fruit, 937 F.2d at 478*.

HN10[] In making the above determinations, the Court is to "apply the 'federal substantive law of arbitrability,'" which is "'applicable to any arbitration agreement within the Coverage of the Act.'" *Mitsubishi, 473 U.S. at 626* (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983))*. The Supreme Court further stated:

> That body of law counsels:
>
> > "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." **[**26]** *Moses H. Cone Memorial Hosp., 460 U.S. at 24-25, 103 S. Ct. at 941-942*.
>
> *See, e.g., Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583, 80 S. Ct. 1347, 1352-1353, 4 L. Ed. 2d 1409 (1960)*. Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

Id.

Pilkington, of course, argues that PPG's claims constitute a "dispute" that the parties agreed to arbitrate under Article XII. It characterizes the wording of Article XII as "quite broad." Pilkington's Memorandum, at 11. Pilkington states that:

> As an initial matter, the clause comprehends "any dispute," regardless how defined, if it involves the Agreement.
>
> The word "involving" is also expansive. As the arbitration panel stated in determining that the 1988 Draft Complaint [6] was arbitrable: "the word 'involving' is an ordinary word of the English language and it expresses a certain nexus between the dispute and the License Agreement, a nexus which is of a general nature. Thus, a dispute may 'involve' the License Agreement even **[**27]** though it does not concern a contractual claim under the Agreement." Walsh Declaration Tab 2 at 3-4. The word "involving" carries the same meaning here as "relating to," which courts have found denotes a broad arbitration clause. *See Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991)* ("'Any and every dispute, difference or **[*1474]** question . . . relating to this Agreement" is an "expansive arbitration provision.")
>
> . . . .
>
> Moreover, courts have consistently held that arbitration clauses covering disputes that concern the "interpretation" of a contract, the "meaning and application" of contract clauses, and similar phrases are very broad in their coverage and should be broadly construed.

Id. at 11-12.

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[6] During the arbitration proceedings begun in 1985, PPG submitted a draft federal court complaint alleging antitrust claims to the arbitrators for an advisory opinion concerning the arbitrability of the claims.

As support, Pilkington cites a number of **[**28]** cases. *Warrior and Gulf, 363 U.S. at 576, 584-85* (clause requiring arbitration of "differences . . . as to the meaning and application of the provisions of the Agreement" described as "quite broad"); *United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 565, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 n. 1 (1960)*; *Challenger v. Local Union No. 1 of the Int'l Bridge, Structural, and Ornamental Ironworkers, AFL-CIO, 619 F.2d 645, 647 (7th Cir. 1980)*. According to Pilkington, the Ninth Circuit has construed equivalent language to Article XII. *Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1464 (9th Cir. 1983)* (contrasting the phrase "arising out of or relating to this agreement" with "arising hereunder" and finding that the former is more expansive than the latter). Finally, Pilkington compares Article XII with the *Mitsubishi* clause and characterizes the *Mitsubishi* clause as narrower because it referred only to portions of that agreement. Pilkington's Memorandum, at 14. The Supreme Court stated that:

. . . .

> insofar as the allegations **[**29]** underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability.

Mitsubishi, 473 U.S. at 624 n. 13.

Next, Pilkington specifies the reasons why it believes that PPG's claims "'touch matters' covered by the Agreement and therefore must be arbitrated." Pilkington's Memorandum, at 14 (quoting *Mitsubishi, 473 U.S. at 624 n. 13*). Pilkington makes the following assertions:

> (1) Because the Complaint alleges that Pilkington has used the 1962 License Agreement to keep PPG from using its LB process in specific world markets, Pilkington asserts that this claim involves the application of the Agreement, *see* Complaint PP 1, 19;
>
> (2) Because the Complaint alleges that Pilkington has misused the 1962 License Agreement to restrict the quantity of glass that licensees may manufacture, to create barriers to entry, and to establish monopolies, Pilkington asserts that these claims touch matters covered by the Agreement, *see* Complaint PP 7-14, 20;
>
> (3) Because the Complaint alleges that Pilkington has used the restrictive terms **[**30]** of the 1962 License Agreement to suppress competition, Pilkington asserts that this claim involves the application of the Agreement, *see* Complaint P 17;
>
> (4) Because the Complaint alleges that one of Pilkington's anticompetitive acts was to use Article XII requiring PPG to submit to arbitration, Pilkington asserts that this claim calls into question the meaning, interpretation, application, or violation of the Agreement, *see* Complaint P 18(a); and
>
> (5) Because the Complaint's prayer for relief asks the Court to declare that the Agreement's restraints are "null, void and unenforceable," Pilkington asserts that this relief requires the Court to apply or interpret the Agreement.

Pilkington's Memorandum, at 15-18.

Pilkington argues that PPG has cosmetically reworked its 1988 draft complaint in an attempt to avoid the impact of *Mitsubishi.* Citing "PPG's efforts to clutter its current Complaint with allegations concerning exports to Argentina and other foreign locales and misconduct in the 'flat glass market,'" Pilkington states that these claims are likewise subject to arbitration because they are premised on the 1962 License Agreement. *Id.* at 19-20. As support, **[**31]** it cites the First Circuit's decision in *Mitsubishi. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 160-61 (1st Cir. 1983)*, *aff'd* **[*1475]** *in part, rev'd in part, Mitsubishi, 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1987)*.

(2) PPG's Opposition

In reference to the terms of Article XII, PPG states that:

> The terms "meaning" and "interpretation" refer to the definition of the provisions of the Float License. The term "application" refers to the manner in which a provision of the Float License is supposed to operate in a given circumstance. The term "violation" refers to whether a party has breached a provision of the Float License. That is *all* the parties agreed to arbitrate under the Float License.
> Resolution of the issues raised in PPG's complaint does not require this Court to determine the meaning of any term in the Float License or whether Pilkington has violated any provision.

Opposition, at 2 (emphasis in original).

PPG disputes Pilkington's argument that Article XII is broader in scope than the *Mitsubishi* arbitration clause. The latter provision provides that:

> "All disputes, controversies or differences **[**32]** which may arise between [the parties] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration."

Mitsubishi, 473 U.S. at 617. PPG argues that Article XII and the Mitsubishi clause differ because: (1) Article XII applies only to disputes "involving the meaning, interpretation, application or violation of the provisions of" the 1962 License Agreement; and (2) the term "involving" is narrower in scope than the clause "arising out of or in relation to" as the latter is used in the *Mitsubishi* provision. PPG asserts that Article XII, read as a whole, is "limited to disputes requiring a decision as to the 'meaning' of provisions in the agreement or the parties' 'violation' of those provisions." Opposition, at 5.

PPG argues that Pilkington's construction "ignores controlling Ninth Circuit precedent that makes clear that the omission of the phrase 'relating to' is 'significant' and indicates that the agreement is 'intended to cover a much narrower scope of disputes.'" *Id.* (quoting *Mediterranean Enter., 708 F.2d at 1463-64*). *See also Swensen's Ice Cream Co. v. Corsair Corp., 942 F.2d 1307, 1309 (8th Cir. 1991)*; **[**33]** *In re Kinoshita & Co., 287 F.2d 951, 953 (2nd Cir. 1961)*; *American President Lines, Ltd. v. S. Woolman, Inc., 239 F. Supp. 833, 836 (S.D.N.Y. 1964)*. PPG further argues that the terms "meaning, interpretation, application or violation" also limit the scope of disputes subject to arbitration. *See Northern Cal. Newspaper Guild Local 52 v. Sacramento Union, 856 F.2d 1381, 1383 (9th Cir. 1988)* (clause "limiting arbitrable disputes to those involving 'application of' the Agreement" limited arbitrable disputes to those "involving construction of the substantive provisions of the contract"). PPG states that:

> The absence of the phrase "relating to" and the presence of the other words of limitation, "meaning, interpretation, application or violation," make it obvious that this arbitration clause was designed to cover a much narrower class of disputes than the clauses on which Pilkington relies.

Opposition, at 6-7.

PPG also argues that its interpretation is supported by the fact that "several other agreements . . . between [the parties] provided for arbitration for 'any controversy or claim **[**34]** arising out or relating to this agreement." *Id. at 7* (citing Zoghby Declaration, Tabs 2-6). PPG notes that this language is similar to that in *Mitsubishi* and, thus, demonstrates that the parties could agree on a broader class of arbitrable disputes when they so desired.

PPG challenges Pilkington's assertion, based on language in *Mitsubishi,* that disputes that "touch matters covered by" the 1962 License Agreement are arbitrable. According to PPG, the fact that the *Mitsubishi* provision was much broader in scope than the one at issue here renders the "touch matters" standard inappropriate here. The question for the Court, as framed by PPG, is whether PPG's claims require the Court to decide a "dispute involving the meaning, interpretation, application or violation of the provisions of" the 1962 License Agreement. **[*1476]** PPG asserts that the following claims do not require that inquiry:

> (1) Pilkington's alleged imposition of exclusive dealing agreements on purchasers of glass;
> (2) Pilkington's alleged acquisition of independent flat glass wholesalers, distributors, and manufacturers thereby facilitating the imposition of exclusive dealing agreements;

(3) Pilkington's **[**35]** use of litigation to allegedly coerce competitors into acceptance of restraints, to suppress competition from competitive technologies, and to create barriers to entry; and

(4) Pilkington's alleged economic and legal threats to potential customers, suppliers, and financial backers of companies that compete with it.

See Complaint PP 13-18. In reference to Pilkington's use of litigation, PPG asserts that:

> None of those allegations raises any dispute about the meaning or violation of any agreements underlying those suits. Whatever the meaning of the terms of those agreements and whether they were violated . . ., Pilkington has used that litigation as part of its scheme to monopolize the markets for float glass technology and flat glass and thereby violated the Sherman Act.

Opposition, at 11.

According to PPG, its prayer for relief does not demonstrate that its claims are arbitrable. PPG states that the 1962 License Agreement provides that "the arbitrators shall not have the power to alter, amend or add to the provisions of this Agreement." *See* 1962 License Agreement, Article XII. Thus, PPG argues that, because only this Court has the power to declare the Agreement **[**36]** "null, void and unenforceable," its prayer for relief is a further demonstration that its claims are not arbitrable.

In an attempt to distinguish *Mitsubishi,* PPG asserts that its monopolization claims are unlike *Mitsubishi's* contract-related claims. According to PPG, the *Mitsubishi* claims directly implicated the parties' performance under their contract whereas "the dispute here centers around whether the agreement played a role in a much wider [anticompetitive] scheme." *Washburn v. Societe Commerciale de Reassurance, 831 F.2d 149, 151 (7th Cir. 1987)* (reinsurance agreement's arbitration provision did not cover RICO claims, which alleged a conspiracy to use various agreements and "several other devices . . . to drive [a company] further into insolvency and defraud entities and individuals who had interests in the continued viability of [the company]"). *See also* *Swensen's, 942 F.2d at 1310*.

PPG also challenges Pilkington's citation of the 1988 advisory opinion of the arbitrators. First, PPG asserts that the two complaints at issue differ markedly. According to PPG, "the 1988 draft complaint was based entirely **[**37]** on PPG's allegation that Pilkington was 'wrongfully and wilfully asserting beyond any possible warrant that information licensed to PPG under the 1962 license remains protectible as trade secret information.'" Opposition, at 17. Thus, PPG argues that the 1988 arbitration and the 1988 draft complaint were both based on the narrow question of whether Pilkington "know-how" had become public information whereas the Complaint in this action does not involve that issue. *Id.* Second, PPG notes that the arbitrability of its claims is to be determined under federal law rather than the English law of arbitrability. Finally, PPG quibbles about the non-binding nature of the arbitrators' 1988 advisory opinion.

PPG states that it is proper for this Court to consider the state of the law at the time the parties entered into their agreement in order to ascertain their intentions. *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117*, *__, 113 L. Ed. 2d 95*, *111 S. Ct. 1156, 111 S. Ct. 1156, 1164 (1991)* ("Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had **[**38]** been expressly referred to or incorporated in its terms".). PPG notes that, until 1978, no court had held that antitrust claims were arbitrable. Thus, PPG argues that the fact that it never attempted to renegotiate the terms of Article XII to exclude antitrust claims does not support the conclusion that **[*1477]** the parties intended antitrust claims to be arbitrable.

(3) Pilkington's Reply

Pilkington attempts to distinguish *Mediterranean,* on which PPG relied for the proposition that "the omission of the phrase 'relating to' is 'significant' and indicates that the agreement is 'intended to cover a much narrower scope of disputes.'" Opposition, at 5 (quoting *Mediterranean, 708 F.2d at 1463-64*). Pilkington states that:

> The Ninth Circuit did not hold that an arbitration clause that lacks the phrase "relating to" must be read as narrowly as one containing the phrase "arising hereunder."

> PPG's argument also overlooks the fact that the words "involve" or "involving" are often described as synonymous to the words "relate" or "relating to." *See Webster's New World Dictionary* 742 (2d ed. 1986) (definition of "involve" includes "to relate to"); William **[**39]** C. Burton, *Legal Thesaurus* 297 (1980) ("involve" defined to include the word "relate").

Reply, at 4-5.

Pilkington next argues that PPG's construction of the words "meaning, interpretation, application or violation" ignores PPG's own admonition that the clause should be "read as a whole." *See* Opposition, at 6. Additionally, Pilkington asserts that PPG has misconstrued the Ninth Circuit's holding in *Newspaper Guild.* Pilkington states that:

> The *Newspaper Guild* court held only that the arbitration clause . . . did not encompass the determination of whether the underlying contract was in effect at the time the cause of action arose. *See* 856 F.2d at 1383-84. Indeed, the court characterized the clause as "broad" and remanded the case for a determination of the status of the agreement with instructions to refer the case to arbitration if the underlying contract was . . . in effect. *Id. at 1383*.

Reply, at 6.

Pilkington disputes PPG's assertion that, until 1978, no court had held that antitrust claims were arbitrable. According to Pilkington, there was authority prior to 1962 that suggested that such **[**40]** claims were arbitrable or that it was an open issue. *See* Greenstein v. National Skirt & Sportswear Ass'n, Inc., 178 F. Supp. 681 (S.D.N.Y. 1959), *appeal dismissed,* 274 F.2d 430 (2nd Cir. 1960).

Pilkington then uses PPG's own argument to demonstrate why its claims are arbitrable. According to Pilkington, PPG's allegation of Pilkington's "exclusionary conduct, including 'sham' litigation, to effect its anticompetitive scheme--undermines this point." Reply, at 9. Pilkington argues that the question of whether it misused the 1962 License Agreement to effect the alleged anticompetitive scheme or whether its use of the agreement was the legitimate protection of its intellectual property is a pivotal issue in the resolution of PPG's monopolization and attempted monopolization claims. Pilkington asserts that its "use or threatened use of litigation or regulatory proceedings necessarily touches upon issues involving the meaning, application, interpretation, or violation of the provisions of the Agreement." *Id. at 9-10*.

In rebuttal of PPG's argument that the arbitrators lack the authority to "alter, amend or add to the provisions **[**41]** of" the Agreement, Pilkington states that PPG ignores Article IX F., which provides the panel with power to curtail and limit provisions that are illegal. It notes that this is exactly the remedy sought by PPG in the 1988 arbitration.

In reference to PPG's assertion that its claims do not involve the meaning, interpretation, application, or violation of the Agreement's provisions because Pilkington's use of the Agreement's restrictions is part of a wider anticompetitive scheme, Pilkington states that:

> In *Washburn,* . . . the court held that the plaintiff's RICO claim was not arbitrable because no analysis of the subject agreement's terms would have been relevant to the evaluation and ultimate resolution of the RICO claim. The court found that, "even if every word of the . . . agreement were interpreted, this case would be no closer to a resolution . . . .
>
> Interpreting the agreement itself would provide no assistance in resolving that issue." *[Washburn,]* 831 F.2d at 151. By contrast, the **[*1478]** meaning, interpretation, application and violation of the Agreement's provisions are central to the resolution of PPG's claims . . . .

Reply, at 14.

[42]** (4) Discussion

According to PPG, the Article XII's words "any disputes involving the meaning, interpretation, application or violation of the provisions of this agreement" would be equivalent to narrow arbitration clauses such as "any dispute arising hereunder" or any dispute arising under." But Article XII's language, the Court concludes, cannot be read as narrowly as PPG suggests. The Supreme Court instructs that the parties' intentions are to be "generously construed in favor of arbitrability" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi, 473 U.S. at 626*. *See also* *Standard Fruit, 937 F.2d at 478* ("The ***HN11***[] scope of the [arbitration] clause must. . . be interpreted liberally"). PPG's reading of the Agreement would violate these principles. Under the 1962 License Agreement, the arbitrable claims are not limited simply to those involving breaches of the Agreement as a contract.

The Court finds that Article XII's language is a broad arbitration clause. PPG ignores the import of Article XII's inclusion of the words "involving the meaning, interpretation, application **[**43]** or violation of the provisions of this agreement." ***HN12***[] A dispute "involving" a contract is simply not as restrictive as one "arising under," "arising hereunder," or "arising out of." The Court finds that the word "involving" is the functional equivalent of the words "relating to." The phrase "arising out of or relating to" has been construed as creating a broad arbitration clause. *See* *Mediterranean Enter., 708 F.2d at 1464*. Article XII's scope is similar in breadth. Further, the use of the words "meaning, interpretation, application or violation of" does not narrow the scope of the clause. Rather, these words, too, are expansive in nature. *See* *Warrior and Gulf, 363 U.S. at 585* (the words "differences . . . as to the meaning and application of" described as creating an arbitration clause that is "quite broad").

PPG's factual allegations repeatedly accuse Pilkington of using its 1962 License Agreement as an anticompetitive tool. In regard to PPG's antitrust claims, Pilkington cannot be held liable for simply being a successful competitor. The resolution of PPG's claims will require the Court to **[**44]** determine whether Pilkington's use of litigation and arbitration pursuant to the Agreement was simply the legitimate protection of its intellectual property rights, or anticompetitive and exclusionary acts. The Court will necessarily have to interpret or ascertain the meaning of the Agreement to determine if Pilkington has misused the Agreement's restraints in the manner alleged. "The clear weight of authority holds that ***HN13***[] the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes." *Standard Fruit, 937 F.2d at 478* (citing *Bauhinia Corp. v. China Nat'l Mach. & Equip. Import & Export Corp., 819 F.2d 247, 249-50 (9th Cir. 1987)*; *Mediterranean, 708 F.2d at 1462-63*). Based on this policy of liberal interpretation of the scope of arbitration clauses, therefore, PPG's claims are arbitrable under Article XII of the 1962 License Agreement.

B. Whether the 1962 License Agreement's choice-of-forum and choice-of-law provisions operate as a prospective waiver of these claims by precluding the application of United States *antitrust law*

[45]** (1) Pilkington's Argument

Pilkington argues that the 1962 License Agreement's choice-of-forum and choice-of-law provisions will not preclude the application of U.S. ***antitrust law*** by the arbitral panel. First, it asserts that Article XII is simply a provision mandating a choice of procedural, rather than substantive, law. *Valero Refining, Inc. v. M/T Lauberhorn, 813 F.2d 60, 64 n. 5, 65 (5th Cir. 1987)*. It states that Article XII's reference to the "laws of England" read in conjunction with **[*1479]** the provision specifying the "seat of arbitration," is "naturally read as a reference to the 'rules' of arbitration." Pilkington's Memorandum, at 24. Pilkington asserts that Article XII mirrors a clause in the *Mitsubishi* agreement specifying that "all disputes . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Mitsubishi, 473 U.S. at 617*. According to Pilkington, both clauses' use of the phrase, "in accordance with," denotes the rules or laws governing the procedure to be used. Pilkington argues that its interpretation of the **[**46]** Agreement is buttressed by Article XIII, which provides that the Agreement "shall be governed by the laws of England." Pilkington states that Article XIII would be redundant if Article XII was a complete choice of law provision.

Second, Pilkington asserts that Article XIII does not mandate the application of English law to every dispute that may "involve" the 1962 License Agreement. The correct reading of Article XIII, argues Pilkington, is that the provision requires the application of English law to the rights and obligations of the parties under the contract. According to Pilkington, Article XIII does not govern every dispute that may "involve" the Agreement under Article XII. *See* *In re Hops Antitrust Litig., 655 F. Supp. 169, 170* (E.D. Mo.), *appeal dismissed,* *832 F.2d 470 (8th Cir.*

1987). *See also* Gemco Latinoamerica, Inc. v. Seiko Time Corp., 671 F. Supp. 972, 975 (S.D.N.Y. 1987). Again, Pilkington cites *Mitsubishi* as controlling. Pilkington states that:

> There, in addition to the choice-of-forum clause (Japan) and a choice-of-procedural-rules clause (Japan Commercial Arbitration **[**47]** Association), the agreement also contained a choice-of law clause: "This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." Mitsubishi, 473 U.S. at 637 n. 19. This clause is broader and more encompassing than the one at issue here and on its face would appear not to permit an examination of a claim under the U.S. antitrust laws. The Supreme Court, however, read the clause as reaching only issues concerning contract interpretation, stayed the antitrust action, and compelled the parties to arbitrate the antitrust claims in Japan under Japanese procedural rules. Similarly, the fact that Article XIII provides that the "Agreement shall be governed by the laws of England," should not act as a bar to this Court's staying these proceedings and ordering arbitration of PPG's Sherman Act claims.

Pilkington's Memorandum, at 25-26.

Pilkington then asserts that English law does not preclude the application of U.S. ***antitrust law*** in arbitration. *See* Crystal Declaration PP 6, 10. According to Pilkington, the testimony of PPG's English law expert, Mr. **[**48]** Sydney Kentridge, does not rebut this assertion. Pilkington characterizes all of Kentridge's testimony as confusing the issue of the scope of the arbitration clause with the issue of the law applicable to arbitral disputes.

As sort of an alternative argument, Pilkington contends that the arbitral panel, rather than this Court, should decide the law applicable to PPG's claims. Standard Fruit, 937 F.2d at 478 (court's role limited to determining whether the claim falls within the scope of the arbitration clause). According to Pilkington, Atsa of Cal., Inc. v. Continental Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983), *amended,* 754 F.2d 1394 (9th Cir. 1985), stands for the proposition that, in the absence of a choice-of-law provision, the Court has no authority to determine the applicable law. Instead, argues Pilkington, only "the arbitrator has the authority to determine the applicable law." *Id.* Thus, it states that the correct procedure mandated by *Mitsubishi* is for the Court to consider the law applicable to PPG's claims only at the enforcement stage after the arbitral panel has ruled. **[**49]** The Supreme Court stated that:

> Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law **[*1480]** clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Mitsubishi, 473 U.S. at 637 n. 19. The Supreme Court further stated that:

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The [New York] Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art. V(2)(b) . . . . While the efficacy of the arbitral process requires that substantive review at the award-enforcement **[**50]** stage remain minimal, it would not require intrusive [federal court] inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.

Id. at 638.

(2) PPG's Opposition

Based on *Mitsubishi's* footnote 19, PPG argues that its claims are not subject to arbitration. Mitsubishi, 473 U.S. at 637 n. 19. According to PPG, Article XII, as applied to its antitrust claims, operates as a prospective waiver of its claims because: (1) Article XII does not permit the arbitrators to apply U.S. ***antitrust law*** to its claims; (2) English law does not permit recovery under the Sherman or Clayton Acts thereby precluding PPG from enforcing any judgment the arbitrators might issue in its favor; and (3) under Article XII, the arbitrators lack the power to alter or amend the provisions of the 1962 License Agreement.

PPG, of course, reads Articles XII and XIII as requiring the arbitrators to apply English law to all disputes "involving the meaning, interpretation, application or violation of the provisions of" the 1962 License Agreement. According to PPG, anything arbitrable under Article XII **[**51]** is to be decided under English law. PPG asserts that courts construing identical or narrower choice-of-law provisions are contrary to Pilkington's position. *See Armco Steel Co. v. CSX Corp., 790 F. Supp. 311, 318-19 (D.D.C. 1991)*. *Accord Todd Shipyards, 943 F.2d at 1061 n. 2, 1063*; *Castelan v. M/V Mercantil Parati,* Civ. A No. 91-1351, 1991 WL 83129 at *1, *3 (D.N.J. 1991).

Further, PPG disputes Pilkington's reliance on *Mitsubishi.* First, contrary to Pilkington's position, PPG asserts that the *Mitsubishi* choice-of-law provision is not broader than the one at issue here. Second, PPG states that Pilkington ignores language of the *Mitsubishi* provision that immediately follows the choice-of-law sentence quoted by Pilkington. See *Mitsubishi, 723 F.2d at 158 n. 1*. According to PPG, this subsequent language makes it clear that, despite the choice of Swiss law, the arbitrators could consider U.S. ***antitrust law***. PPG states that the 1962 License Agreement "prohibits any such flexibility." Opposition, at 27. Finally, PPG notes that: (1) Mitsubishi "conceded that American law applied to **[**52]** the antitrust claims and represented that the claims had been submitted to the panel in Japan on that basis; (2) Soler did not argue otherwise; and (3) the Supreme Court specifically refused to rule of the scope of the choice-of-law provision. *Mitsubishi, 473 U.S. at 637 n. 19*.

PPG argues that *Mitsubishi* supports the Court's prospective determination of whether the effect of Articles XII and XIII "warrant setting aside the forum-selection clause." *Id. at 632*. [7] PPG states that:

> **[*1481]** Pilkington's argument. . . that *Mitsubishi* held that consideration of this issue must await the enforcement of the award is misplaced. In *Mitsubishi,* the antitrust claims had been submitted to arbitration under U.S. law before the Court's condemnation of the case. This fact alone explains the Court's statement that, "having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *[Mitsubishi,* 473 U.S.] at 638.
>
> Pilkington's argument ignores the **[**53]** Court's reliance on cases holding that prospective waivers or releases of antitrust claims invalid. *Id.* The argument also overlooks the [FAA], which provides that a court may refuse to enforce an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract," and the [New York Convention], which provides that a court may refuse to enforce an arbitration clause if "it finds that said agreement is null and void, inoperative or incapable of being performed." *See 9 U.S.C. § 2*; New York Convention, Article II(3) (reprinted at *9 U.S.C.A. § 201 (Supp. 1992)*.

Opposition, at 29-30.

[54]** According to PPG, even if the arbitrators could apply U.S. ***antitrust law*** to its claims, the panel would still be unable to afford PPG complete relief because Article XII prevents the arbitrators from "altering, amending or adding

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[7] The full quote is as follows:

> The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)*. Moreover, the party may attempt to make a showing that would warrant setting aside the forum-selection clause--that the agreement was "affected by fraud, undue influence, or overweening bargaining power"; that "enforcement would be unreasonable and unjust"; or that proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court." *The Bremen,* 407 U.S. at 12, 15, 92 S. Ct. at 1914, 1916, 1917. But absent such a showing--and none was attempted here--there is no basis for assuming the forum inadequate or its selection unfair.

Mitsubishi, 473 U.S. at 632-33.

to the provisions of this Agreement." Thus, PPG asserts that the arbitrators would have to leave the illegal aspects of the 1962 License Agreement intact. Further, it states that no English court would enforce a judgment against Pilkington because of the English hostility to U.S. ***antitrust law*** and the United Kingdom's blocking statute.

(3) Pilkington's Reply

In reference to PPG's citation of language of the *Mitsubishi* provision that immediately follows the choice-of-law sentence quoted by Pilkington, *see* *Mitsubishi, 723 F.2d at 158 n. 1*, Pilkington states that there is no indication that the Supreme Court relied on this language in reaching its decision. It further asserts that the language stands for nothing more than "the unremarkable proposition that should a provision of the distribution agreement be found violative of any jurisdiction's laws, the remaining provisions would remain in effect." Reply, at 17. Finally, **[**55]** Pilkington notes that Article IX F. of the 1962 License Agreement is similar.

Pilkington attempts to distinguish PPG's reliance on *Armco Steel, 790 F. Supp. at 318-19*, as follows:

> First, unlike the situation in *Armco,* there is evidence in the record that the parties did not intend the Agreement's choice-of-law clause to govern all the disputes that might arise between them. *See* Crystal Decl., P 21. Second, the application of English law to this question, unlike the application of Ohio law, would not bar the arbitration of PPG's antitrust claims because there is no basis in English law prohibiting an arbitration panel sitting in London from applying the U.S. antitrust laws. (Mem. at 26-29.) Indeed, Article IX F. requires it. In addition, PPG's own barrister does not dispute this point: "I agree with Mr. Crystal's statement (para. 9) that there is no reason in public policy (or, I would add, in English law) why parties could not agree to have an antitrust dispute arbitrated in accordance with United States law in an arbitration held in England." Kentridge Decl., P 4.

Reply, at 17-18.

In rebuttal of PPG's argument that it could not enforce **[**56]** any judgment it obtained in **[*1482]** arbitration in England, Pilkington notes that this assertion is contrary to PPG's conduct in the 1988 arbitration. It further notes that PPG could seek enforcement of an arbitral award in "any court having jurisdiction under this chapter for an order confirming the award as against any other party to the Arbitration." *9 U.S.C. § 207*. *See also* *Mitsubishi, 473 U.S. at 638*. Finally, citing Mr. Kentridge's testimony at the preliminary injunction hearing, Pilkington states that such an award would not be subject to the U.K. blocking statute.

(4) Discussion

Article XII provides, in pertinent part, that "the seat of the arbitration shall be in London, and the arbitration shall be in accordance with the laws of England." The Court finds that Article XII's choice-of-law provision merely provides for the application of English law to govern the procedural aspects of the arbitration. Article XII's inclusion of the words "in accordance with" support the Court's conclusion. *See* *Mitsubishi, 473 U.S. at 617*. More importantly, if Article XII's choice-of-law provision **[**57]** was a substantive choice-of-law provision, Article XIII would be redundant. The harder question is whether Article XIII permits the arbitrators to apply U.S. ***antitrust law*** to claims in arbitration.

Article XIII of the 1962 License Agreement provides, under the heading of "Construction," that "the Agreement shall be governed by the laws of England." There is less support for Pilkington's position that Article XIII merely provides for the application of English law to contract-related claims thereby permitting the arbitrators to apply non-English law to claims that "involve" the Agreement but are not breach of contract claims. The plain language of Article XIII is quite broad.

The parties have provided conflicting expert testimony on the issue. According to the oral argument of Pilkington's counsel, which was not rebutted in any substantial fashion by PPG's counsel, the major point of disagreement between the experts is whether the English double actionability rule would preclude the application of U.S. ***antitrust law*** to the claims in arbitration independent of the question of whether Article XII or XIII would prevent it. The Court agrees with Pilkington's counsel that the resolution **[**58]** of this question requires it to decide a question of English law, for which the Court is not equipped.

If Article XIII permits the arbitrators to apply U.S. ***antitrust law*** and the double actionability rule does not preclude it, however, the Supreme Court has seemingly closed the door to any thoughts that arbitrators cannot handle complex antitrust cases. In *Mitsubishi,* the Supreme Court stated that:

> ***HN14***[] Potential complexity should not suffice to ward off arbitration . . . . In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal. Moreover, it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense within manageable bounds that prompts them mutually to forgo access to judicial remedies.

Mitsubishi, 473 U.S. at 633.

The Supreme **[**59]** Court has cautioned the lower courts that "there ***HN15***[] is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate forum." *Id. at 636*. Here, however, it is unnecessary to rely on a presumption that an English arbitration pursuant to Article XII will not operate as a waiver of PPG's statutory claims. At oral argument, Pilkington's counsel expressly represented that PPG's claims will be arbitrated pursuant to the substantive antitrust laws of the United States and that Pilkington consents to arbitration on that basis. Thus, as the district court stated in *In re Hops Antitrust Litig.:*

> Under the circumstances, the Court does not now find either (a) the [English] arbitration **[*1483]** proceedings will be so "gravely difficult or inconvenient," or (b) the operation of the choice of forum and choice-of-law provisions will prohibit pursuit of plaintiff's antitrust claims, as to support a court order not enforcing the parties' arbitration agreement.

In re Hops Antitrust Litig., 655 F. Supp. at 172. The Court expressly refers PPG's claims to arbitration under Article XII based on Pilkington's **[**60]** representation and consent to the substantive arbitration of PPG's claims pursuant to U.S. ***antitrust law***. As noted by Pilkington's counsel at oral argument, the Court may, and certainly will, withdraw the reference to arbitration if U.S. ***antitrust law*** does not govern the substantive resolution of PPG's claims. In addition, the Court directs that any damages determination, or arbitral award, made by the arbitrators shall be determined according to U.S. ***antitrust law*** irrespective of any conflict that may exist between those laws and the laws of England. Finally, the Court will retain jurisdiction over this matter in order to ensure that the arbitration directed by this Order is conducted in accordance with the Order.

CONCLUSION

The Court finds that PPG's allegations regarding monopoly power and the existence of a dangerous probability thereof are sufficiently well pleaded to withstand a *Rule 12(b)(6)* motion. *See* *Newman, 813 F.2d at 1522*. The Court will therefore deny Pilkington's Motion to Dismiss.

The Court finds that PPG's antitrust claims are arbitrable under the 1962 License Agreement. It further finds that arbitration under the Agreement's **[**61]** choice-of-forum and choice-of-law provisions will not operate as a prospective waiver of PPG's statutory claims due to Pilkington's express representation and consent to the substantive arbitration of PPG's claims pursuant to U.S. ***antitrust law***. The Court will therefore grant Pilkington's Motion to Stay Proceedings and Compel Arbitration.

Accordingly, IT IS ORDERED that:

(1) Defendants' December 18, 1992 Motion to Dismiss Counts Four and Five is DENIED; and

(2) Defendants' December 18, 1992 Motion to Stay Proceedings and Compel Arbitration is GRANTED.

IT IS FURTHER ORDERED that any damages determination, or arbitral award, made by the arbitrators shall be determined according to U.S. ***antitrust law*** irrespective of any conflict that may exist between those laws and the laws of England.

IT IS FURTHER ORDERED that the Court retains jurisdiction over this matter in order to ensure that the arbitration directed by this Order is conducted in accordance with the Order.

Dated this 9th day of July 1993.

William D. Browning

U.S. District Judge

Petruzzi's IGA Supermarkets v. Darling-Delaware Co.

United States Court of Appeals for the Third Circuit

June 7, 1993, Argued ; July 13, 1993, Filed

No. 92-7481

Reporter

998 F.2d 1224 *; 1993 U.S. App. LEXIS 17424 **; 1993-1 Trade Cas. (CCH) P70,293; 39 Fed. R. Evid. Serv. (Callaghan) 234

PETRUZZI'S IGA SUPERMARKETS, INC. v. DARLING-DELAWARE COMPANY, INC; THE STANDARD TALLOW CORP.; MOYER PACKING COMPANY; HERMAN ISACS, INC. Petruzzi's IGA Supermarkets, Inc. and the class it represents, Appellant

Prior History: [1]** On Appeal From the United States District Court for the Middle District of Pennsylvania. Civil Action No. 86-0386.

Core Terms

prices, district court, conspiracy, summary judgment, put forward, competitors, antitrust, defendants', expert testimony, customers, bid, conspired, retaliation, tapes, concerted action, new account, memorandum, soliciting, motive, raw material, conversations, economists, circumstantial evidence, factors, deposition, collusion, proffered, bother, cases, circumstances

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Sherman Act, Claims**

To establish a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a product plaintiff must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to the concerted action were illegal; and (4) that it was injured as a proximate result of the concerted action.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Standards of Review, De Novo Review**

The appellate courts review the district court's summary judgment determination de novo, applying the same standard as the district court. A non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case. Rather, in all cases summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law. Where the movant has produced evidence in support of its motion for summary judgment, the nonmovant cannot rest on the allegations of pleadings and must do more than create some metaphysical doubt.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] **Summary Judgment, Evidentiary Considerations**

At the summary judgment stage, a court is not to weigh the evidence or make credibility determinations. Instead, these tasks are left for the fact-finder. To raise a genuine issue of material fact, therefore, the summary judgment opponent need not match, item for item, each piece of evidence proffered by the movant, but simply must exceed the mere scintilla standard. Additionally, a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > Inferences

Evidence > Inferences & Presumptions > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

As in other cases, a nonmovant plaintiff in a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, case does not have to submit direct evidence, i.e., the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence. Furthermore, where the nonmovant has put forward evidence which it contends allows for an inference of a *§ 1* violation, the movant defendant bears the burden of proving that drawing an inference of unlawful behavior is unreasonable. Nonetheless, in drawing favorable inferences from underlying facts, a court must remember that often a fine line separates unlawful concerted action from legitimate business practices. Thus, in antitrust cases, care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendants' freedom.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

Evidence which is equally consistent with legal and illegal conduct, standing alone, cannot support an inference of antitrust conspiracy.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN6[] **Summary Judgment, Evidentiary Considerations**

To survive summary judgment in an antitrust case in the absence of direct evidence or strong circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible. The inferences drawn from the proffered evidence must be reasonable.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > General Overview

HN7[] **Summary Judgment, Entitlement as Matter of Law**

The acceptable inferences from circumstantial evidence which can be drawn by the court in deciding a summary judgment motion in an antitrust case vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

HN8[] **Antitrust & Trade Law, Sherman Act**

In cases under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, it is unnecessary for a court to engage in the exercise of distinguishing strong circumstantial evidence of concerted action from direct evidence of concerted action for both are sufficiently unambiguous.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Proof of opportunity to conspire, in the context of antitrust, without more, will not sustain an inference that a conspiracy has taken place.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN10[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

For testimony to be excluded under *Fed. R. Evid. 403*, its probative value must be substantially outweighed by the listed dangers, rather than simply not more probative than prejudicial.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Rule Application & Interpretation

HN11[] **Standards of Review, De Novo Review**

While ordinarily the appellate courts review a district court's admissibility rulings under an abuse of discretion standard, when the court's ruling turns on an interpretation of a Federal Rule of Evidence the appropriate standard of review is plenary.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN12[] **Testimony, Expert Witnesses**

See *Fed. R. Evid. 702*.

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Scientific Evidence > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN13[] **Admissibility, Expert Witnesses**

There are three intertwined bases for excluding testimony under *Fed. R. Evid. 702*: (1) if the testimony will not assist the trier of fact; (2) if scientific evidence is not sufficiently reliable; and (3) if the particular expert does not have sufficient specialized knowledge to assist the jurors.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN14[] **Testimony, Expert Witnesses**

See *Fed. R. Evid. 703*.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

HN15[] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

While *Fed. R. Evid. 403* can be used to exclude expert testimony before trial, if expert testimony survives the rigors of *Fed. R. Evid. 702* and *703*, then *Fed. R. Evid. 403* becomes an unlikely basis for exclusion, especially in the pretrial setting. Moreover, *Fed. R. Evid. 702* incorporates the danger of unfair prejudice; therefore, if a court were to exclude expert testimony under *Fed. R. Evid. 403* it seemingly would have to be on some other basis, such as confusion of the issues or waste of time.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN16[] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

A court cannot fairly ascertain the potential relevance of evidence for *Fed. R. Evid. 403* purposes until it has a full record relevant to the putatively objectionable evidence.

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Civil Procedure > Pretrial Matters > General Overview

HN17[] Conferences, Pretrial Orders

Fed. R. Evid. 403 is a trial-oriented rule. Precipitous *Fed. R. Evid. 403* determinations, before the challenging party has had an opportunity to develop the record, are therefore unfair and improper. In order to exclude evidence under *Fed. R. Evid. 403* at the pretrial stage, a court must have a record complete enough on the point at issue to be considered a virtual surrogate for a trial record.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN18[] Jury Trials, Jury Instructions

Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Yet, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

HN19[] **Monopolies & Monopolization, Attempts to Monopolize**

In addition to proving concerted action through testimonial and economic evidence, an antitrust plaintiff can establish concerted action through the defendants' behavior standing alone. While mere consciously parallel behavior alone is insufficient to prove a conspiracy, it is circumstantial evidence from which, when supplemented by additional evidence, an illegal agreement can be inferred. In addition to establishing consciously parallel behavior by the defendants, a plaintiff also must show the existence of certain plus factors, including: (1) actions contrary to the defendants' economic interests, and (2) a motivation to enter into such an agreement.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN20[] **Monopolies & Monopolization, Conspiracy to Monopolize**

To establish a conspiracy based on consciously parallel behavior, a plaintiff must show: (1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making processes; and (3) certain plus factors.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN21[] **Monopolies & Monopolization, Conspiracy to Monopolize**

In proving a conspiracy to monopolize, a plaintiff need not prove the defendants share the same motive. Rather, all that is required is that they each have a motive to conspire.

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Judges: BEFORE: GREENBERG, NYGAARD, and LEWIS, **[**2]** Circuit Judges.

Opinion by: GREENBERG

Opinion

[*1228] OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

Petruzzi's IGA Supermarket, Inc. (Petruzzi's IGA), for itself and on behalf of the class it represents, appeals from the district court's July 31, 1992 order entering summary judgment in favor of defendants Darling-Delaware Company, Inc. (Darling), The Standard Tallow Corp. (Standard), and Moyer Packing Company (Moyer). Petruzzi's IGA does not appeal from an earlier order of the district court dismissing a fourth defendant, Herman Isacs, Inc., pursuant to *Fed. R. Civ. P. 12(b)(2)* because of a lack of personal jurisdiction. *See* *677 F. Supp. 289 (M.D. Pa. 1987)*. [1] In its complaint, Petruzzi's IGA alleged that the defendants conspired to allocate customers in the fat and bone rendering industry in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*. However, after considering the evidence put forward by Petruzzi's IGA in response to the defendants' motions for summary judgment, the district court concluded that Petruzzi's IGA failed to raise a genuine issue of material fact to controvert the defendants' denial that there was a conspiracy **[**3]** among the remaining defendants. District Court's Opinion (Opin.) at 65. Because we disagree in part with the district court's view of the evidence and in part with its application of the appropriate legal standards, we will reverse its July 31, 1992 order insofar as it granted summary judgment to Darling and Moyer. However, because we agree that the evidence put forward does not tend to exclude the possibility that Standard acted independently, *see* *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984)*, we will affirm the district court's grant of summary judgment to Standard. [2]

[4]** I.

BACKGROUND

This case involves an allegation of a restraint of trade in the fat and bone rendering industry. In this industry, rendering companies, such as the defendants, purchase inedible fats, bones, suet, and meat trimmings (raw materials) from suppliers, such as butcher shops, supermarkets, restaurants, hotels, and government agencies. These companies then process the raw materials into finished products such as tallow, grease, animal feed, and fertilizer.

On March 14, 1986, Petruzzi's IGA filed a class action in the United States District Court for the Middle District of Pennsylvania against Darling, Standard, Moyer, and Herman Isacs, Inc., alleging that from as early as January 1, 1977, to at least December 31, 1985, the defendants conspired to allocate existing raw material accounts in the fat and bone rendering industry in parts of Pennsylvania, New Jersey, and Connecticut. According to the complaint, the defendants violated *section 1* of the Sherman Act by: (1) agreeing to refrain from soliciting accounts serviced by the other defendants; (2) submitting collusive and rigged bids to certain accounts; (3) settling "allocation disputes," where one competitor acquired an account **[**5]** owned by a competitor, by requiring the former to return the account or transfer an account of equal tonnage to the wronged renderer; and (4) urging other renderers to join the conspiracy. Complaint PP 15-17, App. at 141-42. Petruzzi's IGA contends that those competitors of the defendants who refused to abide by these "rules" were targeted by other renderers in an effort to keep them in line. For example, if Rendering Company A offered a higher price for the raw materials from an account which was **[*1229]** being serviced by one of the defendants, then that defendant or perhaps another participant in the conspiracy would respond by offering higher, above-market prices on Company A's other accounts. According to Petruzzi's IGA, because of the defendants' superior financial resources, such predatory tactics ensured that competitors either complied with the rules, sold out to the defendants, or entered bankruptcy. Brief at 5. Petruzzi's IGA does not contend the defendants conspired with respect to new accounts, but only that once the account was won or "loaded," others stayed away or at most put forward sham bids.

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[1] On July 31, 1992, the district court also issued a separate memorandum and order denying the defendants' motion to revoke the conditional class certification. The defendants have not cross-appealed from that order.

[2] We have jurisdiction pursuant to *28 U.S.C. § 1291*. The district court had subject matter jurisdiction over this antitrust action for damages and injunctive relief pursuant to *28 U.S.C. §§ 1331*, *1337* and *15 U.S.C. §§ 15*, *26*.

On April 1, 1991, the three defendants remaining after the dismissal of Herman Isacs, **[**6]** Inc., moved for summary judgment, citing an absence of evidence of concerted action. In response to these motions, Petruzzi's IGA submitted a large amount of evidence which it contended demonstrated the existence of an agreement among the remaining defendants. Of significance, Petruzzi's IGA submitted: (1) testimony from Howard Salisbury and Ralph Ebersole, two former employees of Moyer; (2) secretly taped recordings of conversations between principals of Ryder Rendering Company, a former competitor of the defendants, and principals of Moyer (the Ryder tapes); (3) testimony of two economists who concluded that the defendants conspired not to compete for existing raw material accounts; (4) deposition testimony of representatives of the defendants; (5) a memorandum prepared by Michele Ellerin, the former wife of Lee Ryder, a co-owner of Ryder Rendering (the Ellerin memorandum); (6) records of five past civil and criminal antitrust actions involving the defendants and/or their employees; (7) phone records of the defendants and their principals indicating numerous phone calls to each other over the years; and (8) evidence of socializing by principals of the defendants. Petruzzi's IGA's **[**7]** evidence describes the limited nature of competition for existing accounts and several instances of retaliation against noncomplying rendering companies.

Despite this evidence, the district court granted the defendants summary judgment because it determined that Petruzzi's IGA had not put forward evidence which tended to exclude the possibility that the defendants acted independently. Opin. at 65. In addition, the court stated that summary judgment was appropriate because the defendants "have met plaintiff's evidence with plausible business reasons justifying the conduct called into question." Opin. at 66. Petruzzi's IGA then appealed.

II.

DISCUSSION

In this appeal, we once again consider what evidence an antitrust plaintiff alleging a violation of *section 1* of the Sherman Act [3] must put forward to defeat a motion for summary judgment. ***HN1***[] To establish a *section 1* violation, a product plaintiff must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to the concerted action were illegal; and (4) that it was injured as a proximate result of the concerted action. *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1541 (3d Cir. 1990),* **[**8]** *cert. denied*, *113 L. Ed. 2d 246, 111 S. Ct. 1313 (1991)*; *Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482, 1489 (3d Cir. 1985)*, *vacated for further reconsideration*, *475 U.S. 1105, 106 S. Ct. 1509 (1986)*. Without proof of all of these elements, a plaintiff cannot maintain a *section 1* claim.

As was the case here, at the summary judgment stage antitrust defendants often maintain that the plaintiff has not offered sufficient proof that they acted in concert and accordingly did not satisfy the first element of a *section 1* claim. *See*, *e.g.*, *Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1364 (3d Cir. 1992),* **[**9]** **[*1230]** *cert. denied*, *113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993)*. And, as noted above, the district court agreed with the defendants. Petruzzi's IGA argues that the district court erred in this determination because it proffered evidence sufficient to allow a reasonable jury to conclude that the defendants acted in concert. Petruzzi's IGA asserts that the district court not only improperly discounted evidence that supported an inference of collusion, but also improperly compartmentalized the evidence Petruzzi's IGA put forth.

A. *The Summary Judgment Standard*

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[3] *Section 1* states in relevant 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 . . . .

15 U.S.C. § 1.

HN2[] We review the district court's summary judgment determination *de novo*, applying the same standard as the district court. [4] As this court recently reiterated, "A non-movant's burden in defending against summary judgment in an antitrust case is no different than in any other case." *Big Apple BMW, 974 F.2d at 1363*. Rather, in all cases summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and **[**10]** the moving party is entitled to judgment as a matter of law. Where the movant has produced evidence in support of its motion for summary judgment, the nonmovant cannot rest on the allegations of pleadings and must do more than create some metaphysical doubt.

HN3[] However, at the summary judgment stage, a court is not to weigh the evidence or make credibility determinations. *Id. at 1363*. Instead, these tasks are left for the fact-finder. To raise a genuine **[**11]** issue of material fact, therefore, "the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant," but simply must exceed the "mere scintilla" standard. *Id*. Additionally, a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action. *Id. at 1364* (citing *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 1410, 8 L. Ed. 2d 777 (1962))*; *In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 305 (3d Cir. 1983)*, *rev'd on other grounds sub nom.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

HN4[] As in other cases, a nonmovant plaintiff in a *section 1* case does not have to submit direct evidence, *i.e.*, the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence. [5] *Big Apple BMW, 974 F.2d. at 1364*; **[**12]** *In re Japanese Elec. Prods., 723 F.2d at 304*. Furthermore, where the nonmovant has put forward evidence which it contends allows for an inference of a *section 1* violation, the movant defendant bears the burden of proving that drawing an inference of unlawful behavior is unreasonable. *Big Apple BMW, 974 F.2d at 1363-64* (citing *Eastman Kodak Co. v. Image Technical Servs., Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2083 (1992))*. Nonetheless, in drawing favorable inferences from underlying facts, a court must remember that often a fine line separates unlawful concerted action from legitimate business practices. Thus, we have noted that in antitrust cases, "care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendants' freedom." *Big Apple BMW, 974 F.2d at 1363*.

[13]** To understand exactly what inferences are circumscribed in a *section 1* case, we must examine closely the Supreme Court's decision in *Matsushita Electrical Industries Co.* ***[*1231]*** *v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. In *Matsushita*, the plaintiffs, American manufacturers of television sets, alleged that the defendants, Japanese manufacturers of consumer electronic products (CEP), conspired to fix prices *below* market level so as to drive the American manufacturers from the American CEP market. According to the plaintiffs, the defendants financed this strategy through monopoly profits earned in the Japanese market. Thus, the plaintiffs put forward evidence suggesting, *inter alia*, that the defendants earned monopoly profits in the Japanese market; that they agreed to distribute their products according to a "five company rule," whereby each competitor was allowed to sell to only five American distributors; that they reached agreements with Japan's Ministry of International Trade and Industry on minimum prices for CEP exported to the American market; and that they avoided these agreements through rebate schemes. *Id. at 580-81, 106 S. Ct. at 1353.* **[**14]**

The district court granted the defendants summary judgment. *See 513 F. Supp. 1100 (E.D. Pa. 1981)*. We then reversed in part, holding that the plaintiffs had put forward sufficient evidence from which a conspiracy reasonably

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[4] The district court did not discuss whether Petruzzi's IGA established a genuine issue of material fact with respect to the other three elements of a *section 1* claim. Likewise, the defendants have not argued to this court that Petruzzi's IGA's evidence falls short with respect to these other elements. Accordingly, we do not consider them in this appeal. Rather, we assess only whether Petruzzi's IGA has put forth enough evidence regarding the defendants' alleged concerted action to withstand the defendants' motions for summary judgment.

[5] Of course, contrary to popular thought a smoking gun might be mere circumstantial evidence unless the witness saw it fired.

could be inferred. *See In re Japanese Elec. Prods., 723 F.2d at 303-16*. On certiorari, the Supreme Court reversed our decision. The Court stated that because the plaintiffs' theory of conspiracy did not make sense from an economic standpoint, the ambiguous evidence of a conspiracy they put forward was insufficient to withstand summary judgment. Instead, in the circumstances, the plaintiffs needed to provide "more persuasive evidence to support their claim than would otherwise be necessary." *475 U.S. at 587, 106 S. Ct. at 1356*. The Court emphasized that ***HN5***[] evidence which is equally consistent with legal and illegal conduct, standing alone, cannot support an inference of antitrust conspiracy. *Id. at 588, 106 S. Ct. at 1356* (citing *Monsanto, 465 U.S. at 764, 104 S. Ct. at 1470*). **[**15]**

In reaching its decision the Supreme Court first noted that the alleged predatory pricing conspiracy was speculative at best because it required the defendants to agree to forego profits that a free market would offer them. The Court then stated that the only way such a conspiracy would make any sense was if the defendants could recoup their losses in the future through monopoly profits. *475 U.S. at 588-89, 106 S. Ct. at 1357*. The Court, however, looked at the market and determined that there was no evidence that the defendants could recoup such losses. Thus, the Court concluded that the defendants had no motive to engage in the alleged conspiracy. *Id. at 592-93, 106 S. Ct. at 1359*. The Court further recognized that the alleged unlawful behavior was equally consistent with lawful behavior because "cutting prices in order to increase business often is the very essence of competition." *Id. at 594, 106 S. Ct. at 1360*.

Importantly, however, in reaching its conclusion the *Matsushita* Court did not hold that an antitrust defendant is entitled to summary judgment **[**16]** merely by providing *an* economic theory to justify its behavior. *See Eastman Kodak Co. v. Image Technical Servs., Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2083 (1992)* ("The [*Matsushita*] Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." (emphasis in original)); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990)* ("Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct."), *cert. denied*, *111 S. Ct. 2274 (1991)*. Instead, the Court simply stressed that ***HN6***[] to survive summary judgment in the absence of direct evidence or strong circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible. *Matsushita, 475 U.S. at 593-94, 106 S. Ct. at 1359-60.* **[**17]** In this respect, then, *Matsushita* did not invent a new requirement for an antitrust plaintiff to meet, but merely articulated an established one, *i.e.*, the inferences drawn from the proffered evidence must be reasonable. *See Eastman Kodak Co.,* ***[*1232]*** *112 S. Ct. at 2083*. Therefore, contrary to the district court's reasoning in our case, the defendants were not entitled to summary judgment simply because they demonstrated a plausible rationale for their behavior. Rather, the focus must remain on the evidence proffered by the plaintiff and whether that evidence "tends to exclude the possibility that [the defendants] were acting independently." *Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471*.

B. *Applying The Lessons of* ***Matsushita*** *to This Case*

As just indicated, two important circumstances underlying the Court's decision in *Matsushita* were (1) that the plaintiffs' theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances "would have the effect of deterring *significant* procompetitive conduct." *In re Coordinated Pretrial Proceedings, 906 F.2d at 439* **[**18]** (emphasis added to reflect tenor of court's holding). In particular, the *Matsushita* Court worried that if it allowed mistaken inferences to be drawn from the defendants' price-cutting policies, it would chill procompetitive behavior. *See Matsushita, 475 U.S. at 594, 106 S. Ct. at 1360*. Thus, the Court stated that ***HN7***[] the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences. *See id. at 587, 594, 106 S. Ct. at 1356, 1360*; *see also In re Coordinated Pretrial Proceedings, 906 F.2d at 439-40* (noting that Court's concern in *Matsushita* about deterring procompetitive behavior led to limitations on inferences it was willing to make).

Here, in stark contrast with the circumstances in *Matsushita*, the plaintiff's theory of conspiracy is not implausible. In fact, it makes perfect economic sense. In particular, if Petruzzi's IGA is correct, the defendants' action would enable them to make profits that the free market would not allow them, in both the **[**19]** short-run and the long-run. Because the defendants provided a homogeneous service, [6] the only true basis for competition among them was price. Therefore, the only way for the defendants to curtail competition was by agreement. Moreover, because the sellers were selling a by-product of their everyday operations that required disposition, they had an inelastic supply curve, *i.e.*, the amount they were willing to sell was not highly dependent on the price they were offered, and they did not have much bargaining power absent competition from the renderers. *See* Richard A. Posner, *Economic Analysis of Law* 267-68 (3d ed. 1986) (discussing factors that make collusion likely).

[20]** Also in direct contrast to *Matsushita*, the defendants' challenged activities are not procompetitive. After all, refusing to bid on accounts hardly can be labelled as the "very essence of competition." *Matsushita, 475 U.S. at 594, 106 S. Ct. at 1360*. Therefore, given the circumstances of this case, more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present.

Nonetheless, the mere facts that a plaintiff alleges a plausible conspiracy and that that allegation does not threaten to chill procompetitive behavior do not mean that there are no restrictions on the inferences that can be drawn from the evidence it puts forward. For example, the cases indicate that a plaintiff cannot withstand a summary judgment motion by establishing only consciously parallel behavior on the part of the defendants. *See Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 74 S. Ct. 257, 259-60, 98 L. Ed. 273 (1954)*; *In re Japanese Elec. Prods., 723 F.2d at 304.* **[**21]** Instead, in a conscious parallelism case, a plaintiff also must demonstrate the existence of certain "plus" factors, for only when these additional factors are present does the evidence tend to exclude the possibility that the defendants acted independently. **[*1233]** *See In re Japanese Elec. Prods., 723 F.2d at 304*.

C. *The Lessons of* ***Matsushita*** *- Part Two*

In its decision, the district court stated that if a plaintiff provided direct evidence of a conspiracy, then the strictures of *Matsushita* did not apply. Opin. at 12; *see also In re Coordinated Pretrial Proceedings, 906 F.2d at 440-41* (drawing this conclusion). This statement is undeniably true, for no inferences are required from direct evidence to establish a fact and thus a court need not be concerned about the reasonableness of the inferences to be drawn from such evidence. However, this conclusion does not mean that all circumstantial evidence should be treated alike. Rather, the focus in *Matsushita* was on *ambiguous* evidence, *see Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356* ("But ***antitrust law*** limits the **[**22]** range of permissible inferences from ambiguous evidence in a *§ 1* case."), and what inferences *reasonably* could be drawn from that type of evidence. The Supreme Court did not draw a distinction between direct evidence on the one hand and circumstantial evidence on the other. Rather, it stated that in the absence of a plausible theory of conspiracy, a court must consider whether the plaintiff put forward "sufficiently unambiguous" evidence that the defendants conspired. *Matsushita, 475 U.S. at 597, 106 S. Ct. at 1362*. Therefore, ***HN8***[] in *section 1* cases, it is unnecessary for a court to engage in the exercise of distinguishing strong circumstantial evidence of concerted action from direct evidence of concerted action for both are "sufficiently unambiguous." [7] Moreover, in this case, such an exercise is doubly unnecessary because Petruzzi's IGA's theory is not implausible.

D. *The Evidence*

[23]** Before detailing the evidence put forward by Petruzzi's IGA, we pause to stress the nature of its allegations because it is important to keep it in mind when considering the evidence. Although Petruzzi's IGA alleges that the defendants' actions had an impact on prices, it does not contend that the defendants conspired to fix prices *per se*.

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[6] The service provided by the renderers was homogeneous in that they all did the same thing, pick up the materials. In this case, the materials sold by the suppliers was for the most part homogeneous as well. Accordingly, the renderers would have no reason to be concerned about who supplied them with raw materials. The only exception is that Standard did not pick up suet and meat trimmings, but only fat and bones, which the industry calls "ice cream."

[7] In fact circumstantial evidence could be quite compelling. *See* note 5 *supra*.

Also Petruzzi's IGA's ultimate goal is not to prove that the defendants priced predatorily. Rather, it seeks to show only that the defendants conspired to allocate customers so that once a renderer had won or "loaded" an account, competition for that account effectively ceased. Thus, with respect to the evidence relating to pricing, Petruzzi's IGA does not need to show that prices across the industry were suspiciously similar, or that the defendants priced predatorily. Rather, it need demonstrate only that the prices paid by the defendants differed significantly between new and existing accounts for such data would be consistent with its theory that competition was restrained unlawfully only on existing accounts.

In essence, Petruzzi's IGA contends that the defendants created a cartel to ensure that prices for raw materials would be artificially **[**24]** low. Game theory teaches us that a cartel cannot survive absent some enforcement mechanism because otherwise the incentives to cheat are too great. *See* Posner, *supra*, at 265-66; George J. Stigler, *A Theory of Oligopoly*, *in The Organization of Industry* 39, 42-44 (1968). Here, Petruzzi's IGA contends that the defendants enforced their agreement by "targeting" the noncomplying companies, *i.e.*, bidding on their accounts predatorily. Thus, to the extent that there is testimony regarding the defendants pricing above market, it is relevant not to establish a predatory pricing violation by a particular defendant, but to show the enforcement mechanism used by the defendants to enforce their agreement. Instances of predatory pricing, therefore, are circumstantial evidence that an unlawful agreement exists.

With this background, we now turn to the evidence put forward by Petruzzi's IGA. We consider this evidence as a whole and with the reasonable inferences that we can draw from it. Such a consideration reveals that while a reasonable jury could conclude that Darling and Moyer acted in concert, it could not find that Standard took part in this conspiracy.

1. *Testimony* **[**25]** *of an Agreement between Moyer and Darling*

Howard Salisbury, a solicitor for Moyer during the early 1980s, testified that Moyer **[*1234]** followed a "code" in not soliciting the accounts of other renderers, particularly Darling. Likewise, Ralph Ebersole testified that representatives of Moyer and Darling discussed price-fixing and other customer problems while at National Renderers Association (NRA) meetings. The district court dismissed the significance of their testimony, however, stating that neither man knew whether this adherence to the "code" flowed from conversations between representatives of the defendants. Rather, the district court said that all that could be inferred from these statements was that Moyer adhered to a code of noninterference. Opin. at 23-24. Our reading of the record shows otherwise.

Salisbury signed a written statement stating, "I did not bother Darling accounts. Mr. Sage [a high-level Moyer solicitor] told me on at least two occasions that there was a *mutual agreement and understanding with Darling*, not to bother their accounts." App. at 2228 (emphasis added). When discussing this statement during his deposition, Salisbury stated that Sage told him: "there **[**26]** was an understanding." App. at 2212. While Salisbury later testified that he was not told of any understanding or agreement that Moyer had with any other company, App. at 2216, he did not retract his statement as to Darling. [8] In fact, Salisbury testified:

> I told [Mr. Rubin and Mr. Keiser, lawyers for Petruzzi's **[**27]** IGA] that there was an agreement or understanding. I also explained to Mr. Kaiser (sic) it has been going on ever since I have been in the business. Ever since 1969. It was something that everybody done (sic).

App. at 2224.

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[8] Darling discounts the meaning of Salisbury's testimony by pointing out that Salisbury was not aware of any meeting with Darling. Darling's Brief at 9. However, this fact simply means that Salisbury could not supply direct evidence of an agreement. It does not diminish the value of his circumstantial evidence. Similarly, Darling asserts that the only reason that Salisbury was told this was because the stores were under contract. *Id*. at 9. However, this narrow construction of Salisbury's more general statements is not appropriate, at least at the summary judgment stage, especially considering that later in the deposition Salisbury reaffirmed his assertion that an agreement existed. *See* App. at 2224.

Like Salisbury, Ralph Ebersole also provided evidence of an agreement between Moyer and Darling. Ralph Ebersole was the Director of Marketing for Finished Products at Moyer from 1974 to 1979. He took this job after his company sold out to Moyer, but he left to start his own company once his five-year contract with Moyer was up. Because he was not involved directly with the purchase of raw materials, Ebesole's testimony relates mostly to the meetings between other renderers at the NRA meetings which he attended.

Ebersole testified at his deposition that he is not currently a member of the NRA because he did not agree with what went on in those meetings, *e.g.*, discussions about "keeping prices down." App. at 843. He testified that while attending the NRA meetings for Moyer, he saw John Hendricks of Moyer and Earl Englemyer of Darling discussing customer problems. App. at 846-47, 899. He also testified that Sage of Moyer and Englemyer discussed inquiries that **[**28]** Moyer was receiving from Darling's customers relating to the prices they were being paid. Sage apparently informed Englemyer that Moyer could not explain to Darling's customers why it would not pick up the raw materials from them. App. at 852. From this testimony, a reasonable jury could conclude that Moyer and Darling were acting in concert.

Moreover, Ebersole's testimony suggests that Moyer did not limit its attempts to conspire to Darling. Ebersole testified that a principal at Southern Tier, a renderer which is not a party to this action, informed him that Sage approached him about working out a relationship in which each company would stay away from the other's customers. App. at 860. [9] He further testified about **[*1235]** overhearing conversations between Sage and Ryder principals about not soliciting the accounts of others. App. at 866-67. While neither Ryder nor Southern Tier are defendants, this testimony does suggest that Moyer pursued a course of doing business through agreements with its competitors, thereby supporting a damaging interpretation of the other testimony put forward by Petruzzi's IGA.

[29]** However, there is no reference to Standard in either Salisbury's or Ebersole's testimony. While Ebersole did testify that representatives from Moyer, Darling, and Standard socialized, App. at 849, he did not relate any instance where representatives from Standard participated in discussions regarding the allocation of accounts. Thus, at best, Ebersole's testimony establishes that Standard had the opportunity to conspire. Yet, as we previously have pointed out, "***HN9***[] Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." *Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 894 (3d Cir.)*, *cert. denied*, *454 U.S. 893, 102 S. Ct. 390, 70 L. Ed. 2d 208 (1981)*. Here, there is nothing more to implicate Standard.

2. *The Ryder Tapes*

In March 1983, Lee Ryder and his cousin Kent Ryder secretly taped four of their conversations with John Hendricks and Curt Moyer of Moyer Packing. Lee and Kent Ryder were co-owners of Ryder Rendering Co. before it sold out to Darling. Ryder Rendering was having problems with Moyer and sought to obtain evidence to give to the Justice Department for **[**30]** a possible antitrust action. Although the Ryders hoped to gain evidence to use against Moyer, Lee Ryder maintained in his deposition that he did not suspect collusion in the rendering industry. App. at 1887-89. Similarly, Kent Ryder testified that the tapes were made only with the intention of suing Moyer. App. at 1985. The Ryders insisted that they made the tapes only because they suspected Moyer of pricing predatorily. However, the Ryders' stated beliefs are not relevant for summary judgment purposes. Rather, the words on the tapes can speak for themselves. These words, like the testimony of Salisbury and Ebersole, suggest the existence of an agreement in the industry of which Moyer was a part.

The district court considered these tapes, but ruled that they were insufficient to establish the existence of a conspiracy. The district court dismissed the significance of this testimony for primarily two reasons. First, it noted that the Ryders were trying to trap the Moyer representatives into saying something incriminating. Second, the court found that most of the statements revolved around Ryder's solicitation of A&B Rendering of Allentown, with which

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[9] While this statement as it stands now is hearsay, in this circuit it can be considered on a motion for summary judgment because it is capable of being admissible at trial. *See* *J.F. Feeser, Inc., 909 F.2d at 1542*. Petruzzi's IGA simply has to produce the Southern Tier principal to give this testimony. In any event, our result would be the same even if we ignored Ebersole's testimony on this point.

Moyer may have had a five-year contract. **[**31]** [10] Opin. at 33-40. However, as Petruzzi's IGA points out, while the conversations may have been inspired by problems associated with A&B, the statements on the tapes are not limited to problems with the A&B account.

For example, in a meeting on March 11, 1983, John Hendricks and Lee Ryder began by discussing the problems with A&B. However, during this conversation, Hendricks told Ryder:

> Well -- you know the feeling of everybody. This isn't the first conversation we've had, and it's not the first conversation you've had with anybody else about taking people's accounts.

App. at 300. From this statement, a rational jury could conclude that Moyer and other renderers had spoken to Ryder about taking existing accounts. In fact, this conclusion is supported by other comments made by Hendricks. In a meeting the next day, Hendricks told Lee Ryder:

> You're blatantly taking -- you're blatantly taking accounts that have been existing with Moyer **[**32]** Packing. Now, that's what you are doing, you know that. And I'm **[*1236]** not the first one that ever talked to you about it. *You're not playing*.

App. at 305 (emphasis added).

Hendricks also told Lee Ryder: (1) "why don't you put your prices in line and make money on what you have?" App. at 299; (2) "why don't you just operate with what you have and not worry about what other people have," App. at 293; (3) "the only restrictions that you have on operating your business is; don't take other people's accounts," App. at 298; and (4) "yeah, but you're interfering with other people's business*es*, that's the problem -- that's the problem," App. at 298 (emphasis added). From all of these statements, a jury reasonably could conclude that Hendricks, acting on behalf of Moyer, was attempting to get the Ryders to play by the industry rules and that Moyer was part of an agreement among some renderers.

As noted, the district court discounted these statements because they related to a particular problem with A&B. However, even the comments pertaining directly to A&B suggest a more pervasive problem. For instance, in a March 9, 1983 conversation between Curt Moyer and Kent Ryder, Moyer told **[**33]** Kent Ryder: "I certainly don't want to start anything; you know what I mean. . . . Pretty, pretty heavy. So I don't know, somebody, something got away from somebody or just what happened, but that's what it is." App. at 282. Similarly, Hendricks told Lee Ryder, "I put A&B out of the rendering business and I loaded it." App. at 291; "you shouldn't solicit [A&B], that's right. I mean, now, uh, you knew that for the last five years." App. at 292; and "it's not an auction. Is it?" App. at 306. Again, a reasonable inference is that Moyer was attempting to get Ryder to play by the rules.

However, like the testimony of Salisbury and Ebersole, none of the statements in the Ryder tapes implicates Standard. In fact, Hendricks made the only reference to Standard in the tapes when he asked Lee Ryder why he was bothering his accounts and not Darling's or Standard's accounts. App. at 293. This statement in no way implicates Standard, for one cannot infer reasonably that this statement indicates that Standard had an agreement with Moyer. Petruzzi's IGA has argued that this statement shows that Moyer was aware of what was going on at Standard. However, the record reveals that it was easy to determine **[**34]** who had what account because the raw materials were placed in containers that bore the servicing renderer's name. App. at 805-06. Moreover, it is conceded that representatives from Moyer and Standard spoke. Thus, this information could have been communicated during those conversations without violating the Sherman Act.

3. *The Expert Testimony*

In addition to this testimonial evidence, Petruzzi's IGA proffered the expert economic testimony of Dr. F. Gerard Adams and Dr. Martin A. Asher. These two economists worked together on a report that concluded that there was collusive activity with respect to existing accounts. After reading some of the evidence that Petruzzi's IGA had gathered, the two experts hypothesized that there would be a difference in the prices paid to existing accounts and new accounts. However, according to the experts, there is no rational basis for such a difference because the

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[10] There seems to be a dispute as to whether there was a five-year contract.

service provided by the defendants was homogeneous and therefore the only true basis for competition is price. *See also* App. at 2121 (testimony of Robert Sage of Moyer) (noting that price is key factor).

The experts noted that the homogeneity of the industry made it different from **[**35]** industries in which the service or the product was differentiated because in those industries it may make sense to offer a special introductory price so as to introduce the customer to the special virtues of the soliciting company. For example, a newspaper or magazine might offer a low introductory rate on its product to obtain the consumer. A newspaper would be willing to accept this initial, short-term loss because it realistically could expect to recoup the loss once it has developed brand loyalty. By contrast, a rational gasoline station would not offer customers discounts only on their initial purchases because once its prices went up beyond the prices of its competitors, the customers would go elsewhere. *Cf*. *Matsushita, 475 U.S. at 589-93,* ***[*1237]*** *106 S. Ct. at 1357-59* (noting that it did not make sense for defendants to price below costs where there was no opportunity to recoup this investment in future). Instead, we would expect a particular gas station's prices to be constant no matter how many times the customer had been in before unless, of course, it had an agreement with its competitors not to service each other's cars. [11]

[36]** Although the two experts based their hypothesis on the other evidence proffered by the plaintiff, they tested this hypothesis with multiple regression analysis using the pricing data that the defendants turned over to Petruzzi's IGA. From this study, they concluded that new accounts were paid roughly 39% more for raw materials than were existing accounts. App. at 730-31. Both experts testified that this pricing pattern *alone* is sufficient to suggest anticompetitive behavior for, as noted above, there is no logical reason for any disparity in price in this homogeneous industry.

The district court dismissed the significance of this evidence for two reasons. First, it ruled that the testimony could not be considered because it was inadmissible under *Federal Rule of Evidence 403*. Second, it summarily stated that even if the evidence were admissible, it was not sufficient to raise a genuine issue of material fact because of weaknesses in the study. We consider each of these rulings in turn, finding the evidence to be both admissible and suggestive that Darling and Moyer acted in concert. However, because the study did not contain a sufficient sample size from Standard, we conclude **[**37]** that it is insufficient to implicate Standard.

a. *Admissibility*

The district court concluded that while the expert testimony could not be excluded under *Federal Rules of Evidence 702* and *703* based on the record before it, the testimony should be excluded under *Rule 403* because it was "*not* more probative than prejudicial." Opin. at 55 (emphasis in original). Before considering the admissibility of the expert testimony under each of these Rules, we note that the district court applied the wrong test under *Rule 403*. ***HN10***[] For testimony to be excluded under *Rule 403*, its probative value must be "substantially outweighed" by the listed dangers, rather than simply "not more probative than prejudicial."

HN11[] While ordinarily we review a district court's admissibility rulings under an abuse of discretion standard, when the court's ruling turns on an interpretation of a Federal Rule of Evidence the appropriate standard of review is plenary. *Lippay v. Christos, 996 F.2d 1490, 1993 U.S. App. LEXIS 13020 (3d Cir. 1993)*; *DeLuca by DeLuca v. Merrell Dow Pharm., Inc., 911 F.2d 941, 944 (3d Cir. 1990)*. Here, though we do discuss the interpretation of the Rules, at bottom **[**38]** we are using the deferential standard of review because the district court exercised discretion under *Rule 403* in excluding the expert testimony. [12]

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[11] A gas station might give a discount to a frequent customer to promote customer loyalty. If the defendants wanted to promote customer loyalty through pricing they would, as purchasers, raise prices.

[12] Darling and Moyer obviously are not harmed by our use of the abuse of discretion standard inasmuch as we surely would have come to the same result regarding this evidence if we had exercised plenary review, *i.e.*, the evidence should not have been excluded. While in theory Petruzzi's IGA could be prejudiced by the deferential review inasmuch as it is seeking to overturn the district court's *Rule 403* determination, in fact it is not because we rule the evidence admissible as to all defendants, though as we shall explain, it is inadequate to support Petruzzi's IGA's case against Standard.

(i) Rule 702. Rule 702 states in its entirety:

> HN12[] If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, **[**39]** or education, may testify thereto in the form of an opinion or otherwise.

The district court found, and the defendants do not contend otherwise, that the proffered testimony passed the Rule 702 threshold. Thus, our discussion of Rule 702 is rather limited because this ruling is not in dispute. **[*1238]** Nevertheless, we do address the issue as it is useful to do so for purposes of placing our discussion of Rule 403 in context.

HN13[] There are three intertwined bases for excluding testimony under Rule 702: (1) if the testimony will not assist the trier of fact; (2) if scientific evidence is not sufficiently reliable; and (3) if the particular expert does not have sufficient specialized knowledge to assist the jurors. *See* 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* P 702[01] (1992) [hereinafter *Weinstein's Evidence*]; *see also* *Hines v. Consolidated Rail Corp., 926 F.2d 262, 272-73 (3d Cir. 1991)* (noting two general reasons to exclude evidence under Rule 702: unqualified witness and unreliable scientific technique (citing *In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 855 (3d Cir. 1990)*, *cert. denied* **[**40]** , *111 S. Ct. 1584 (1991)))*.

There is no basis in the record to challenge the qualifications of Drs. Adams and Asher. Thus, the only matters which we must consider are whether the testimony will assist the trier of fact and whether the methodology is scientifically acceptable. However, neither of these factors require the exclusion of the evidence.

First, we note that the scientific method used by the economists, multiple regression analysis, is reliable. Therefore, the results of such a study should be accepted, assuming that it was done properly. Here, the only possible problem is that the data set used by the experts was incomplete or inaccurate such that an economist would not rely on it. However, no showing was made to this effect by the defendants.

Second, and more importantly, the testimony clearly will assist the trier of fact because it makes sense out of pricing data through the use of multiple regression analysis. The data standing alone are meaningless to a lay person. In fact, they are meaningless to an economist until a statistical study is run.

Nonetheless, if the expert testimony is overly confusing or more prejudicial than probative, then **[**41]** it also can be excluded under Rule 702. 3 *Weinstein's Evidence* P 702[02], at 702-19 to -20. Here, the main concern is that the testimony is more prejudicial than probative. This concern is similar to the concern under Rule 403 and should be decided on a case-by-case basis. *Id*. at 702-20 to -22.

In this case, such an analysis weighs in favor of admissibility. The experts conducted a pricing study based on data that they received from the defendants. Though there may be flaws in their study, no showing to this effect has been made by the defendants. Thus, while the defendants did try to poke holes in the value of the study during the depositions, they have not supplied any experts who testified that the study's methodology was fatally flawed. In fact, as in *DeLuca*, here the experts' qualifications were unchallenged, [13] the testimony went to a crucial issue, and the analysis purported to be based on reasoning accepted in the published literature. *See* DeLuca, 911 F.2d at 957. Therefore, given these facts, we are "unwilling in the absence of countervailing evidence or persuasive argument to conclude that [the expert] testimony would be unhelpful **[**42]** under Rule 702." *Id*. Accordingly, the district court correctly concluded that the evidence satisfied Rule 702.

(ii) Rule 703. Rule 703 states in its entirety:

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[13] Perhaps facetiously, Darling states that the plaintiff's experts had expertise only in economics, not as "cospiratologists [sic]." Darling's Brief at 25. But as we have noted, "Characterizing the expert as an 'oath-helper,' or a 'conspiracyologist,' is no substitute for recognition of the rule of law embodied in Rule 702." *In re Japanese Elec. Prods., 723 F.2d at 280*.

> ***HN14***[] The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The district court found that *Rule 703* does not provide a basis to exclude the expert **[*1239]** testimony. [14] **[**43]** Opin. at 55. While it is true that the experts based their opinion in part on evidence that otherwise was not admissible, they also concluded that the pricing data alone supported Petruzzi's IGA's allegations. App. at 582, 739-40. The extra evidence simply reinforced their conclusion. Therefore, even if the extra evidence was not the type reasonably relied upon by experts in their field, the testimony still satisfied *Rule 703* because there can be no doubting that price data is of the type reasonably used by economists. *See In re Japanese Elec. Prods, 723 F.2d at 280*. Moreover, there has been no showing by the defendants that the other evidence upon which the economists used is not of a type reasonably relied upon by economists. Thus, the district court correctly found that the testimony would be admissible under *Rule 703*.

[44]** (iii) *Rule 403*. ***HN15***[] While *Rule 403* can be used to exclude expert testimony before trial, we have stated that if expert testimony survives the rigors of *Rules 702* and *703*, then *Rule 403* becomes an unlikely basis for exclusion, especially in the pretrial setting. *See In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 859 (3d Cir. 1990)*, *cert. denied*, *111 S. Ct. 1584 (1991)*; *DeLuca, 911 F.2d at 957*. Moreover, as we have noted, *Rule 702* incorporates the danger of unfair prejudice, *United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985)*; therefore, if a court were to exclude expert testimony under *Rule 403* it seemingly would have to be on some other basis, such as confusion of the issues or waste of time. *See id. at 1243*. Nonetheless, the district court excluded the testimony because the court thought it was unfairly prejudicial and could mislead the jury.

As noted earlier, the court seemingly applied the wrong test under *Rule 403*, and thus never made a determination that the unfair prejudice that would result from the expert testimony **[**45]** would *substantially outweigh* the probative value. For purposes of this discussion, however, we will assume that the court made such a determination. Yet, in doing so, the court abused its discretion.

In assessing the experts' testimony, the court correctly noted that the information regarding the pricing patterns was new. Opin. at 57. Nonetheless, it held that this testimony was more prejudicial than helpful because there was no factual basis for the experts' theory and because of problems in the data set. Opin. at 62-64. However, both these conclusions are mistaken. First, basic economic theory provides the linchpin for the experts' theory. As noted above, in a homogeneous industry it does not make sense for a company to differentiate in price between new and existing accounts.

Second, any problems with the underlying data should have been resolved under *Federal Rules of Evidence 702* or *703*. However, as already noted, the district court explicitly found that the study satisfied these requirements. In that context, the court properly recognized:

> Defendants have not produced any expert reports to counter the opinions of plaintiff's experts or challenge the data on which they **[**46]** rely. This court is not, therefore, in a position, to undertake its own review of whether the data on which the two economists rely is of the type relied upon by others in their field. Nor are we in a position to challenge their methodology.

Opin. at 54-55. Thus, the court concluded that the exclusion of their testimony under either *Rule 702* or *703* would be improper without opinions from experts for the defendants or an evidentiary hearing. But there were no such experts and there was no evidentiary hearing.

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[14] While the defendants do not concede that this ruling was correct, they do not launch an all-out assault on it. *See* Darling's Brief at 25 n.24; Standard's Brief at 38 n.28.

However, a few pages later in its opinion, the court changed its approach, holding that the testimony was prejudicial because there are questions about its reliability and completeness. "An economic theory unsupported by factual data adds nothing to the analysis," the district court concluded, "and does not raise an issue of material fact where none existed." Opin. at 62. Thus, the court found unfair prejudice because:

> **[*1240]** imbued as such testimony would be, with the aura of economic expertise and couched in terms of economic theory and analysis there is great danger that a jury of laymen, unfamiliar with economic antitrust theory and analysis would accept unquestioningly **[**47]** the theories espoused by Drs. Adams and Asher and defer to their opinions on the existence of a conspiracy, the ultimate issue of this case.

Opin. at 63.

Similarly, while discussing *Rules 702* and *703* the court stated, "We do not question that their opinions are based on data of the type reasonably relied on by experts in the field." Opin. at 54. Yet, the court in considering *Rule 403* then asserted that data which the experts used was unreliable: "we know nothing of what was supplied or how it was used in determining that prices paid to established accounts were lower than those paid to new accounts." Opin. at 59. The court further added, "The deposition testimony of Drs. Adams and Asher is equally vague and raises more questions about the reliability and completeness of the data considered that it answers." Opin. at 59-60.

However, if the court were concerned about the accuracy of the data, then it should have held an *in limine* hearing to assess the admissibility of the testimony. *Cf*. *In Re Paoli, 916 F.2d at 859* ("[A] ***HN16***[] court cannot fairly ascertain the potential relevance of evidence for *Rule 403* purposes until it has a full record relevant **[**48]** to the putatively objectionable evidence."). Instead, without any contrary expert testimony on which to rely and without holding an evidentiary hearing, the court chose to make its own assessment of the study's value. Clearly, this was inappropriate and reveals the court's error. *See* *In re Japanese Elec. Prods., 723 F.2d at 281* ("In making these exclusionary rulings the trial judge made the same fundamental legal error which we noted earlier: he assumed that the determining factor under *Rule 703* was his view of what data experts in a field ought to rely upon rather than making a factual inquiry and a finding as to what data experts, in this case economists, deem reliable."). As we have stated:

> *Rule 403* ***HN17***[] is a trial-oriented rule. Precipitous *Rule 403* determinations, before the challenging party has had an opportunity to develop the record, are therefore unfair and improper.
>
> In sum, we hold that in order to exclude evidence under *Rule 403* at the pretrial stage, a court must have a record complete enough *on the point at issue* to be considered a virtual surrogate for a trial record.

In re Paoli, 916 F.2d at 859-60 **[**49]** (emphasis added) (footnote omitted). In this case, whatever else can be said about the completeness of the record, it is clear that the record on the experts' price study was not sufficiently complete to be a surrogate for trial.

In justifying its decision, the court also stated that because the evidence of prior civil and criminal actions against defendants is not admissible and yet was relied on by the experts, there would be a danger in allowing them to testify when the jury cannot hear one of the key bases for their opinion. However, the court ignored the experts' testimony that the pricing patterns alone provide sufficient basis for their conclusion. In doing so, the court employed a process similar to that which we criticized in *In re Japanese Elec. Prods.*, regarding the district court's *Rule 702* analysis:

> What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action.

723 F.2d at 280. **[**50]** Thus, there can be no doubt that the district court abused its discretion by excluding the proffered expert testimony under *Rule 403*.

We also note that the court excluded the expert testimony based on a concern about unfair prejudice. *HN18*[] Unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Fed. R. Evid. 403* Advisory Committee's Note. Thus, it is likely that the court in using the term "unfair **[*1241]** prejudice" simply meant that the evidence would mislead the jury. Yet, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharm., Inc., 125 L. Ed. 2d 469, 61 U.S.L.W. 4805, 4809 , 113 S. Ct. 2786 (U.S. June 28, 1993)* (No. 92-102); *see also* *In re Japanese Elec. Prods., 723 F.2d at 279* ("'The jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations.'" (quoting 3 *Weinstein's Evidence* P 702[03])).

b. *Is the economic evidence enough*

As noted, the district court stated that even **[**51]** if the expert economic testimony were admissible, it still would grant the defendants summary judgment. In particular, the court stated that based on the deficiencies in the underpinnings of the expert testimony, no genuine issue of material fact would be raised. But it is clear to us that in order to reach this decision, the court impermissibly weighed Petruzzi's IGA's evidence by commenting on its weakness. Moreover, it apparently did not consider this evidence in conjunction with the other evidence put forward by Petruzzi's IGA.

To support its conclusion, the court stated, "The [expert opinion] added nothing to the evidence." Opin. at 65. Yet, earlier the court itself recognized that the testimony regarding the pricing patterns was new. Opin. at 57. The results of the multiple regression analysis show a price differential between new and existing accounts. As discussed above, there is no rational way to explain this difference. To get around this study, the defendants and the district court stressed potential flaws in the experts' study. However, the fact remains that the defendants did not supply expert testimony undermining the validity of the study or ask for a hearing on the **[**52]** study's validity. Thus, they have established no valid basis for challenging the study's reliability.

While the study alone may not be enough to raise a jury issue, it certainly goes a long way in helping Petruzzi's IGA to satisfy its burden of proof. More importantly, this study, in conjunction with the testimony of Salisbury and Ebersole and the Ryder tapes, "tends to exclude the possibility" that the market as it exists today came about a result of independent action.

However, as the study relates to Standard, the district court's reading of the testimony is correct. During his deposition, Dr. Asher testified that the study used only one year of Standard's data, even though the experts had access to more years. Instead, they extrapolated from the one year by using the same pattern that existed with respect to Moyer. According to Asher, they used this methodology because there were not sufficient new accounts for Standard to create an adequate sample. App. at 749. Thus, as Dr. Asher admits, the data set relating to Standard was insufficient to draw any definite conclusions. While this data problem is not enough to exclude the price study generally, it does serve to limit the inferences **[**53]** that can be drawn from it as it relates to Standard. Therefore, because this is the only evidence implicating Standard, this evidence standing alone is not sufficient to defeat summary judgment. *See* *Daubert, 61 U.S.L.W. at 4809-10* ("in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment"); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1339 (7th Cir. 1989)* (noting that opinion not based on adequate facts supplies nothing to judicial process); *Town Sound & Custom Tops, Inc. v. Chrysler Motor Corp., 743 F. Supp. 353, 364 (E.D. Pa. 1990)* (granting summary judgment where expert opinion did not add any evidence), *aff'd*, *959 F.2d 468 (3d Cir. 1992)*, *cert. denied*, *121 L. Ed. 2d 139, 113 S. Ct. 196 (1992)*.

4. *Few Account Turnovers*

Finally, Petruzzi's IGA has put forward testimony that relatively few accounts transferred **[**54]** among the defendants. This testimony also supports Petruzzi's IGA's allegations for it is anecdotal evidence of the effects of the conspiracy. For example, Salisbury testified that he did not lose any of his customers **[*1242]** to Standard or Darling. App. at 2223. Sage testified that during approximately 15 years at Moyer he lost less than 20 accounts for fat and bones to the other two defendants. App. at 2179-80. Uriahs Shelly of Moyer testified that in approximately 13 years he lost less than ten accounts to Darling out of roughly 1,500. App. at 2286. Finally, Earl Englemyer of Darling testified that during his ten years, he did not lose any accounts to the competition. *See* App. at 1046-50. While this anecdotal evidence by itself is certainly not enough to prove the existence of a conspiracy, when considered in conjunction with the other evidence, it makes an inference of concerted action more reasonable.

Yet, once again, this evidence does not implicate Standard. The record clearly shows that Standard had capacity problems during the time of the alleged conspiracy. Thus, its ability to process additional materials was limited severely. Indeed, as Petruzzi's IGA's own experts testified, **[**55]** Standard had very few new accounts during this period. Thus, the fact that Moyer and/or Darling lost few accounts to Standard should be expected as for the most part Standard was not bidding on anyone's accounts during this time. [15]

E. *Conscious Parallelism*

HN19[] In addition to proving concerted **[**56]** action through testimonial and economic evidence, an antitrust plaintiff can establish concerted action through the defendants' behavior standing alone. While, as noted above, mere consciously parallel behavior alone is insufficient to prove a conspiracy, it is circumstantial evidence from which, when supplemented by additional evidence, an illegal agreement can be inferred. *See*, *e.g.*, *Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 208 (3d Cir. 1980)*. The need for additional evidence derives from the same concerns elaborated in *Matsushita*, namely the desire not to curb procompetitive behavior. [16] Therefore, in addition to establishing consciously parallel behavior by the defendants, a plaintiff also must show the existence of certain "plus" factors, including: (1) actions contrary to the defendants' economic interests, and (2) a motivation to enter into such an agreement. *See* *Schoenkopf, 637 F.2d at 208*; *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977)*, *cert. denied*, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)*; *Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309, 1314 (3d Cir. 1975)*; **[**57]** *see also* William C. Holmes, *1992* ***Antitrust Law*** *Handbook* § 1.03[3], at 154 (noting that wide range of circumstantial evidence can be used to establish needed plus factor, "for example, have they attended meetings or conducted discussions at which they had the opportunity to conspire; have they acted against their own economic best interests; have they engaged in parallel behavior that is economically irrational unless an agreement exists; has at least one participant expressly invited common action by the other . . . "). In this respect, then conscious parallelism cases "are merely illustrations of the more general proposition that there are legal limitations upon the inferences which may be drawn from circumstantial evidence." *In re Japanese Elec. Prods., 723 F.2d at 304*.

[58]** ***HN20***[] To establish a conspiracy based on consciously parallel behavior, a plaintiff **[*1243]** must show: (1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making processes; and (3) certain "plus" factors. *Schoenkopf, 637 F.2d at 208*. In laying out this test, the district court misstated the appropriate legal standard, stating that Petruzzi's IGA had to prove the existence of "a shared common motive to coordinate behavior." Opin. at 11.

[15] Petruzzi's IGA submitted other evidence which it contends showed the existence of a conspiracy among the defendants. This information included social contacts and telephone calls among representatives of the defendants. In light of our conclusion that summary judgment should not have been granted based on the testimony of Salisbury, Ebersole, and the economic experts, we do not consider this evidence. We do note, however, that the evidence is insufficient to exclude the possibility that Standard acted independently. *See* *Tose v. First Pennsylvania Bank, N.A., 648 F.2d at 894* ("Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place.").

[16] For instance, most major banks raise or lower their prime rates when the Federal Reserve lowers the rate it charges them. Banks are certainly aware of the other banks decisions and are motivated, at least in part, by their competitors' actions. Nonetheless, proof of only this behavior is not sufficient to establish a *section 1* violation. *See* *In re Japanese Elec. Prods., 723 F.2d at 304* ("While conscious parallel conduct has some tendency suggestive of concert of action, the tendency is so slight that we have held that circumstance, standing alone, to be legally insufficient.").

However, we have made it clear that the *HN21*[] defendants need not share the *same* motive. Rather, all that is required is that they each have a motive to conspire. *Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 214-15 (3d Cir. 1992)*, *cert. denied*, *122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993)*. While the defendants do not strenuously contest that their behavior, at least in some respects, was consciously parallel, we address these aspects of a conscious parallelism case to lay the proper framework.

1. *Parallel Behavior*

As Moyer and Darling implicitly have conceded, Petruzzi's IGA has put forward **[**59]** evidence establishing that they acted similarly. While it may be true that the defendants did not use the same prices or run their internal business operations identically, the evidence shows that they acted similarly by refraining from competing on existing accounts, while at the same time competing actively for new accounts. *See* App. at 638-39, 641 (testimony of Warren Alcock of Darling); App. at 1263-65 (testimony of Edward Harrigan of Moyer); App. at 2088-89, 2124 (testimony of Robert Sage of Moyer); *see also* Moyer's Brief at 32 (admitting that expert testimony showed that defendants acted in parallel manner).

The record also shows that Moyer and Darling retaliated against those competitors that did bid on their accounts. As Warren Alcock of Darling proudly testified, justifying his conduct by reference to a famous American foreign policy: "I regarded Teddy Roosevelt's statement of 'Speak softly and carry a big stick' as -- renderers did not bother me. I did not bother them. If they bothered me, I hit them back hard." App. at 641-42. Likewise, Salisbury stated generally about Moyer:

> [Robert Sage] said that if any other rendering outfits was bothering our customers, **[**60]** then it was fair game to go back and bother theirs. Other than that, just what customers was there, what was ours was ours.

App. at 2192.

In addition, Salisbury provided testimony regarding specific instances of Moyer's retaliation against noncomplying competitors. For instance, Salisbury discussed retaliation against Ryder:

Q: Why did you attempt to get Peck's Market?

A: At that time, Moyer was having problems with Ryder in different areas.

Q: Did anybody tell you to solicit Ryder's accounts?

A: Mr. Sage.

App. at 2195; *see also* App. at 2204 (Salisbury's testimony relating to Moyer's problems with Bear Creek) ("A: Yes, I did retaliate on a couple of their stops.; Q: Did anybody tell you to retaliate?; A: Mr. Scarborough."); App. at 1178-81 (testimony of Robert Fry) (discussing Sage's conversations with him about competitors who took his accounts); App. at 301 (Hendricks to Lee Ryder: "I'm going to go out and cost you money, and you're going to go out and cost me money, and if that's what you want, I guess that's what we're going to do. We'll see who's got the most money."). Likewise, Ebersole also testified about Sage's retaliatory efforts against Southern **[**61]** Tier and Fry Rendering, two noncomplying competitors. *See* App. at 859-62. Moreover, Ebersole testified that Moyer approached other renderers to help in their retaliation efforts. According to Ebersole, Mr. Leidy, from Greencastle Products, was approached by Moyer to help it solicit Ebersole's customers to help retaliate against him. App. at 918-19. From this wealth of evidence, a reasonable jury could conclude that Moyer and Darling acted similarly both by refraining from competing on existing accounts and by retaliating against those renderers who went after their accounts.

[*1244] 2. *Consciousness*

Petruzzi's IGA also put forward evidence suggesting that the renderers were aware of each other's policies. For example, as Moyer admits in its brief, Hendricks's recorded statement "everybody does it [refrains from soliciting other renderers' accounts]" proves "parallel conduct," *i.e.*, at least Moyer was aware that its behavior was consistent with its competitors. *See* App. at 294; Brief at 20 n.4. Similarly, Sage testified:

A: The main competition was always new openings with everybody. You are always competing hard on that.

. . .

Q: Was there less activity for existing **[**62]** accounts as compared to new openings?
A: Yes.

App. at 2124; *see also* App. at 1192-93 (testimony of Robert Fry of Fry Rendering) (stating that Fry did not solicit existing accounts, but only went after them when he received calls from them and noting that this behavior was "a way of doing business. You stayed in your own area. That was it.").

Similarly, there was evidence indicating that Darling knew of Moyer's retaliatory efforts. For example, Lee Ryder testified that Mr. Schneider, a Darling representative, tried to intervene and settle the price war between Ryder and Moyer. App. at 1921-22. Darling may have taken this role because it saw itself as a maintainer of order in the industry. However, whatever its reasons, it shows that it was aware of the retaliatory behavior of Moyer.

3. *"Plus" Factors*

As noted above, mere consciously parallel behavior is not a sufficient basis from which to infer concerted action. Instead, courts require "plus" factors because otherwise the evidence is equally consistent with legal behavior. In his treatise, Professor Areeda suggests the easiest "plus" factor to explain is evidence implying a traditional conspiracy. *See* VI **[**63]** Phillip E. Areeda, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* P 1434b, at 214 (1986) [hereinafter Areeda, ***Antitrust Law***]. The testimony of Ebersole and Salisbury, the Ryder tapes, and the economic data discussed above satisfies this requirement. [17]

However, even without this evidence purporting to show a traditional agreement, we have stated that a plaintiff can survive summary judgment if it shows that the defendants had a motive to conspire and acted contrary to their self-interest. Professor Areeda cautions against blindly applying these "plus" factors, lest they become meaningless. *See* VI Areeda, ***Antitrust Law*** P 1434c, at 214-15. For instance, it is quite likely that oligopolists acting independently might sell at the same above-marginal **[**64]** cost price as their competitors because the firms are interdependent and competitors would match any price cut. Therefore, they quickly learn that price cuts do not increase market share and go back to their noncompetitive pricing. Accordingly, Areeda warns courts not to consider a failure to cut prices or an initiation of a price rise as an action against self-interest because it also reflects the interdependence of the industry. *See id*.

However, Areeda's concerns are not germane here because we are not dealing with parallel pricing. Rather, we are dealing with refusals to bid on existing accounts as aggressively as new accounts. *See* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 681 (1962) ("I have suggested that the kind of behavior found in parallel interdependent decisions as to basic price and similar price matters should not be deemed an unlawful conspiracy; but that parallel interdependent decisions to adopt rigid delivered-price systems, to indulge in practices patently exclusionary of competitors, and to impose resale price maintenance, may appropriately **[**65]** be condemned on a conspiracy charge."). The defendants have justified their behavior by arguing that they did not want to induce a price war or retaliation. Thus, they argue that their behavior merely reflects their interdependence. **[*1245]** The district court accepted this argument. *See* Opin. at 27 ("Further, attempts to lure an account away from another renderer were likely to incur the wrath of that renderer and bring about a retaliatory strike against one of the aggressor's own accounts."). Yet, the defendants' argument makes no sense for there is no reason that bidding on each other's accounts should start a price war anymore than bidding on new accounts should trigger one. One logical explanation is that the defendants set up the rules this way.

It is clear that this behavior was against the defendants' self-interest. As the economic experts testified, such a refusal to bid is against their economic interest, especially when they could beat the price. *See* App. at 2229 (statement of Salisbury) ("If the account was with Darling I did not go after it even when I knew I could do better on the price."). Indeed, compare this behavior with the instances of retaliation when Moyer went **[**66]** after an

[17] Moreover, in this respect, the testimony relating to the defendants' opportunity to conspire and the solicitation of others to partake in common action is also relevant. *See* Holmes, *supra*, § 1.03[3], at 154; note 15 *supra*.

account even though the price was "over and above" what they were paying in their own areas. App. at 860 (testimony of Ebersole regarding Moyer's behavior). Leaving all other things the same, absent an agreement it does not make economic sense for defendants not to bid on an account, unless they have some problem like capacity or they know that the existing price is too high.

In fact, only Standard made claims of capacity problems. While it is true that Standard did bid on some new accounts, we are unwilling to draw the inference that it did so because of an agreement with Moyer and Darling. Rather, Irwin Frish of Standard has indicated that he bid only on new accounts that were brought to his attention. App. at 2658-59. The record clearly indicates that Standard did not employ a large sales force and that Petruzzi's IGA did not rebut Standard's contention that several of the new accounts it did acquire came from Moyer and Darling. While we recognize that an antitrust defendant should not be granted summary judgment merely because it asserted *a* plausible motive for its behavior, *see* Eastman Kodak Co., 112 S. Ct. at 2083, we emphasize that **[**67]** Petruzzi's IGA in the first instance has failed to put forward enough evidence suggesting that Standard acted in concert with Darling and Moyer. In these circumstances, we are hesitant to declare that companies must bid on accounts that they cannot service to avoid possible antitrust liability.

Additionally, Moyer's and Darling's retaliatory behavior was against their economic interest for rational business people do not undertake above-market retaliatory strikes unless they feel that they can recoup the costs in the long run. *Cf.* *Matsushita, 475 U.S. at 589-93, 106 S. Ct. at 1357-59* (concluding sellers would not agree to lower prices unless losses could be recovered in long run). Here, however, Salisbury's testimony indicates that Moyer did it only to send a message. [18] Regarding Moyer's retaliatory efforts against Ryder, Salisbury stated that Moyer sought: "Not to drive them out of business. We just retaliated against stops that Ryder had taken away from Moyer." App. at 2217. Once this effort was successful, the retaliation stopped: "it lasted about a week. Then I was given word by Mr. Scarborough stay away from Ryder stops." App. **[**68]** at 2223. The fact that Moyer and Darling both engaged in a practice that was otherwise against their self-interest certainly suggests that there was an understanding in the industry that required enforcement. This is the same understanding that Salisbury's and Ebersole's testimony suggested.

Petruzzi's IGA also has shown the defendants' **[**69]** motivation to enter into such an agreement. Again, as the experts have testified, each defendant stood to make extra profits if it could keep the price of its raw materials **[*1246]** down. Moreover the defendants have not contradicted the experts' conclusion with evidence suggesting that any savings in the costs of production would be wiped out by competition in the market for finished goods.

It is one thing for competitors all to charge the same price, as a perfectly competitive market could lead them to do so. It is quite another for competitors all to refrain from soliciting each other's accounts. See VI Areeda, ***Antitrust Law*** P 1420d, at 123-24 (noting that refusal to bid in oligopoly situation is not inevitable, but cannot be sustained without some enforcement mechanism). It is still another for competitors to use the same enforcement mechanism. Therefore, we hold that Petruzzi's IGA has put forward enough evidence to take this case beyond the simple allegation of parallel behavior. It has supplied evidence which indicates that Moyer and Darling had an actual agreement, and it has provided evidence that Moyer and Darling acted against their self-interest in ways not attributable to **[**70]** interdependence.

F. *Evidence Properly Excluded*

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[18] This behavior is different than an oligopolist responding to a price cut by one competitor with an equal or lower price. In that case, presumably the price is still above the oligopolist's costs and thus makes sense. Moreover, that price typically is offered to all its customers, not just those who are customers of the price-reducer. Furthermore, as Professor Areeda states:

> One oligopolist may refrain from lowering his price because he fears, indeed knows that his rivals will match it. But that differs from the situation of the present subparagraph where the feared retaliation is something more coercive than matched behavior.

VI Areeda, ***Antitrust Law*** P 1415f, at 93 n.27.

While we conclude that based on the evidence so far discussed, summary judgment was improperly granted to Darling and Moyer, we nevertheless address two additional pieces of evidence that the district court excluded from consideration. We do so because one piece implicates Standard and because we recognize that on remand Petruzzi's IGA may want to introduce this evidence.

1. *The Ellerin Memorandum*

Petruzzi's IGA produced a memorandum created in 1983 by Michelle Ellerin, Lee Ryder's former wife, detailing Ryder's experiences in the rendering industry. With hopes of getting the government to indict Moyer, Ellerin prepared a memorandum providing a brief history of the rendering industry and Ryder's experiences in it. The memorandum states, among other things, that John Hendricks of Moyer Packing told Lee Ryder about the industry "rules"; *i.e.*, no soliciting each other's existing accounts, new business is fair game, and if there is a "mix up," then material must be traded to adjust for any inequities. This memorandum also states that Darling and Standard worked together. Thus, if admissible, the information contained in **[**71]** this memorandum might be sufficient to defeat summary judgment as to all defendants. However, the district court found that the information contained in this memorandum could not be considered because it was based entirely on inadmissible hearsay that could not be reduced to admissible form at trial. Opin. at 28-33; *see* *J.F. Feeser, Inc., 909 F.2d at 1542*; *Williams v. Borough of West Chester, Pa., 891 F.2d 458, 466 n.12 (3d Cir. 1989)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 324-27, 106 S. Ct. 2548, 2553-55, 91 L. Ed. 2d 265 (1986))*.

Petruzzi's IGA argues that the district court erred in reaching this conclusion because the information is capable of being admitted at trial. In particular, it argues that Ellerin had personal knowledge of the events listed in the memorandum. However, our review of her deposition reveals that the district court correctly concluded that Ellerin derived her knowledge solely from information from her husband or Kent Ryder. *See*, *e.g.*, App. at 985 ("Everything I knew about the industry and what the document speaks about came primarily from Lee and from **[**72]** some degree from Kent."); App. at 998 ("My direct knowledge comes only from Lee and Kent Ryder."). Moreover, because Lee and Kent Ryder both testified during their depositions that they had no reason to believe that there was any collusion in the industry, we agree with the district court that the relevant information contained in the memorandum could not be reduced to admissible form.

Petruzzi's IGA also argues that there are numerous exceptions to the hearsay rule under which it could introduce the documents produced by Ellerin. Yet, it does not suggest any particular rule under which we can conclude that the information could be admitted. In the circumstances, we hold that for purposes of this summary judgment motion this memorandum cannot be reduced to admissible form. [19]

[73]** 2. *The Prior Antitrust Actions*

Petruzzi's IGA also offered evidence of five prior antitrust actions brought against **[*1247]** the defendants and/or employees of the defendants. Petruzzi's IGA claims that this evidence is admissible to prove the defendants' motive and economic incentive to participate in the conspiracy. *See* *Bogosian, 561 F.2d at 446* (requiring proof of these "plus" factors in conscious parallelism case). The district court, however, refused to consider this evidence because none of the five prior actions qualified for admissions under section 5(a) of the Clayton Act, *15 U.S.C. § 16(a)*, and their admissibility was barred by *Federal Rules of Evidence 408* and *410*. Opin. at 44-45. After a careful review of this evidence we have concluded that the district court's ruling was correct and that further discussion regarding the bases for its conclusion is not necessary.

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[19] Petruzzi's IGA also argues that the documents were admissible because Lee Ryder asserted the attorney-client privilege over them in his deposition. However, our reading of the record does not reveal any such assertion by Lee Ryder and the reference to the record in Petruzzi's IGA's Reply Brief at 13 to support its argument is not to his deposition. Furthermore, Ellerin testified in her deposition that she prepared the document in her capacity as a spouse, not as a lawyer. App. at 978. Moreover, Ellerin testified that she and Lee Ryder showed the document to the government, thereby removing any possibility of a claim of privilege. App. at 980. In any event, even if Lee Ryder asserted a claim of privilege over the document, he did not vouch, as Petruzzi's IGA suggests, that he was the source of the information nor did he vouch for the accuracy of the statements in the document.

We do point out, however, that these prior actions are not relevant to the defendants' motive. As noted above, the defendants' motive to enter into the conspiracy is clear, and the existence of these earlier cases has no relevance to proving that **[**74]** fact. Simply because the defendants were named in past antitrust cases involving similar allegations does not make it more probable that the defendants had a motive to carry out their conspiracy. *See Fed. R. Evid. 401*. Petruzzi's IGA's argument is at best an attempt to end run the restrictions on using past settlements and *nolo* pleas against defendants. [20]

III.

CONCLUSION

For the reasons stated above, we will reverse the district court's July 31, 1992 order inasmuch as **[**75]** it grants summary judgment to Darling and Moyer. However, we will affirm the district court's grant of summary judgment to Standard.

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[20] Petruzzi's IGA also has suggested that the fact that the defendants' discussed the prices of finished goods indicates that they acted in concert. The district court rejected this conclusion, noting that the prices for finished goods were reported in the trade reports and that any inference relating to the raw materials market would be too speculative. Opin. at 47-48. We agree with the district court that evidence of these discussions among the defendants in one context is insufficient to draw an inference of conspiracy in another market.

Tri-State Rubbish v. Waste Management

United States Court of Appeals for the First Circuit

July 13, 1993, Decided

No. 92-2218

Reporter

998 F.2d 1073 *; 1993 U.S. App. LEXIS 17409 **; 1993-1 Trade Cas. (CCH) P70,295

TRI-STATE RUBBISH, INC., ET AL., Plaintiffs, Appellants, v. WASTE MANAGEMENT, INC., ET AL., Defendants, Appellees.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. Gene Carter, U.S. District Judge].

Core Terms

municipalities, customers, prices, district court, contracts, disposal, tipping, supervision, recyclable, predation, counts, solid waste, ordinances, predatory, antitrust claim, waste disposal, trash, waste collection, collection, transfer station, state action, per ton, electricity, immunity, monopoly, haulers, failure to state a claim, state action doctrine, anti trust law, flow control

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

Municipalities enjoy the protection of the Parker doctrine if, but only if, the conduct in question is of a kind authorized or directed by state law.

Governments > Local Governments > Claims By & Against

HN2[] **Local Governments, Claims By & Against**

Immunity from antitrust claims is not defeated by claims that the municipality "conspired" with a private party or that the municipality made some error under local law.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN3[] **Parker State Action Doctrine, Local Governments & Private Parties**

State action immunity will extend to private actors only where they are subject to adequate official supervision.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN4[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Exclusive dealing contracts may also benefit customers and are unlawful only upon a particularized showing of unreasonableness.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] **Anticompetitive & Predatory Practices, Predatory Pricing**

A company that rationally prices its own product or service at or above its own costs does not violate the Sherman Act merely because its costs, and thus its prices, are lower than a rival's costs; and this is true even though its lower costs may be due to the generosity, or foolishness, of another supplier who has charged the company too little for an input.

Counsel: Ralph A. Dyer for appellants.

Michael A. Nelson with whom Emily A. Bloch, Nicholas S. Nadzo and Jensen Baird Gardner & Henry were on brief for appellee Mid-Maine Waste Action Corp.

Robert S. Frank with whom Carl E. Kandutsch and Verrill & Dana were on brief for appellees Waste Management, Inc., Waste Management of Maine, Inc., Consolidated Waste Services, Inc. and Consolidated Waste Transport, Inc.

John J. Wall, III with whom Thomas F. Monaghan and Monaghan, Leahy, Hochadel & Libby were on brief for appellee City of Auburn.

Judges: Before Breyer, Chief Judge, Torruella and Boudin, Circuit Judges.

Opinion by: BOUDIN

Opinion

[*1074] BOUDIN, *Circuit Judge*. The complaint in this case charged that a number of entities, public and private, were seeking to monopolize the waste disposal business and otherwise acting in violation of federal and state law. The district court **[*1075]** dismissed the complaint for failure to state a claim. We affirm the district court with one exception: as to the predation claims against the private defendants, we do not think that state action **[**2]** immunity has been made out on this record, and therefore remand those claims for further proceedings.

I. THE BACKGROUND

This case is one of several in which state and local communities have taken measures to cope with their waste collection responsibilities, and private haulers have been adversely affected and responded with antitrust suits. The cases vary, and in this one the history is tangled and the claims numerous. In describing the facts, we take the allegations of the complaint as true, as is customary in reviewing dismissals for failure to state a claim. *See* *Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)*.

Maine has in force statutes that give local communities substantial authority over local waste collection and disposal. Under this legislative umbrella, the City of Auburn and eleven other municipalities formed in 1986 a non-profit, non-stock corporation to assist in waste disposal. The entity--Mid-Maine Waste Action Corporation ("MMWAC")--was then mandated to construct a facility to burn municipal waste and derive electricity from the process. Maine law expressly authorizes municipalities to cooperate in waste disposal projects, *Me. Rev.* **[**3]** *Stat. Ann. tit. 38, § 2201*, and provides for interlocal agreements to organize public waste disposal corporations to own or operate facilities. *Id*. *§ 1304-B(5)*.

MMWAC issued over $ 42 million in bonds to construct a waste-to-energy facility. The bonds were to be funded through so-called "tipping fees," customarily charged to those who dispose of waste at a landfill or other disposal facility, and through the revenues from the sale of the electricity. To secure the quantity of waste needed to operate the facility economically--that is, at a high percentage of its capacity--the MMWAC municipalities enacted flow control ordinances. These local laws, authorized by *Me. Rev. Stat. Ann. tit. 38, § 1304-B(2)*, required the delivery of all solid waste generated within each municipality to MMWAC. Each municipality also contracted with MMWAC to deliver to it the solid waste generated in the community, paying MMWAC whatever tipping fee was required to produce revenues to service its debt.

Because the MMWAC incinerator-generator facility would not be ready before 1992, MMWAC provided in the meantime for an alternative method of disposing of the waste it received. For this interim period, MMWAC **[**4]** contracted with two related entities, Consolidated Waste Services and Consolidated Waste Transportation (collectively, "the Consolidated companies") to operate a transfer station near the MMWAC construction site. A transfer station is a collection point at which waste may be processed or repackaged before being sent to its final destination. MMWAC agreed to pay the Consolidated companies $ 66 per ton to receive the waste delivered and to dispose of the waste until the MMWAC incinerator was ready to operate.

MMWAC's initial tipping fee was set at $ 75 per ton. It is common in waste collection for municipalities to collect residential trash themselves or to contract out this function but to require commercial businesses to contract directly with private haulers for their trash removal facilities. Under the municipalities' agreements with MMWAC and under the local flow control ordinances, private trash haulers in the twelve municipalities and the municipalities themselves were effectively required to deliver their trash to the transfer station and pay the $ 75 per ton tipping fee to MMWAC.

Waste Management of Maine, Inc. is an operating subsidiary of Waste Management, Inc., one of the **[**5]** largest waste collection and disposal firms in the nation. The operating subsidiary provides trash collection in various Maine towns. In July 1990, after the transfer station agreement between MMWAC and the two Consolidated companies, Waste Management, Inc. acquired the two Consolidated companies; and one of the two may thereafter have been merged into Waste Management of Maine. We refer to **[*1076]** all four companies, collectively, as "Waste Management."

Tri-State Rubbish, Inc., a competitor of Waste Management of Maine, is also in the business of collecting and disposing of commercial trash, including waste generated by various customers in Auburn. Its affiliate, Recycling Unlimited Services Corp., Inc., processes waste and recovers from it recyclable commodities. Gary Hart is the principal in both businesses. In 1990, Tri-State Rubbish declined to deliver to the Consolidated transfer station all of the waste collected by Tri-State Rubbish in Auburn. Tri-State Rubbish's position was that waste capable of having recycled commodities extracted from it was not covered by the local flow control ordinance.

Auburn brought suit against Tri-State Rubbish in a Maine state trial court in December **[**6]** 1990 to enjoin it from refusing to deliver all of its Auburn waste to the transfer station. In July 1992, the court rejected Tri-State Rubbish's interpretation of Maine law and granted an injunction in favor of Auburn. *City of Auburn* v. *Tri-State Rubbish, Inc*., No. CV-90-561 (Me. Sup. Ct., Androscoggin County, July 20, 1992). That case, we are told, is now on appeal to the Maine Supreme Judicial Court.

MMWAC's incinerator-generator began operating in early 1992 and almost at once MMWAC found that the waste produced in the twelve municipalities was not enough to keep the new facility operating at an optimal level. This led MMWAC to seek additional waste from outside the member towns; it did so by offering a reduced tipping fee, allegedly $ 45 to municipalities who were not members of MMWAC and as low as $ 28 to Waste Management of Maine for its delivery to MMWAC of waste collected outside the twelve communities. These reduced fees were not made available to Tri-State Rubbish.

In September 1992, Tri-State Rubbish, Recycling Unlimited, and Hart (collectively "Tri-State") began the present suit in federal district court. The defendants were Auburn, MMWAC, and the four Waste Management **[**7]** companies: Waste Management, Inc., Waste Management of Maine, and the two Consolidated companies. Based on the events described above, the complaint asserted federal and state antitrust claims, a claim of tortious interference (by Waste Management) with Tri-State's contractual relations, and claimed violations (by Auburn) of *42 U.S.C. § 1983* and provisions of the U.S. Constitution.

The defendants in this federal action moved to dismiss the complaint under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief may be granted. The district court granted the motions, concluding that the antitrust claims were barred by so-called "state action" immunity; the bases for dismissing the other claims are more conveniently described below as the separate claims are discussed. *Tri-State Rubbish, Inc. v. Waste Management, Inc., 803 F. Supp. 451 (D. Me. 1992)*. This appeal followed. [1]

[8]** II. THE FEDERAL ANTITRUST CLAIMS

A half century ago the Supreme Court determined, in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, that Congress had not intended the federal antitrust laws to apply to trade restraints or monopolies imposed by state governments. Although the antitrust laws aim at competitive markets, the Court in *Parker* recognized that governments often restrict competition for public purposes. The actions of state governments, no less than those of the federal government itself, were deemed not to fall within the constraints of the antitrust laws.

After a certain amount of wobbling, it has become settled that ***HN1***[] municipalities enjoy the protection of the *Parker* doctrine if, but only if, the conduct in question is of a kind authorized or directed by state law. *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985)*; *Fisichelli v. Town of Methuen, 956 F.2d 12 (1st Cir.* ***[*1077]*** *1992)*. In general this ***HN2***[] immunity is not defeated by claims that the municipality "conspired" with a private party, *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*, **[**9]** or that the municipality made some error under local law. *Fisichelli, 956 F.2d at 14*.

Count I. In count I of its complaint, Tri-State contends that in violation of the Sherman Act, *15 U.S.C. §§ 1-2*, Auburn and MMWAC have sought to monopolize and restrain trade in the waste disposal business in Auburn and the other eleven municipalities. The gist of the claim, as elaborated in Tri-State's brief, is simple: under the local ordinances, all solid waste generated in the twelve municipalities must be turned over to MMWAC or its designee. Thus the waste disposal business in these locations, including recyclable materials, is within the sway of one entity, MMWAC.

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[1] Although both sides have captioned their briefs to show "Tri-State Rubbish, Inc., et al." as the plaintiffs-appellants, the notice of appeal names only Tri-State Rubbish, Inc. as the appellant. Our caption and other references to Hart and Recycling Unlimited are without prejudice to any consequences that may flow on remand from the way the notice of appeal was framed.

With a couple of caveats, Tri-State concedes that state action immunity is available as to count I if the Maine legislature empowered municipalities to engross all solid waste including waste that might be recycled. But it argues that Maine's policy is to promote the recovery of recyclable commodities from waste before the residue is burned for electricity. It derives this priority from a declaration of policy in the Maine statute preceding the specific grants of **[**10]** authority. *Me. Rev. Stat. Ann. tit. 38, § 1302*, para. 2. It urges us to read the Maine legislation to exclude such recyclable waste from the authorization that allows municipalities to control the disposition of solid waste.

The Maine statute explicitly permits a municipality to require that "solid waste" generated within its boundaries be delivered to "a designated disposal or reclamation facility," *id.* *§ 1304-B(2)*, reclamation includes the generation of electricity, *id.*, and solid waste is defined to include "useless, unwanted or discarded solid material." *Id*. § 1303-C(29). The statutory definition of solid waste goes on to say that "the fact that a solid waste or constituent of the waste may have value or other use or may be sold or exchanged does not exclude it from this definition." *Id.* This final clause pretty much disposes of Tri-State's argument.

Statutes or ordinances similar to those involved in this case exist elsewhere. Tri-State cites us to several that have been construed not to reach waste from which recyclable commodities could be extracted. Yet the case on which it principally relies concerned an authorizing statute that *excluded* recyclables. [2] **[**11]** By contrast, the definitional phrase in the Maine statute (quoted at the end of the last paragraph) explicitly includes recyclables in the waste that is subject to municipal control. The district court's reading of the Maine statute follows its plain language, *803 F. Supp. at 456*, and comports with the reading of the Maine state court in the injunction action against Tri-State. *City of Auburn*, *supra*. We see no error in the district court's interpretation.

[12]** Tri-State also objects to the district court's ruling that MMWAC should be treated as a municipality for state action purposes. As a private actor, Tri-State argues, MMWAC must show that it is subject to state supervision pursuant to *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. *Midcal*, building upon statements in *Parker* and later cases, made clear that ***HN3***[] state action immunity will extend to private actors only where they are subject to adequate official supervision. The state, in other words, may take anticompetitive measures itself or authorize its municipalities to do so; but it may not license *private* restraints unless the private parties are themselves regulated.

Passing the question whether the conduct challenged in count I is that of MMWAC (as opposed to the municipalities), we think that MMWAC's status is that of the municipalities. MMWAC's mission, waste disposal, is a **[*1078]** traditional local-government function. By statute MMWAC's directors must be elected by municipal officers and are themselves municipal officers. *Me. Rev. Stat. Ann. tit. 38, § 1304-B(5)*. The full faith and credit of the municipalities **[**13]** may be pledged in aid of its operations. *Id*. Patently MMWAC is the creature of its member municipalities and enjoys their status. *See Interface Group, Inc*. v. *Massachusetts Port Authority, 816 F.2d 9, 13 (1st Cir. 1987)*. [3]

Counts II, III and III-A. These counts, which include Tri-State's remaining federal antitrust claims, present a different set of issues. In count II Tri-State first challenged as a restraint of trade and attempted monopolization the agreement between MMWAC and the Consolidated companies. As a consequence of the interim arrangements, Tri-State argues that Waste **[**14]** Management of Maine was able to offer "predatory" prices to customers in Auburn and other MMWAC municipalities. In Tri-State's view, the $ 66 per ton payment by MMWAC to the

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[2] In *Waste Management of the Desert, Inc*. v. *Palm Springs Recycling Center, Inc., 9 Cal. App. 4th 239, 11 Cal. Rptr. 2d 676* (Cal. App.), *petition for review granted*, ***13 Cal. Rptr. 2d 850, 840 F.2d 955 (1992)***, the California statute reserved the right of anyone "to donate, sell or otherwise dispose of his or her recyclable materials" and of any private company to contract with a private waste hauler to remove segregated recyclable materials. 11 Cal. Rptr. at 683-84.

[3] The only participants named in count I are the municipalities and MMWAC. Since their conduct is authorized by statute, the state action doctrine applies. Contrary to Tri-State's claim, municipalities (or their instrumentalities) engaged in state-authorized conduct are not themselves required to be further supervised by the state. *See* *Town of Hallie, 471 U.S. at 47*.

Consolidated companies for disposing of the waste allowed their affiliate Waste Management of Maine effectively to reduce its $ 75 per ton tipping fee to $ 9 ($ 75 less $ 66) and thus steal away Tri-State's customers. [4]

Counts III and III-A concern the activities of Waste Management of Maine in other non-MMWAC communities. This competitor, says Tri-State, has been favored by MMWAC with a low tipping fee ($ 24 per ton), not available to Tri-State, for "foreign" waste delivered from outside the MMWAC municipalities to the **[**15]** new incinerator-generator. [5] As a result, Tri-State has lost customers outside the twelve municipalities to "low ball" prices. Further, the customers are "locked up" by exclusive dealing contracts and supplied with trash containers that can be used only for Waste Management trash.

In analyzing these claims, the district court distinguished between MMWAC and the Waste Management companies. As to the former, the court pointed out that the participating municipalities were empowered by the Maine statute to control completely the collection and disposition of waste generated within their communities, dealing if they chose to do so with a single entity. *803 F. Supp. at 458*; *Me. Rev. Stat. Ann. tit. 38, **[**16]** § 1304-B(4)*. Thus, assuming that MMWAC's interim arrangements with the Consolidated companies favored the Waste Management companies over Tri-State, MMWAC was protected by the state action doctrine.

As to the conduct in Counts III and III-A, the district court noted that the Maine legislature clearly contemplated that municipalities could buy waste from other municipalities to make up any shortfall. *803 F. Supp. at 459*; *Me. Rev. Stat. Ann. tit. 38, § 1304-B(4-A)(B)*. A reduced tipping fee is merely one way of "buying" such waste. Nothing in the authorizing statute says that the same price must be offered to everyone; on the contrary the need for long-term fuel commitments, recognized elsewhere in the statute, *see* *Me. Rev. Stat. Ann. tit. 38, § 1304-B(4)*, suggests that arrangements with one or a few suppliers were entirely foreseeable. We agree with the district court that MMWAC's alleged exclusive offer of the $ 24 tipping fee to Waste Management of Maine for foreign waste was authorized by statute and is protected by the state action doctrine.

A different, and more difficult, issue is presented by Waste Management's claim that it too is protected by **[**17]** the state action **[*1079]** doctrine. Tri-State objects that Waste Management, at least, is fully subject to the *Midcal* requirement that it be supervised before any of its actions can be protected. The district court agreed that supervision is required. But it found that municipal, as opposed to state, supervision is sufficient. It further held that this obligation was satisfied by MMWAC's obligation, undertaken in its contracts with its municipality members, to comply with all pertinent laws. *803 F. Supp. at 461*.

We agree with the district court's view, supported by the greater weight of authority, that municipal supervision of private actors is adequate where authorized by or implicit in the state legislation. Although there is some precedent to the contrary, [6] **[**18]** we share the view of the Eighth and Ninth Circuits, endorsed by the leading antitrust treatise, that municipal supervision is adequate. [7] As Professors Areeda and Hovenkamp note, "it would be implausible to rule that a city may regulate, say, taxi rates but only if a state agency also supervises the private taxi operators." ***Antitrust Law***, *supra* n.7, at 197.

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[4] Tri-State's assertion of a $ 9 per ton "net" tipping fee appears to be faulty economics. The $ 66 per ton payment to the Consolidated companies was to cover the cost of receiving and disposing of the waste. Whether or not the *cost* to the Consolidated companies was actually $ 66 per ton, it is not likely to have been zero.

[5] The record does not explain why, given MMWAC's need for fuel, it would make sense for MMWAC to offer the $ 24 tipping fee exclusively to Waste Management of Maine. While we accept the allegation as true for purposes of this appeal, we note that MMWAC's brief denies that this is what happened.

[6] *See*, *e.g.*, *Riverview Investments, Inc*. v. *Ottawa Community Improvement Corp., 774 F.2d 162 (6th Cir. 1985)*.

[7] *Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983)*, *cert*. *denied*, ***471 U.S. 1003, 85 L. Ed. 2d 158, 105 S. Ct. 1864 (1985)***; *Tom Hudson & Assocs*. v. *City of Chula Vista, 746 F.2d 1370 (9th Cir. 1984)*, *cert*. *denied*, ***472 U.S. 1028, 87 L. Ed. 2d 634, 105 S. Ct. 3503 (1985)***; *Savage v. Waste Management, Inc., 623 F. Supp. 1505 (D.S.C. 1985)*; *see also* P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 212.7c at 196-97 (Supp. 1992).

At this point, our analysis of Waste Management's position diverges somewhat from that of the district court. As to any claim that Waste Management received favorable tipping fees--whether through MMWAC payments to the Consolidated companies or outright as to foreign waste--we think "supervision" is not a requirement at all: the choice to make such payments was that of MMWAC and its actions are protected as state action. To treat the mere receipt of such authorized payments as wrongful would undermine the *Parker* protection afforded MMWAC **[**19]** and mistake the purpose of the supervision requirement, which is to prevent the unregulated licensing of *private* anticompetitive conduct.

This analysis disposes of the claims under counts II and III against all parties including the Waste Management defendants, so far as those claims attack the official actions of MMWAC: the contract between MMWAC and the Consolidated companies, the payments to the Consolidated companies by MMWAC, and the tipping fees set by MMWAC for Waste Management of Maine, whether for local or foreign waste. It does not, however, resolve the attacks, scattered throughout counts II, III, and III-A against the conduct of Waste Management of Maine vis-a-vis its own customers. These attacks charge Waste Management of Maine with predatory pricing of its waste collection services, wrongful exclusive dealing by long-term contracts, and unreasonably restricting the use of the containers it furnished. [8]

[20]** *The Predation Claims*. The district court held that the Waste Management defendants were protected as to their customer-related conduct under the state action doctrine. The court reasoned that by its agreements with the municipalities, MMWAC had committed itself to obey the law; that Waste Management of Maine had contractual arrangements with MMWAC; and that this contractual authority provided sufficient municipal supervision to cast the garment of *Parker* protection over Waste Management of Maine's own conduct. *803 F. Supp. at 461*. The district court noted, however, that the contracts had not been made available to it for inspection. *Id*. We are not persuaded that the rates and contract terms Waste Management set for its own customers have been brought within *Parker*.

[*1080] There is simply nothing to which we have been pointed to show that MMWAC has claimed or exercised any control whatever over the rates that Waste Management of Maine charges to its customers or the other terms (such as length of contract) on which it deals. While it is conceivable (but not proved) that MMWAC claims such authority with respect to customer contracts in the MMWAC communities, **[**21]** it is certainly less likely that it does so in the non-MMWAC communities which are the locales for the predation alleged in counts III and III-A. Absent a showing of control, questions of state authorization and the adequacy of official supervision need not even be reached.

It is a close question whether the judgment of dismissal should nevertheless be affirmed on an alternative ground, namely, that the allegations of the complaint fail to state a predation claim even if the state action doctrine is ignored. This alternative course is urged by Waste Management, and we have given it serious consideration. The requisites for proving predatory pricing are demanding, because the conditions under which it is plausible are not common, and because it can easily be confused with merely low prices which benefit customers. *See Barry Wright Corp*. v. *ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983)*. ***HN4***[] Exclusive dealing contracts may also benefit customers and are unlawful only upon a particularized showing of unreasonableness. *Tampa Electric Co*. v. *Nashville Coal Co., 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*.

Thus a complaint that did no more than **[**22]** allege predatory pricing or exclusive dealing contracts with *nothing* more specific might well be susceptible to dismissal for failure to state a claim. The present complaint is, in a sense, both better and worse. It is somewhat more specific, asserting at one point that the prices offered by Waste Management of Maine were as much as 50 percent below market rates, at other places that the rates were sometimes below variable cost, and that the exclusive dealing contracts were for three years.

[8] MMWAC is also charged in these counts but, apart from bare references to conspiracy, there is nothing in the complaint to connect MMWAC with Waste Management's actions vis-a-vis its own customers except the favorable tipping fees. Since the fee payments are state action, we do not think that any claim has been stated against MMWAC based on Waste Management's alleged predation.

At the same time, the complaint goes some distance toward undermining its own predatory pricing claim. Tri-State implies that the low prices offered by Waste Management of Maine were, in some instances at least, the result of the favorable tipping fees that MMWAC made available to it. If this is the whole of the charge, then there is no predatory pricing claim at all. ***HN5***[] A company that rationally prices its own product or service at or above its own costs does not violate the Sherman Act merely because its costs, and thus its prices, are lower than a rival's costs; and this is true even though its lower costs may be due to the generosity, or foolishness, of another supplier who has charged the **[**23]** company too little for an input. *See generally Brooke Group Ltd*. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 1993 U.S. LEXIS 4245, 61 U.S.L.W. 4699, 4702-03, 113 S. Ct. 2578 (June 21, 1993).

Even apart from this possible explanation for lower prices, Tri-State's predatory pricing claim is on the edge of inadequacy. Although the complaint asserts that Waste Management is pricing below variable cost--the normal test of predation, *see Barry Wright*--it is not clear what basis if any Tri-State has for this assertion. The reference to prices 50 percent below customary prices might invite some suspicion, but in an industry like waste collection, in which customers are scattered along routes, the variable cost of serving additional customers to piece out a route may be extremely low.

The claim that the duration of the exclusive contracts is unlawful is, if anything, an even thinner case on the face of the complaint. That some of the contracts are three years, the only specific in the complaint, might invite curiosity, but it does not even begin to establish illegality. Under *Tampa Electric Co*., it is the totality of reasons for such a term, and its actual impact on competition, that are decisive. **[**24]** Here, we know nothing about the number of customers affected, the size of any cancellation penalty, the practice in the industry, or anything else that might help to paint a picture of the competitive scene. Of course, a plaintiff is required only to plead a claim, not to recite evidence, but the essence of a claim like this one lies in the details.

A final concern is that predatory pricing is a section 2 claim and is condemned **[*1081]** only where it is part of an attempt to monopolize or is used to secure or retain an actual monopoly. *E.g.*, *C.A.T. Industrial Disposal, Inc*. v. Browning-Ferris Industries, 884 F.2d 209 (5th Cir. 1989). [9] Tri-State certainly does allege both the aim of monopoly and the actuality, but its complaint supplies very little information (*e.g.*, market shares in a properly defined market) from which one can frame a judgment whether this claim is plausible. The complaint does say that Waste Management, Inc. and its subsidiaries are the largest waste handling and disposal business in Maine and in the nation; but the primary issue is dominance or prospective dominance in a properly defined economic market.

[25]** One's first instinct is that monopoly would be hard to sustain in a business in which the basic equipment is a truck and entry is apparently easy. *See generally* United States v. Waste Management, Inc., 743 F.2d 976 (2d Cir. 1984). But waste collection might in theory be subject to local monopoly in some circumstances. Thus, the efficiencies of collecting from a number of closely located customer sites could make new entry difficult, especially if the community were small and many customers were tied to an existing dominant hauler by long-term contracts; and environmental restrictions on new landfills in some areas could give a decisive advantage to a hauler that controlled the only available facility. There are some hints, but only hints, in the complaint that Waste Management of Maine may enjoy an advantage of this latter sort.

Taking everything together, we think it wiser not to affirm the dismissal of the predation claims on the alternative ground. Thin and doubtful though they may be, we cannot say at this stage that these claims are hopelessly inadequate if *Parker*'s shield is removed. The district court did not rest its decision on that **[**26]** ground, and it has been the subject of only a small portion of the briefs on this appeal. The old prejudice against summary disposition of antitrust claims has diminished, First National Bank v. Cities Service Co., 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968), but the grant of a Rule 12(b)(6) motion on the predation claims would, at least at this time, be a shade too summary.

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[9] Exclusive dealing, which can be attacked *inter alia* under section 1 of the Sherman Act, 15 U.S.C. § 1, can be condemned without a showing that monopoly power is present or within reach. But the impact on competition is part of the equation and, absent a potential monopoly or oligopoly, the competitive impact may be hard to establish.

We underscore the limited nature of our remand. These claims can be stated, if at all, only against the Waste Management defendants. The district court is fully entitled to demand more specific explanations from Tri-State as to the gray areas in its predation claims, including the basis for the charge of pricing below variable cost, the basis for the market definitions urged, and the basis for any claim that monopoly power exists or could plausibly be secured in a properly defined economic market. Nothing in this opinion is intended to preclude summary disposition at a later stage, and this need not mean much later if these claims prove to have little substance. [10]

[27]** III. TRI-STATE'S REMAINING CLAIMS

Count IV of the complaint reasserts, under the Maine antitrust statute, the federal antitrust claims made in the earlier counts. The Maine antitrust statutes parallel the Sherman Act, *see* *Me. Rev. Stat. Ann. tit. 10, §§ 1101 et seq*., and Tri-State offers no separate argument for liability under state law. In point of fact, the Maine statute under which MMWAC is organized also has an explicit exemption from state antitrust laws for specified municipal contracts or ordinances. *Me. Rev. Stat. Ann. tit. 38, § 1304-B(6)*. Accordingly, the dismissal of the state antitrust claim is sustained except as to the predation claims against the Waste Management defendants.

[*1082] In count V, Tri-State claims that the solicitation of Tri-State customers by Waste Management of Maine was a violation of Maine law against interference with advantageous contractual relations. The gravamen is that this solicitation was unlawful because achieved through discriminatory tipping fees, predatory pricing, and other wrongs. The district court dismissed the count on the ground that the actions in question were within the ambit of the state legislation and therefore could not be **[**28]** "wrongful interference." *803 F. Supp. at 463-64*. In this court, Tri-State does not argue the claim at length, asserting instead that its tortious interference claim is "contingent" upon our finding that the alleged anticompetitive conduct enjoys no immunity.

We think the fixing of tipping fees by the municipalities and MMWAC is embraced by the Maine statute--Tri-State makes no effort to show the contrary--but, as earlier stated, we cannot find on this record that the terms on which Waste Management of Maine dealt with its own customers has been the subject of regulation. Accordingly, count V, so far as it makes allegations against the private defendants based on Waste Management of Maine's dealings with its own customers, is remanded for consideration together with the predation claims. Nothing in the complaint explains why MMWAC is responsible for such contracts, however, and as to it the dismissal of count V is sustained for failure to state a claim.

Count VI of the complaint asserts a claim under *42 U.S.C. § 1983* against Auburn. In part, this count says that the *City of Auburn* injunction action against Tri-State **[**29]** represented discriminatory prosecution in violation of due process principles. Count VII makes the same complaint based on equal protection principles. Count VIII, the final count of the complaint, re-asserts the allegations of counts VI and VII as violations of Maine's own civil rights statutes. *Me. Rev. Stat. Ann., tit. 5, §§ 4682-83*. On appeal, Tri-State advises that it elects not to press the selective prosecution issue in this court, reserving it for its state court appeal.

This leaves only Tri-State's final contention--the other subject of its count VI claim--that the Auburn flow control ordinance is "an unconstitutional taking of [Tri-State's] property without compensation." Tri-State's theory seems to be that the Auburn flow control ordinance has crippled Tri-State's waste disposal business. This, says Tri-State, is a business in which it has engaged for many years and its interests in continuing without undue interference deserve protection as "investment-backed expectations." *Penn Central Transp. Co*. v. *New York City, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)*.

While the Supreme Court did use the quoted phrase to describe a pertinent consideration in takings **[**30]** cases, the *Penn Central* opinion actually reaffirms that government for public purposes can, without compensation, impose

[10] The Waste Management defendants are also free to pursue their *Parker* defense as to the predation claims. Our holding is that on this record there is an insufficient basis for determining that *Parker* immunity exists as to the terms on which Waste Management of Maine deals with its customers.

general regulations that may severely limit the value of an ongoing business. The Supreme Court has in fact twice upheld municipal ordinances granting one waste collector the exclusive right to collect and dispose of waste within the community, putting existing haulers out of business. [11] Despite Tri-State's claims that these cases are outdated, nothing in the Supreme Court's more recent decisions raises serious doubts about their validity. The Sixth Circuit has rejected an argument almost identical to Tri-State's. *Hybud Equipment Corp*. v. *City of Akron, 654 F.2d 1187 (1981)*, *vacated on other grounds*, *455 U.S. 931, 71 L. Ed. 2d 640, 102 S. Ct. 1416 (1982)*.

* * *

In this **[**31]** case, we have concluded that, with the possible exception of its predation claims against the private defendants, none of Tri-State's claims has any merit. This does not mean that there is no basis for Tri-State's concerns about the competitive impact of the MMWAC arrangements, or for its assertion that the plan is unfair to it or bad for recycling. But government action may be anticompetitive, unfair or unwise without being illegal. Absent illegality, the solution lies with the legislature and not in the courts.

[*1083] The judgment of the district court is *affirmed* except for the dismissal of the federal and state antitrust claims in counts II-V and the tort claim in count VI insofar as those counts charge the Waste Management defendants with predation or related anticompetitive conduct toward customers. Those claims are *remanded* for further proceedings in accordance with this opinion. No costs.

It is so ordered.

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[11] *See California Reduction Co*. v. *Sanitary Reduction Works, 199 U.S. 306, 50 L. Ed. 204, 26 S. Ct. 100 (1905)*; *Gardner v. Michigan, 199 U.S. 325, 50 L. Ed. 212, 26 S. Ct. 106 (1905)*.

Ticor Title Ins. Co. v. FTC

United States Court of Appeals for the Third Circuit

February 24, 1993, Argued on Remand from the Supreme Court ; July 15, 1993, Filed

No. 89-3787

Reporter
998 F.2d 1129 *; 1993 U.S. App. LEXIS 17621 **; 1993-2 Trade Cas. (CCH) P70,296

TICOR TITLE INSURANCE COMPANY, CHICAGO TITLE INSURANCE COMPANY, SAFECO TITLE INSURANCE COMPANY (now known as Security Union Title Insurance Company), LAWYERS TITLE INSURANCE CORPORATION and STEWART TITLE GUARANTY COMPANY, Petitioners v. FEDERAL TRADE COMMISSION, Respondent

Prior History: [1]** On Petition for Review of an Order of the Federal Trade Commission (FTC Docket No. 9190). Certiorari Granted October 7, 1991. On Remand From The Supreme Court of the United States June 12, 1992

Core Terms

insurance business, rates, title search, insurer, supervision, regulated, McCarran-Ferguson Act, exemption, rating bureau, insurance company, immunity, anti trust law, title insurance, policyholders, insurance department, insurance contract, title insurance policy, state action doctrine, rate setting, antitrust, entities, title insurance company, insurance industry, state law, Bureau, state statute, issuance, argues, spread, prong

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Torts > Public Entity Liability > Immunities > Judicial Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN1[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine immunizes agreements among competitors to influence legislative, judicial, or administrative action from antitrust liability.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] US Federal Trade Commission Actions, Judicial Review

The Federal Trade Commission's (FTC) legal conclusions are subject to plenary review. Its factual findings are conclusive if supported by substantial evidence. *15 U.S.C.S. § 45(c)*. Under the "substantial evidence" standard, a reviewing court must accept the FTC's findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN3[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-15*, provides a statutory antitrust exemption for activities that constitute the "business of insurance," are regulated pursuant to state law, and do not constitute acts of boycott, coercion or intimidation.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN4[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-15*, exempts from antitrust regulation only "business of insurance," not all activities of insurance companies.

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN5[] Industry Practices, Federal Regulations

Under the McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-15*, three criteria are relevant in determining whether a given practice constitutes the "business of insurance": whether the practice has the effect of transferring or spreading a policyholder's risk; whether the practice is an integral part of the policy relationship between the insurer and the insured; and whether the practice is limited to entities within the insurance industry. None of the three is independently determinative.

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN6[] Industry Practices, Federal Regulations

See *15 U.S.C.S. § 1012(b)*.

Insurance Law > Industry Practices > Federal Regulations > General Overview

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

HN7[] **Industry Practices, Federal Regulations**

For purposes of the McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-15*, a title search and examination has nothing to do with the actual performance of a title insurance contract. Instead, the title search and examination is a matter of indifference to the policyholder, whose only concern is whether his claim is paid, not why it is paid.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN8[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

For purposes of determining the scope of the antitrust immunity provided in the McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-15*, the second clause of *§ 1012(b)* makes "the business of insurance" itself exempt from the antitrust laws to the extent that it is regulated by state law. The first clause of *§ 1012(b)* exempts state laws enacted for the purpose of regulating the business of insurance from all other federal statutes. The United States Supreme Court held that to equate the scope of the first clause with that of the second clause would be to read words out of the statute. The plain text of *§ 1012(b)* compels the conclusion that the first clause necessarily covers more than the second clause, which limits its exemption to the business of insurance regulated by state law.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Insurer Insolvency > Priority of Claims

Governments > Federal Government > US Congress

Insurance Law > Claim, Contract & Practice Issues > Claims Made Policies > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN9[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

For purposes of determining the scope of the antitrust immunity provided in the McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-15*, the United States Supreme Court reasons that the more limited reading of the second clause of *§ 1012(b)* better advances the legislative purpose of *§ 1012(b)*: The first clause of *§ 1012(b)* was intended to further Congress' primary objective of granting the states broad regulatory authority over the business of insurance, while the second clause accomplishes Congress' secondary goal of carving out only a narrow exemption for "the business of insurance" from the federal antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Types of Insurance > Property Insurance > Title Insurance

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN10[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The court rejects the notion that the indirect effects of the title search and examination process on the business of title insurance are sufficient to merit protection from antitrust liability under the McCarran-Ferguson Act, *15 U.S.C.S. § 1012(b)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN11[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

Under the McCarran-Ferguson Act, *15 U.S.C.S. § 1012(b)*, the relevant question is whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b), not whether a particular entity is entitled to antitrust immunity by virtue of its status as an insurance company. The McCarran-Ferguson Act immunizes activities rather than entities.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > Federal Regulations > General Overview

Business & Corporate Compliance > ... > Insurance Company Operations > Conducting Business > Foreign Insurers

HN12[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

For purposes of determining the scope of the antitrust immunity provided in the McCarran-Ferguson Act, *15 U.S.C.S. §§ 1011-15*, agreements that insurance companies make with parties wholly outside the insurance industry are unlikely to be about anything that could be called "the business of insurance" under *§ 1012(b)*, as distinct from the broader "business of insurance companies."

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Torts > Public Entity Liability > Immunities > Judicial Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN13[] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

With respect to ***antitrust law***, the Noerr-Pennington doctrine immunizes agreements to influence legislative, judicial, or administrative action.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN14[] **Exemptions & Immunities, Parker State Action Doctrine**

There is a two-prong test for determining when private parties who take part in an agreement to fix prices are entitled to immunity from the antitrust laws under the state action doctrine. First, the state regulation must be "clearly articulated and affirmatively expressed as state policy." Second, the policy must be "actively supervised" by the state.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN15[] **Exemptions & Immunities, Parker State Action Doctrine**

In analyzing when private parties who take part in an agreement to fix prices are entitled to immunity from the antitrust laws under the state action doctrine, the purpose of the active supervision inquiry is not to determine whether the state has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the state has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the state has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the state's own.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

HN16[] **Exemptions & Immunities, Parker State Action Doctrine**

The United States Supreme Court expressly declares that when prices are initially set by private parties, the person claiming antitrust immunity must show that the state undertook steps to evaluate the rate setting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the state. This declaration significantly narrowed the reach of the active supervision prong of the state action exemption. The Supreme Court plainly instructed lower courts that a state's rubber stamp is not enough. Active supervision requires the state regulatory authorities' independent review and approval.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN17[] **Exemptions & Immunities, Parker State Action Doctrine**

Under the "negative option" method of approving rates, sometimes called the "file and use" approach, filed rates are deemed approved if the director of the State Department of Insurance took no action on them within 15 days of their filing. The United States Supreme Court criticized this method in Montana and Wisconsin, and flatly states that the active supervision standard is not met where the potential for state supervision was not realized in fact.

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Judges: BEFORE: HUTCHINSON, NYGAARD and ALITO, Circuit Judges.

Opinion by: HUTCHINSON

Opinion

[*1130] OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*.

This case concerning petitioners' assertions of immunity from the antitrust laws is again before this Court on cross-petitions for review and enforcement of a Federal Trade Commission ("FTC") order after remand by the United States Supreme Court. *See* FTC v. Ticor Title Ins. Co., 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992). The FTC exercised subject matter jurisdiction under 15 U.S.C.A. § 45 (West Supp. 1992). This Court exercises appellate jurisdiction under 15 U.S.C.A. § 45(c) (West 1973). On the merits, we will affirm the final order of the FTC holding **[**3]** that the petitioners are subject to antitrust regulation.

I. *Procedural History*

A detailed statement of the case appears in the Supreme Court's opinion on *certiorari*, *see* *Ticor, 112 S. Ct. at 2173-76*, and in this Court's earlier opinion, *see* *Ticor Title Ins. Co. v. FTC, 922 F.2d 1122, 1125-27 (3d Cir. 1991)* ("*Ticor I*"). Therefore, we will give only a brief summary of the case's procedural history.

Petitioners are five of the nation's largest title insurance companies (collectively "Ticor"). [1] **[**4]** On January 7, 1985, the FTC issued an administrative complaint alleging that Ticor [2] **[*1131]** had engaged in "unfair methods of competition" in violation of section 5 of the Federal Trade Commission Act ("FTC Act"), *15 U.S.C.A. § 45(a)(1) (West Supp. 1992)*, by agreeing collectively to set uniform rates for title search and examination services. Ticor accomplished this rate setting through state-licensed "rating bureaus" in thirteen states.

The administrative law judge ("ALJ") before whom the case was brought issued an initial decision and proposed order on December 25, 1986. The ALJ found Ticor's claim that the collective formulation of rates for title search and examination services is part of the "business of insurance" exempt from the FTC Act under sections 2(b) and 3(a) of the McCarran-Ferguson Act, *15 U.S.C.A. §§ 1012(b)*, *1013(a) (West 1976)*, was without merit. The ALJ also rejected Ticor's claim that the *Noerr-Pennington* doctrine [3] protected the challenged conduct from antitrust liability as joint efforts by petitioners to influence state regulators in matters of state policy. The ALJ also rejected Ticor's claim that the state action doctrine exempted them from antitrust liability in Connecticut and Wisconsin, but held that Ticor's rate setting actions in Arizona, Idaho, **[**5]** Montana, New Jersey, and Pennsylvania satisfied both prongs of the state action doctrine and were thus immune from antitrust regulation. Finally, the ALJ ruled that the FTC had failed to prove that Ticor used its rating bureau to establish uniform rates for title search and examination services in Ohio.

Ticor appealed the ALJ's initial decision. The FTC cross-appealed. On September 19, 1989, the FTC affirmed in part and reversed in part the ALJ's decision. The FTC affirmed the ALJ's holding on the McCarran-Ferguson Act and *Noerr-Pennington* issues, as well as its holding that the state action doctrine did not apply to Ticor's rate setting actions in **[**6]** Connecticut and Wisconsin. It rejected Ticor's state action defense with respect to its rate setting actions in New Jersey, Pennsylvania, Montana, and Arizona, and reversed the ALJ to that extent. The FTC dismissed the complaint insofar as it concerned Ticor's rate setting actions in Idaho and Ohio.

The FTC's final order prohibited Ticor from fixing prices for title search and examination services in the six states where it had held Ticor violated the antitrust laws. The order nevertheless contained a proviso that permits collective establishment of rates for title services in any of these states if undertaken "pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body." [4] Joint Appendix (Jt. App.) at 125.

In this Court, Ticor filed a timely petition to review the FTC's final order. The FTC filed a cross-petition **[**7]** for enforcement. *See* *15 U.S.C.A. § 45(c)* ("To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.")

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[1] Specifically, petitioners include Ticor Title Insurance Company, Chicago Title Insurance Company, SAFECO Title Insurance Company (now known as Security Union Title Insurance Company), Lawyers Title Insurance Corporation, and Stewart Title Guaranty Company.

[2] The complaint made charges against a sixth title insurance company which have been settled. Thus, the FTC's final order affected only the five title insurance companies who have joined as petitioners before this Court.

[3] ***HN1***[] The *Noerr-Pennington* doctrine immunizes agreements among competitors to influence legislative, judicial, or administrative action from antitrust liability. *See* *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626 , 85 S. Ct. 1585 (1965)*; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464 , 81 S. Ct. 523 (1961)*.

[4] This proviso merely restates the requirements of the state action doctrine. *See infra* typescript at 18-19.

This Court reversed the FTC's final order on the ground that Ticor was entitled to immunity because the active supervision requirement of the state action doctrine was met in each state. *Ticor I, 922 F.2d at 1140*. In reaching this conclusion, we followed the United States Court of Appeals for the First Circuit's reasoning that the active supervision prong of the state action doctrine would be satisfied if the state regulatory program was staffed, funded and empowered by law. *Id. at 1137* (citing *New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064, 1071 (1st Cir. 1990))*.

[*1132] The Supreme Court granted certiorari to consider (1) whether this Court was correct in its statement of the law concerning the "active supervision" prong of the state action doctrine, and in its application of that law to the facts of the case, and (2) whether this Court **[**8]** exceeded its authority by departing from the factual findings entered by the ALJ and adopted by the FTC. *Ticor, 112 S. Ct. at 2176*. [5] On the first issue, the Supreme Court reversed. It held that although the criteria set forth in the First Circuit test of active supervision were relevant to the active supervision prong of the state action doctrine, they were not the exclusive measure of whether that prong was met. *Id. at 2179*. The Court reasoned:

> Where prices or rates are set as an initial **[**9]** matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision in either Wisconsin or Montana.

Id. Having concluded that Ticor's acts in Montana and Wisconsin were not immune from antitrust liability because there was no active supervision, the Supreme Court remanded the case to this Court to determine whether the regulatory schemes of Connecticut and Arizona met the active supervision prong under the above standard. *Id. at 2180*.

II. *Statement of Facts*

We again refer the reader to the opinion of the Supreme Court and our earlier opinion for a detailed statement of facts. *See id. at 2173-76*; *Ticor I, 922 F.2d at 1127-29*. A relatively concise factual history is presented here.

The purpose of title insurance is to indemnify **[**10]** buyers and lenders for loss resulting from non-record defects in the title of a parcel of real estate. Such defects include those not discoverable from a search of the public records on the parcel, as well as losses caused by errors or mistakes in the search and examination. Negligence need not be proved in order to recover. Title insurance policies generally except matters that a search and examination of public records have identified, as well as any discrepancies that a survey has actually revealed or would have revealed if performed.

Originally, title insurance companies relied upon independent examiners to perform title search and examination services. As the business evolved, title insurance companies expanded and began to provide these services themselves. Today, a title insurance company may still issue a policy of title insurance after an abstractor or attorney unaffiliated with the insurance company performs the search and examination, but in many cases either an attorney-agent of the insurance company or a trained title insurance company employee performs the service. Some insurance companies, however, still use a list of approved attorneys whom a buyer or lender may then **[**11]**

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[5] Before the Supreme Court, the parties confined their briefing on the first issue to the regulatory schemes of Wisconsin and Montana, and on the second issue to Connecticut and Arizona. *Ticor, 112 S. Ct. at 2176*. The FTC did not challenge this Court's ruling in *Ticor I* that the New Jersey and Pennsylvania schemes satisfied the "clearly established policy" requirement of the state action doctrine. *See infra* typescript at 18-19.

hire to perform the search and examination on which the title insurer bases its list of record exceptions to the insuring covenant.

An attorney may act as an attorney-agent for hypothetical insurance company A and at the same time act as an approved attorney for insurance company B. If company A hires the attorney to perform a search and examination as an attorney-agent, he will receive as compensation from the insurance company the price fixed by the insurance companies through the rating bureau in the state in which the property is located. In contrast, if a buyer or lender hires the attorney either directly or by reference to company B's list of approved attorneys, the attorney bills the buyer or lender at whatever rate they negotiate.

[*1133] In many states, title insurance companies file only their rates for indemnification services (the "risk rate"). In some states a rate is also filed for search and examination services. In the latter case, the search and examination rate is identified separately from the rate charged for underwriting the risk insured against liability.

III. *Issues on Appeal*

On remand, Ticor presents three issues. First, it argues that under the McCarran-Ferguson **[**12]** Act, *15 U.S.C.A. §§ 1011-15 (West 1976)*, its collective establishment of rates for title search and examination services falls within that Act's "business of insurance" exemption from federal antitrust laws. Second, Ticor asserts that the collective establishment of rates for title search and examination services was an agreement to influence legislative, judicial, or administrative action, and is therefore immune from the antitrust laws under the *Noerr-Pennington* doctrine. Finally, Ticor asserts that its filing of title insurance rates through state-chartered rating bureaus in Connecticut and Arizona was actively supervised by those states and thus not subject to the antitrust laws under the standards governing state action that the Supreme Court set out in the opinion that ordered this remand.

HN2[] The FTC's legal conclusions are subject to plenary review. Its factual findings are conclusive if supported by substantial evidence. *15 U.S.C.A. § 45(c)*. Under the "substantial evidence" standard, a reviewing court "must accept the [FTC's] findings of fact if they are supported by such relevant evidence as a reasonable **[**13]** mind might accept as adequate to support a conclusion." *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454, 90 L. Ed. 2d 445 , 106 S. Ct. 2009 (1986)* (quoting *Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 95 L. Ed. 456 , 71 S. Ct. 456 (1951))*.

IV. *Discussion*

A. *The McCarran-Ferguson Act*

Ticor argues that the collective filing of proposed rates for the search and examination activities of title insurers is exempt from antitrust liability under ***HN3***[] the McCarran-Ferguson Act (the "Act"). That Act provides a statutory antitrust exemption for activities that (1) constitute the "business of insurance," (2) are regulated pursuant to state law, and (3) do not constitute acts of "boycott, coercion or intimidation." *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 219-20, 59 L. Ed. 2d 261 , 99 S. Ct. 1067 (1979)*. The only one of these three requirements at issue here is whether the challenged rate setting activities constitute the business of insurance. *See id. at 211* (***HN4***[] McCarran-Ferguson Act exempts from antitrust regulation only "business of insurance," not all activities of insurance companies).

Under *Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 73 L. Ed. 2d 647 , 102 S. Ct. 3002 (1982)*, **[**14]** ***HN5***[] three criteria are relevant in determining whether a given practice constitutes the "business of insurance": (1) Whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. *Id. at 129* (citing *Royal Drug, 440 U.S. at 211-21*). None of the three is independently determinative. *Id.*

Ticor argues that search and examination services satisfy the first Pireno factor because of their logical and temporal relationship to the risk underwritten in the title insurance policy. In support, Ticor cites several pre-*Pireno* cases in which courts held that search and examination services are conditions precedent to the issuance of a title insurance policy, rather than a wholly separate endeavor. *See* Brief for Petitioners on Remand at 5-7 (citing *McIlhenny v. American Title Ins. Co., 418 F. Supp. 364, 369 (E.D. Pa. 1976)*; *Schwartz v. Commonwealth Land Title Ins. Co., 374 F. Supp. 564, 574 (E.D. Pa. 1974)*; **[**15]** *Commander Leasing Co. v. Transamerica Title Ins. Co.*, Civil Action No. C-3295 (D. Col. 1972), *aff'd*, *477 F.2d 77 (10th Cir. 1973)*; *In re Equifax Inc., 96 F.T.C. 844, 1101 (1980))*. Ticor contends that the determination **[*1134]** of what risks will be insured is at the heart of the business of insurance, and that title searchers and examiners decide what risks are underwritten by eliminating from coverage recorded defects of title.

Ticor ignores a critical fact: The title search and examination does not itself spread or transfer risk. At most, title searchers identify defects of title. Title searchers themselves have no power to insure against any risk they identify. The search and examination are like many other arrangements title companies make for services in an effort to reduce costs. Ticor cannot claim that its title searchers determine the risk it agrees to underwrite any more than it could make a similar claim regarding the services provided, for example, by its secretarial staff or by a physician employed to report on the health of applicants for health or life insurance. When a title insurance policy is issued, it is the **[**16]** insurer's decision to cover or refuse to cover the risks posed by the title searcher that triggers Ticor's obligation to indemnify the policyholder against the risks of title defect covered by the policy, whether from non-record defects or human error in the search. The title search and examination do not come under the first *Pireno* requirement of transferring or spreading the risk.

The second *Pireno* factor is whether the challenged practice is integrated into or encompassed within the relationship between the insurer and insured that flows from the policy. Historically, title search and examination services were provided by persons or entities separate from the issuer of the title insurance policy itself. Even today, entities other than title insurance companies provide title search and examination services. Thus, the second *Pireno* factor is not satisfied. The fact that title search and examination services, in many cases, still are not provided or performed by the title insurance companies themselves also indicates that the third *Pireno* criterion, whether the challenged practice is limited to entities within the insurance industry, is not satisfied either.

Ticor **[**17]** argues that court decisions and "other judicial developments" since the filing of the briefs in *Ticor I* confirm its belief that the collective filing of proposed rates for search and examination activities of title insurers is the "business of insurance" within the meaning of the McCarran-Ferguson Act and *Pireno*. Brief for Petitioners on Remand at 4. Ticor first points to the case of *Gahn v. Allstate Life Insurance Co., 926 F.2d 1449 (5th Cir. 1991)*. In that case, the court of appeals applied *Pireno* to determine whether ERISA preempted a state statute. ERISA itself contains a provision exempting from preemption state laws that regulate the business of insurance. The issue before the *Gahn* court was whether a state statute, which precluded medical insurers from discontinuing coverage after a policyholder was diagnosed with a terminal illness, regulated the business of insurance. *Id. at 1454*. The Fifth Circuit held that the statute satisfied all three of the *Pireno* criteria: "It can transfer the risk of non-coverage from an insured to the insurer; it is 'an integral part of the policy relationship between **[**18]** the insurer and the insured'; and it only applies to the insurance industry." *Id.* (quoting *Pireno, 458 U.S. at 129*). Accordingly, ERISA did not preempt the statute because the statute regulated insurance. *Id.*

Ticor argues Gahn's holding that the state statute regulated the business of insurance even though it was directed at a practice "clearly intended to *exclude* risks from the insurer's coverage[,]" Brief for Petitioners on Remand at 9, is analogous to the practice of title insurers with respect to title searches. We disagree. The state statute the court considered in *Gahn* established certain conditions precedent to an insurer's power to cancel a pre-existing insurance contract. As such, the statute affected the substantive terms of the insurance contract, and thus squarely regulated insurance under ERISA's exemption of state insurance law from preemption. *Gahn, 926 F.2d at 1454* (citing *Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 742-43, 85 L. Ed. 2d 728 , 105 S. Ct. 2380 (1985))*. An insurer's unilateral cancellation of a pre-existing health insurance policy would transfer risk from the insurer **[**19]** to the insured. The promise to indemnify against an unforeseen event is integral, *i.e.* encompassed within, to the insurer-insured relationship. Finally, because the **[*1135]** statute considered in *Gahn* affects only those aleatory contracts that are embodied in insurance policies issued by state regulated insurers, it is peculiar to the insurance industry. *See id. Gahn* does not persuade us that Ticor's action in setting rates for title searches and examinations is the business of insurance.

Ticor also cites *Mutual Reinsurance Bureau v. Great Plains Mutual Insurance Co., 969 F.2d 931* (9th Cir.), *cert. denied*, *121 L. Ed. 2d 540, 113 S. Ct. 604 (1992)*. Like *Gahn*, this case involved ERISA's preemption of a state statute making arbitration provisions in insurance contracts unenforceable. The court of appeals held that the statute was a law regulating the business of insurance within the meaning of the McCarran-Ferguson Act, which ERISA excepted from preemption. *Id. at 933*. Ticor contends it is significant that the Ninth Circuit reached this result "even though arbitration clauses are not unique to insurance **[**20]** contracts." Brief for Petitioners on Remand at 9. The challenged statute in *Mutual Reinsurance*, however, as in *Gahn*, directly regulated a term of the insurance contract, unlike the regulatory schemes at issue here. Although arbitration clauses are not unique to insurance contracts, Ticor fails to recognize that the state statute in question in *Mutual Reinsurance* did not generally prohibit arbitration clauses. Rather, the statute at issue made such clauses unenforceable only when contained in insurance contracts. *See* *Mutual Reinsurance, 969 F.2d at 933* ("Simply put, the Kansas legislature has placed limits on the enforceability of an agreement to spread risk . . . ."). *Mutual Reinsurance* therefore does not support Ticor's position.

Finally, Ticor points to material in a brief the Solicitor General filed before the United States Supreme Court in *United States Department of Treasury v. Fabe*, previously pending at No. 91-1513 (U.S., *cert. granted*, *118 L. Ed. 2d 541, 112 S. Ct. 1934* (May 18, 1992), Brief for Petitioners filed July 23, 1992). In that case, the United States Court of Appeals for the Sixth Circuit had held that **[**21]** an Ohio statute establishing priority among claims made by various debtors in the course of liquidation of an insolvent insurer was a statute regulating the business of insurance under the McCarran-Ferguson Act. *Fabe v. United States Dept. of Treasury, 939 F.2d 341, 351-52 (6th Cir. 1991)*. In effect, this holding trumped a conflicting federal law giving priority to claims of the federal government. *See* *id. at 343*. Ticor points to the Solicitor General's argument that the state statute at issue in *Fabe* does not regulate the business of insurance because, *inter alia*, it "'does not regulate the terms of insurance policies'" and under fundamental principles of insurance, the policy defines the scope of the risk that the insurer assumed. Brief for Petitioners on Remand at 10 (quoting Brief for *Fabe* Petitioners at 14, 19). According to Ticor, the Solicitor General's rationale implicitly confirms its contention that title search and examination directly shape the terms of the title insurance policy because they determine what is excluded from the policy.

In the title insurance business, as we stated above, the proposition **[**22]** that the insurance policy defines the scope of the risk assumed by the insurer does not logically imply that the person conducting the title search and examination has defined the risk. The two are separate. We reject Ticor's effort, in reliance on the Solicitor General's brief in *Fabe*, to coax us into an analogy that is not compelled and seems to us unwarranted.

Fabe has now been decided, in a decision affirming in part and reversing in part the Sixth Circuit's decision, and does not compel a different result. *See* *United States Dept. of Treasury v. Fabe, 124 L. Ed. 2d 449, 61 U.S.L.W. 4579, 113 S. Ct. 2202* (U.S. June 11, 1993) (to be reported at *113 S. Ct. 2202*). The precise issue in *Fabe* was whether the Ohio statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company was a law enacted "for the purpose of regulating the business of insurance" within the meaning of section 2(b) of the McCarran-Ferguson Act. [6] *61 U.S.L.W. at 4579*. **[*1136]** In deciding this issue, the United

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[6] This section provides,

> ***HN6***[] No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C.A. § 1012(b) (West 1976).

States Supreme Court expressly distinguished precedent holding that "'ancillary activities' that do not affect performance of the insurance **[**23]** contract or enforcement of contractual obligations do not enjoy the antitrust exemption for laws regulating the 'business of insurance.'" *Id. at 4582* (quoting *Pireno, 458 U.S. at 134 n.8*). *Pireno*, for example, held that use of a peer review committee to advise the insurer whether charges for chiropractic services were reasonable and necessary was not part of the business of insurance because the committee "had nothing to do with whether the insurance contract was performed; it dealt only with calculating what fell within the scope of the contract's coverage." *Id.* (citing *Pireno, 458 U.S. at 130*). Likewise, *Royal Drug* held that an insurer's agreements with participating pharmacies to provide benefits to policyholders was not part of the business of insurance: "'The benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $ 2 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies.'" *Id.* (quoting *Royal Drug, 440 U.S. at 213-14* **[**24]** (footnote omitted)).

We think the title search and examination at issue in the present case is analogous to the peer review process in *Pireno* and the insurer-pharmacy reimbursement process in *Royal Drug*. Like those processes, ***HN7***[] the title search and examination has **[**25]** nothing to do with the actual performance of the title insurance contract. Instead, the title search and examination is "'a matter of indifference to the policyholder, whose only concern is whether his claim is paid, not why it is paid.'" *Id.* (quoting *Pireno, 458 U.S. at 132*) (emphasis omitted).

In contrast, *Fabe* held that "the Ohio priority statute is designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy." *Id.* As such, the statute was integral to the performance of insurance contracts and therefore was enacted for the purpose of regulating the business of insurance. *Id.*

In addition to pointing out that the focus in Pireno and *Royal Drug* was on the absence of any effect on the performance of the contract, *Fabe* drew another distinction between those cases and the Ohio priority statute that is material to the title search and examination issue before us. *Pireno* and *Royal Drug*, ***HN8***[] like this case, involved the scope of the antitrust immunity provided in the second clause of section 2(b), which makes "the business **[**26]** of insurance" itself exempt from the antitrust laws to the extent that it is regulated by state law. *15 U.S.C.A. § 1012(b)*. *Fabe*, on the other hand, involved the first clause of section 2(b), which exempts state laws enacted for the purpose of regulating the business of insurance from all other federal statutes. *Fabe, 61 U.S.L.W. at 4582*. The Supreme Court held that to equate the scope of the first clause with that of the second clause "would be to read words out of the statute." *Id.* The plain text of section 2(b) compels the conclusion that the first clause necessarily covers more than the second clause, which limits its exemption to the business of insurance regulated by state law. *See id.*

HN9[] The Supreme Court reasoned that the more limited reading of the second clause better advances the legislative purpose of section 2(b): The first clause was intended to further Congress' primary objective of granting the states broad regulatory authority over the business of insurance, while the second clause accomplishes Congress' secondary goal of carving out only a narrow **[*1137]** exemption for "the business of insurance" **[**27]** from the federal antitrust laws. *Id. at 4583* (citing *Royal Drug, 440 U.S. at 218 n.18*). Because the Ohio priority statute distributed the insolvent insurer's assets to policyholders in preference to other creditors, its purpose was identical to the insurance company's primary purpose of paying claims made against policies. *Id.* Accordingly, *Fabe* affirmed the Sixth Circuit's holding that the Ohio priority statute was a law enacted for the purpose of regulating the business of insurance and thus exempt from the federal antitrust laws under the first clause of section 2(b) insofar as it established the priority of policyholders' claims against an insolvent insurer. *Id. at 4583*.

The Supreme Court nevertheless reversed the Sixth Circuit's holding that the priority statute was entirely immune under section 2(b) and held that to the extent that the statute was designed to further the interest of other creditors, it was not a law enacted for the purpose of regulating the business of insurance. *Id.* In reaching this holding, the Court recognized,

> Of course, every preference accorded to the creditors of an insolvent **[**28]** insurer ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company. This argument, however, goes too far: "But in that sense, every business decision made by an insurance company has some impact on its reliability . . . and its status as a reliable insurer." *Royal Drug, 440 U.S. at 216-17*.

Id. at 4583-84. Following the lead of *Royal Drug*, we too ***HN10***[] reject the notion that the indirect effects of the title search and examination process on the business of title insurance are sufficient to merit protection from antitrust liability under section 2(b). *See* *id. at 4584* (citing *Royal Drug, 440 U.S. at 217*).

The Supreme Court's recent decision in *Hartford Fire Insurance Co. v. California, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (U.S. 1993)*, bolsters this conclusion. The Supreme Court there reaffirmed that under *Royal Drug* and *Pireno* "'the business of insurance' should be read to single out one activity from others, not to distinguish one entity from another." *Id.* at * 8. In *Royal Drug*, for example, the Court recognized that the insurance **[**29]** companies' agreement to fix prescription drug prices sold to Blue Shield policyholders "'would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the 'business of insurance companies.' But that is precisely what Congress did not do'" *Id.* (quoting *Royal Drug, 440 U.S. at 233* (footnote omitted)). Likewise, *Pireno* considered ***HN11***[] whether "'a particular practice is part of the 'business of insurance' exempted from the antitrust laws by § 2(b),'" *id.* (quoting *Pireno, 458 U.S. at 129*) (emphasis omitted), not whether a particular entity was entitled to antitrust immunity by virtue of its status as an insurance company. *See id.* at * 9 ("McCarran-Ferguson Act immunizes activities rather than entities") (citing *Royal Drug, 440 U.S. at 232-33*). The ***HN12***[] agreements that insurance companies make with parties wholly outside the insurance industry, like the retail pharmacists in *Royal Drug*, "are unlikely to be about anything that could be called 'the business of insurance,' as distinct from the broader 'business of insurance companies.'" *Id.* **[**30]** (quoting *Royal Drug, 440 U.S. at 233*). The Supreme Court ultimately held that the domestic insurance companies in *Hartford Fire* did not lose the antitrust immunity to which they were otherwise entitled under section 2(b) of the McCarran-Ferguson Act simply because they agreed or acted with foreign reinsurers that the Court assumed were not regulated by state law. *Id.*; *see id.* ("The alleged agreements at issue in the instant case, of course, are entirely different [from *Royal Drug*]; the foreign reinsurers are hardly 'wholly outside the insurance industry[]'").

Like the agreements in *Pireno* and *Royal Drug*, the title insurance companies in the present case entered agreements setting fees for a practice that is historically independent of the business of insurance: Title search **[*1138]** and examination. Although some insurance companies today themselves provide title search and examination services, such services can be described, at most, as the "business of insurance companies" instead of the actual "business of insurance" as determined by application of the *Pireno* factors.

In short, the three "judicial developments" that Ticor has **[**31]** cited do not affect our conclusion that the title search and examination procedures at issue do not constitute the "business of insurance" under the standards for application of the McCarran-Ferguson Act that *Pireno* sets forth. Ticor's actions in setting rates for these services is therefore not entitled to immunity from the antitrust laws under the McCarran-Ferguson Act.

B. *The Noerr-Pennington Doctrine*

Ticor also argues that its collective rate setting is immune from antitrust liability under ***HN13***[] the *Noerr-Pennington* doctrine, which immunizes agreements to influence legislative, judicial, or administrative action. *See* *Pennington, 381 U.S. at 657*; *Noerr Motor Freight, 365 U.S. at 127*. Specifically, Ticor contends that its activities are a protected form of "joint petitioning" because it did not agree to charge proposed rates without approval from each state's insurance department. *See* Brief for Petitioners on Remand at 12.

Ticor's argument is unavailing. The conduct which it refers to as "joint petitioning" of the government is in fact nothing more than action in a private marketplace. We agree with the FTC **[**32]** that Ticor's "collective rate setting efforts can 'more aptly be characterized as commercial activity with a political impact' . . . than as political activity with a commercial impact." Jt. App. at 170 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 507, 100 L. Ed. 2d 497 , 108 S. Ct. 1931 (1988))*.

C. *"Active Supervision" Under the State Action Doctrine*

The FTC found no active state supervision of Ticor's filings for title search and examination fees in Arizona or Connecticut. It found Arizona's supervision deficient because state regulators accepted rate filings simply on Ticor's representation that they were based upon rates historically produced by market competition. The Insurance Department conducted no examination of the Rating Bureau despite a statutory requirement of examination every five years. In Connecticut, the FTC concluded that regulators could not meaningfully supervise a critical component of the rate-making process because they could not directly regulate insurer expenses. In both states, the FTC concluded that regulatory scrutiny of certain miscellaneous filings was inadequate. Ticor argues that these conclusions must be reversed under **[**33]** the standards the Supreme Court articulated for determining what constitutes "active supervision" in its opinion on certiorari from our earlier decision in this case.

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233 , 100 S. Ct. 937 (1980) articulated ***HN14***[] a two-prong test for determining when private parties who take part in an agreement to fix prices are entitled to immunity from the antitrust laws under the state action doctrine. First, the state regulation must be "'clearly articulated and affirmatively expressed as state policy'"; second, the policy must be "'actively supervised'" by the state. [7] *Id. at 105* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364 , 98 S. Ct. 1123 (1978))*.

In *Ticor* the Supreme Court attempted to clarify the meaning **[**34]** of the active supervision principle:

> ***HN15***[] The purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation **[*1139]** inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

112 S. Ct. at 2177. The ***HN16***[] Supreme Court, however, expressly declared that when prices are initially set by private parties, the person claiming immunity must show that the state undertook steps to evaluate the rate setting scheme. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id. at 2179*. This declaration significantly narrowed the reach of the active **[**35]** supervision prong of the state action exemption. The Supreme Court plainly instructed us that a state's rubber stamp is not enough. Active supervision requires the state regulatory authorities' independent review and approval. Bearing this in mind, we turn to the regulatory schemes of Arizona and Connecticut.

1. *Arizona*

The director of the State Department of Insurance licensed the Title Insurance Rating Bureau of Arizona in 1968. The Rating Bureau was statutorily authorized to establish joint rates for its members, including Ticor. The Rating Bureau, in theory, was subject to a wide range of latent powers possessed by the state insurance director. They included the power to audit the Rating Bureau's records and revoke its license, as well as broad authority to hold public hearings, promulgate rules, and issue orders discontinuing bureau practices found to be inconsistent with the insurance statute. The ALJ found that

> actual use of these powers, however, is more hypothetical than real as shown by the fact that during the entire period 1968 to 1981 the Insurance Department conducted no examination of the Arizona Rating Bureau although there is a statutory requirement for **[**36]** such an examination at least once every five years.

Jt. App. at 79-80 (footnote omitted). Moreover, no public hearing was ever held in Arizona on joint rates that the Rating Bureau filed. No rate filing was ever disapproved. No hearings on title insurance rates filed by the Rating

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[7] For a detailed history and explanation of the rationale behind the state action doctrine, *see* *Ticor, 112 S. Ct. at 2176-78*.

Bureau were ever held. The only hearings that were held involved allegations that insurers or their agents had given illegal inducements to realtors in order to obtain business. Arizona law did not require that insurance rate filings be subjected to public notice, comment and hearings, nor did it require that a written decision, reviewable by the state courts, be issued for each rate filing.

Instead, Arizona employed ***HN17***[] the "negative option" method of approving rates. Under this method, sometimes called the "file and use" approach, filed rates were deemed approved if the director took no action on them within fifteen days of their filing. [8] The Supreme Court criticized this method in Montana and Wisconsin and flatly stated that the active supervision standard is not met where, as here, "the potential for state supervision was not realized in fact." *Ticor, 112 S. Ct. at 2179*. **[**37]**

We recognize that this record contains some evidence of supervision by Arizona. Arizona's Insurance Department appears to have inquired into the Rating Bureau's 1968 general rate filing before letting it take effect. The FTC, however, found that in reality the Insurance Department approved the filing without undertaking any substantive review. Although the Department of Insurance inquired how the risk component of the 1968 filed inclusive rate was derived, there was no convincing evidence that either the Rating Bureau justified the rate increase or the State reviewed it.

Against this backdrop, the FTC found a lack of active supervision in Arizona. It did so after finding that the original 1968 filing went into effect essentially unreviewed, and that the Insurance Department failed to undertake the requisite formal examination of the Rating Bureau **[**38]** at least once every five years, even though an Arizona statute required **[*1140]** such an examination. It does appear that the Insurance Department, in 1980, announced a comprehensive investigation of the Rating Bureau, but apparently it was not actually conducted and the Rating Bureau went out of business in 1981. *Id. at 2175*. Evidence in the record supports these findings. When this evidence of inaction is coupled with Arizona's persistent failure to exercise its statutorily established regulatory powers with any degree of consistency, we are unable to hold under the standard the Supreme Court enunciated in *Ticor* that the FTC's finding that Arizona did not actively supervise the rate filings was not supported by substantial evidence.

2. *Connecticut*

Connecticut adopted a hands-off policy of minimum state involvement in regulation of title insurance rates on the principle that the rates are best determined by a competitive market. [9] The Connecticut Rating Bureau, officially known as the Connecticut Board of Title Underwriters, was authorized to establish joint rates for its members after receiving a license from the state's insurance commissioner in **[**39]** 1965. The Connecticut Rating Bureau, like Arizona's, was theoretically subject to a wide array of latent powers possessed by the State Insurance Department under the applicable state regulatory statutes. Among the Department's powers were the authority to conduct audits and hold hearings on rates set by the Bureau. It did not do either. *Id. at 2174*.

Prior to 1982, Connecticut allowed insurers to use rates as soon as they were filed. It discontinued this practice in 1982 and implemented a "file and use" approach that was tantamount to the negative option method we described **[**40]** in our analysis of Arizona's practice. Connecticut's "file and use" approach required insurers operating through rating bureaus to wait thirty days after filing rates before using them. If the Insurance Commissioner did not disapprove the rates during the thirty days, they were deemed approved and became effective.

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[8] Notwithstanding this statutory system, in practice the Arizona Rating Bureau's rate submissions were not put into effect until actually stamped "approved" by the director.

[9] Connecticut law did not require that insurance rate filings be subject to public notice, comment, and hearings, or that a written decision, appealable to state courts, be issued with respect to each rate filing. State insurance regulators were opposed to any such strict procedural requirements on the grounds of cost and the inevitable delay in responding to market forces that such regulatory procedures would entail.

The Connecticut Bureau filed only two major rate increases, one in 1966 and one in 1981. The Insurance Department wrote to the Bureau after its 1966 filing requesting additional justification for the proposed increases. It was concerned with whether the 1966 rate was for risk only or should also include search and examination costs. The Department later approved the increases. There is, however, no evidence in the record that the additional justification the Department requested was satisfactorily provided before approval.

In 1981 the Connecticut Rating Bureau filed for a 20% rate increase. A state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau. This official, however, did not have authority to act with respect to the cost data that were, in his opinion, excessive. *See* *id. at 2175*.

[41]** Whether the supervisory scheme in Connecticut met the *Ticor* active supervision standard is a closer question than in Arizona. There is at least some evidence that the State Insurance Department took an interest in the rates the Bureau proposed. *See* Jt. App. 71 n.192 (ALJ's recognition that rate increases and reductions filed between 1966 and 1983 sometimes were carefully reviewed but at other times approved with minimal review). There is also evidence, however, that Connecticut could not meaningfully examine the rates proposed because it never obtained the information necessary for a proper evaluation. *See* Jt. App. at 139 (FTC adopted ALJ's findings that State Insurance Department suffered from "dearth of information" that would have enabled it to assess **[*1141]** appropriateness of filed rates). On balance, we are again unable to hold, from the circumstances this record shows concerning operation of the statutory scheme and the degree of supervision Connecticut exercised over the two primary rate increases the Bureau proposed, that the FTC's finding that Connecticut's involvement with title insurance rates fell short of active supervision is not supported by substantial evidence.

[42]** V. *Conclusion*

Ticor's collective establishment of rates for title search and examination services is not immune from the federal antitrust laws under either the "business of insurance" exception to the McCarran-Ferguson Act or the *Noerr-Pennington* doctrine. Ticor also has not shown that officials in either Arizona or Connecticut actively supervised the rate setting schemes by undertaking the necessary steps to evaluate the merits of the rates set. Therefore, Ticor may not claim immunity under the state action doctrine. For these reasons, the FTC's final order will be affirmed.

Dissent by: ALITO

Dissent

ALITO, *Circuit Judge*, dissenting:

I believe that the setting of uniform rates for title search and examination services is part of the "business of insurance" within the meaning of Section 2(b) of the McCarran-Ferguson Act, *15 U.S.C. § 1012(b)*. I therefore dissent.

I.

Section 2(b) of the McCarran-Ferguson Act makes the federal antitrust laws inapplicable to the "business of insurance" to the extent that such business is regulated by state law and is not subject to the "boycott" exception contained in Section 3(b), *15 U.S.C. § 1013* **[**43]** *(b)*. In this case, as the majority notes (maj. typescript at 11), the petitioners' challenged activities are regulated by state law and do not fall within the "boycott" exception, and therefore the applicability of the McCarran-Ferguson Act turns on whether those activities constitute the "business of insurance."

In interpreting this statutory term, the majority properly looks to the Supreme Court's opinion in *Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 73 L. Ed. 2d 647 , 102 S. Ct. 3002 (1982)*. There, the Court, relying on its prior decision in *Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 59 L. Ed. 2d 261 , 99 S. Ct.*

1067 (1979), wrote that three criteria are "relevant in determining whether a particular practice is part of the 'business of insurance' exempted from the antitrust laws by § 2(b) . . . ." 458 U.S. at 129. These criteria, none of which is "necessarily determinative in itself," are (*id*.):

> [F]**irst**, whether the practice has the effect of transferring or spreading a policyholder's risk; **second**, whether the practice is an integral part of the policy relationship between the insurer and the insured; and **[**44]** **third**, whether the practice is limited to entities within the insurance industry.

In the present case, the outcome produced by applying these criteria depends on the way in which the "practice" at issue is defined. The majority views the practice as "the title search and examination . . . itself" (maj. typescript at 12), divorced from the issuance of the title insurance policy. The Commission took a similar approach, stating that it drew "a sharp distinction" between these two activities. Commission Opinion at 33; J.A. at 160.

Once the pertinent practice is defined in this way, it can be argued with considerable force, as the majority and the Commission have done, that most if not all of the *Royal Drug-Pireno* criteria cannot be met. Indeed, with respect to the first criterion, I fully agree with the majority that "the title search and examination does not itself spread or transfer risk." Maj. typescript at 12. Likewise, as to the third criterion, I cannot quarrel with the majority's conclusion that the practice of conducting title searches and examinations is not and has not historically been limited to entities within the insurance industry. Maj. typescript at 13.

[*1142] If, **[**45]** however, the practice at issue is defined differently -- as the process of issuing title insurance, an indispensable component of which is the title and search examination -- then the *Royal Drug-Pireno* criteria point to an entirely different result. The practice of issuing title insurance clearly transfers and spreads risk, is "an integral part of the policy relationship between the insurer and the insured," and is "limited to entities within the insurance industry." *Pireno, 458 U.S. at 129*.

Thus, the decisions reached by the majority and the Commission are correct only if they have correctly defined the "practice" that must be tested against the *Royal Drug-Pireno* criteria. And neither *Royal Drug* nor *Pireno* explains how a court should go about defining the scope of the "practice" to which their criteria should be applied.

II.

While *Royal Drug* and *Pireno* do not address this issue, earlier decisions of the lower courts take the sensible view that a title search and examination performed as part of the process of issuing title insurance cannot be dissected from the rest of the policy-issuing process for the purpose of applying the **[**46]** McCarran-Ferguson Act.

In *Commander Leasing Co. v. Transamerica Title Insurance Co., 477 F.2d 77 (10th Cir. 1973)*, the court of appeals upheld the district court's determination that title search and examination was not a "separate business" but rather a "condition precedent" to the issuance of title insurance and a part of the "business of insurance." *Id. at 81*. Similarly, in *Schwartz v. Commonwealth Land Title Insurance Co., 374 F. Supp. 564, 574 (E.D. Pa. 1974)*, Judge Becker aptly wrote:

> The investigation of the risk of loss prior to deciding whether to insure that risk is clearly part of the business of insurance. . . . It would be in our view unrealistic, indeed ostrich-like, to separate the title search process from the pure insurance aspect of the title companies' activities and . . . to call only the latter "the business of insurance."

See also McIlhenny v. American Title Ins. Co., 418 F. Supp. 364, 368-69 (E.D. Pa. 1976).

I agree with this analysis. The Commission and the majority do not dispute that conducting a title search and examination **[**47]** is an indispensable element of the process of issuing a title insurance policy. They do not claim that any insurer issues title insurance without first performing such a search and examination, and in fact the statutes of many states expressly require title insurers to perform a title search and examination before issuing a policy. *See*, *e.g.*, ***N.J. Stat. Ann.** 17:46B-9* (West 1985); 40 **Pa. Cons. Stat. Ann.** § 910-7 (1992). As a result, I believe that it is indeed "unrealistic" and "ostrich-like" to pretend that a title search and examination performed as part of the title insurance policy issuance process is a separate "practice" from the rest of that process. [10]

[48]** We must not forget that "the starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *Royal Drug Co., 440 U.S. at 210*. *See also* *Department of the Treasury v. Fabe, 113 S. Ct. 2202, 2207,* ***[*1143]*** *124 L. Ed. 2d 449, 61 U.S.L.W. 4579, 4581* (June 11, 1993). By its terms, Section 2(b) applies, without any qualification relevant here, to the "business of insurance," and the "ordinary understanding of that phrase" (*Royal Drug Co., 440 U.S. at 211*) certainly includes those preparatory and administrative activities that are an indispensable part of the issuance of insurance policies.

Moreover, I see nothing in "the structure of the [McCarran-Ferguson] Act and its legislative history" (*id*.) that is sufficient to undermine this interpretation. I recognize that Congress's "primary concern" in enacting Section 2(b) was to ensure that "cooperative ratemaking efforts be exempt from the antitrust laws" (*id. at 221*), but I do not think that the Act's structure or legislative history demonstrate **[**49]** that Congress intended to limit Section 2(b)'s reach strictly to this area of "primary concern." On the contrary, the precursor bill proposed by the National Association of Insurance Commissioners (NAIC) contained a specific exemption that seems applicable to the activities challenged in this case. This exemption applied to "any cooperative or joint . . . investigation [] or inspection agreement relating to insurance." 90 **Cong. Rec.** A4406 (1944). The Supreme Court has found that "the views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Royal Drug, 440 U.S. at 221* (footnote omitted). Moreover, the Court has long recognized that Section 2(b) is not confined to the fixing of rates. As it stated in *SEC v. National Securities, Inc., 393 U.S. 453, 460, 21 L. Ed. 2d 668 , 89 S. Ct. 564 (1969)*:

> The selling and advertising of policies, *FTC v. National Casualty Co., 357 U.S. 560, 2 L. Ed. 2d 1540 , 78 S. Ct. 1260 (1958)*, and the licensing of companies and their agents, cf. *Robertson v. California, 328 U.S. 440, 90 L. Ed. 1366 , 66 S. Ct. 1160 (1946)*, are also within the scope of the statute. **[**50]** . . . Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class.

To be sure, the Court has held that Section 2(b) does not extend to certain insurance company activities that are not indispensable parts of the policy issuance process. *See* *Pireno, supra* (use of peer chiropractic review committee to determine whether charges were reasonable and necessary); *Royal Drug Co., supra* (price-fixing agreements between health benefit insurer and pharmacies); *SEC v. National Securities, Inc., supra* (misrepresentations and omissions in insurers' communications to stockholders); *SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65, 3 L. Ed. 2d 640 , 79 S. Ct. 618 (1959)* (issuance of annuities involving no true underwriting of risks). See *also* *Fabe, 61 U.S.L.W. at 4582* ("*Pireno* and *Royal Drug* held only that 'ancillary activities' that do not affect performance of the insurance contract or enforcement of contractual obligations" are not entitled to antitrust exemption). But the majority in this case **[**51]** goes much further and holds that a central and indispensable element of the process of issuing title insurance does not constitute part of "the business of

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[10] I am not persuaded by the Commission's reliance on footnote nine of *Royal Drug Co., 440 U.S. at 213-14 n.9*. In that case, the Court held that the "business of insurance" did not encompass agreements between Blue Shield and participating pharmacies regarding the prices that Blue Shield would pay the pharmacies for prescription drugs furnished to Blue Shield policyholders. While I find footnote nine somewhat unclear, I think it is best understood to mean only that the "business of insurance" under Section 2(b) does not necessarily encompass everything that an insurance company must do, following issuance of policies, in order to ensure that promised policy benefits are provided to its insureds. *See* *Pireno, 458 U.S. at 130* ("business of insurance" does not include arrangements that come into play only after the insurance contract is entered). By contrast, title searches and examinations occur before the title insurance contract is entered and play an essential role in defining the risk that is transferred. Thus, I do not think that footnote nine is controlling here.

insurance." Whether the majority's decision represents sound antitrust policy, I do not believe that it is supported by the language, structure, or legislative history of the McCarran-Ferguson Act, and I therefore respectfully dissent. [11]

[11] Because I would reverse the Commission's order based on Section 2(b), I do not address the alternative grounds for reversal advanced by the petitioners.

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Ehredt Underground v. Commonwealth Edison Co.

United States District Court for the Northern District of Illinois, Eastern Division

July 16, 1993, Decided ; July 19, 1993, Docketed

Case No. 91 C 2361

Reporter

830 F. Supp. 1083 *; 1993 U.S. Dist. LEXIS 9874 **; 145 L.R.R.M. 2176; 1994-1 Trade Cas. (CCH) P70,513

EHREDT UNDERGROUND, INC., Plaintiff, v. COMMONWEALTH EDISON COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 196, Defendants.

Prior History: [1]** Adopting Magistrate's Document of May 27, 1992, Reported at: *1992 U.S. Dist. LEXIS 7360*.

Core Terms

employees, collective bargaining agreement, exemption, bid, conspiracy, contractor, allegations, campaign, anti trust law, recommended, job site, excavation, cable, wage scale, wages, defense motion, non-statutory, bargaining, terminated, installation, parties, statutory exemption, restraint of trade, state claims, labor union, Sherman Act, preempted, believes, favoring, unfair labor practice

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

Governments > Courts > Judges

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Magistrates, Pretrial Referrals**

A district court reviewing the report and recommendation of a magistrate judge makes a de novo determination of the record of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions. *Fed. R. Civ. P. 72(b)*; *28 U.S.C.S. § 636(b)(1)*. Therefore, the court will review the objections of both parties and shall only dismiss a count for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. The court accepts all well pleaded facts in the complaint as true and views allegations in a light most favorable to the plaintiff.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] Motions to Dismiss, Failure to State Claim

When deciding a motion to dismiss, the court should take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the fight most favorable to the plaintiffs.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN3[] Exemptions & Immunities, Labor

The labor exemption to the antitrust laws reflects the accommodation between the congressional policies favoring free competition in the marketplace as reflected by federal antitrust laws, and the labor policies favoring collective bargaining and other union activities reflected by the National Labor Relations Act, *29 U.S.C.S. § 151 et seq.* There is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN4[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act states: every contract, combination, or conspiracy in restraint of trade is illegal. *15 U.S.C.S. § 1*. Sections 6, 20 of the Clayton Act specifically exempt labor union activity from antitrust liability. Section 6 states that the labor of a human being is not a commodity or article of commerce nor shall such labor organizations, or the members thereof, be held to be illegal combinations or conspiracies in restraint of trade. *15 U.S.C.S. § 17*. Section 20 limits the power of federal courts to issue injunctions in cases arising out of a labor dispute concerning terms or conditions of employment. *29 U.S.C.S. § 52*.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN5[] Labor, Nonstatutory Exemptions

The Norris LaGuardia Act, 29 U.S.C.S. § 101 et seq., expands the protection for labor unions from antitrust liability. The act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy. The Clayton and Norris-LaGuardia Acts combine to provide a comprehensive exemption from antitrust liability for union activity. Even though the language of the act does not explicitly exempt union activity from antitrust liability, it is interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes. Labor unions, however, do not have absolute immunity from liability under the antitrust laws; they remain accountable for certain anticompetitive activities. Two distinct exemptions to the antitrust laws exist. The first is a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and the second is a nonstatutory exemption based on an accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act and the congressional policy favoring free competition in business markets.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Scope, Exemptions

Whether a labor union has violated the antitrust laws can be determined only by reading the Sherman Act, the Clayton Act, and the Norris LaGuardia Act together, as a harmonizing text of outlawry of labor conduct. Pursuant to this reading, there is a broad rule for the statutory exemption to the antitrust laws: So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. So long as a union acts unilaterally and in its own interest, therefore, it will not be liable for resulting restraints on trade. However, once a union conspires with employers to restrain trade, that union forfeits its statutory exemption because the purpose of the exemption is not to immunize labor unions who aid and abet businessmen in violating the Sherman Act. Furthermore, a plaintiff's complaint alleges conduct outside this exemption where the complaint shows the union did not act in its own self-interest or when a conspiracy between the union and a non-labor entity was properly pled.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN7[] Exemptions & Immunities, Labor

While a union is free to unilaterally impose the same wage scale on every employer with whom it bargains, and it need not be concerned that the wages it is imposing will be too high for certain employers to pay, the union loses the antitrust labor exemption when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. However, when such a collective bargaining agreement is part of a conspiracy in restraint of trade, the plaintiff must show that the union conspired with a non-labor entity to impose the wage scale on the plaintiff; that the non-labor entity is in a position to directly benefit from the resulting restraint on trade; and that the union and non-labor groups share an anti-competitive purpose.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > Football

HN8[] Regulated Practices, Price Fixing & Restraints of Trade

In order to accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, *29 U.S.C.S. § 151 et seq.*, certain union-employer agreements are accorded a limited nonstatutory exemption from antitrust sanctions. The non-statutory exemption is designed to allow unions and employers freedom in the collective bargaining process. The exemption applies to those terms or conditions of a collective bargaining agreement which are intended to eliminate competition over wages or working conditions, and only indirectly restrain trade in the business market. Those agreements that are intended to restrain competition in the business market are not exempt. The non-statutory exemption protects the parties to a collective bargaining agreement from antitrust liability when they bargain for terms or conditions which indirectly restrain trade.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN9[] Collective Bargaining & Labor Relations, Federal Preemption

When a state law or remedy interferes with federal labor policy or specific provisions of the National Labor Relations Act (Act), any state claims brought pursuant to that state law are preempted. When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the Act or constitute an unfair labor practice under § 8, or when an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board (Board). The first question must, therefore, be whether the actions complained of are subject to Board regulation. If they are, then the state claim is preempted by federal labor law. Thus, the court turns first to whether plaintiff's allegations are directed at conduct that is arguably prohibited by § 8 of the Act.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN10[] **Collective Bargaining & Labor Relations, Federal Preemption**

In deciding whether the basis of a state law claim is arguably prohibited by the National Labor Relations Act (Act), the critical question is whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the National Labor Relations Board.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN11[] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

Section 8(b)(4)(C) of the National Labor Relations Act, *29 U.S.C.S. § 158(b)(4)(C)*, states that it is an unfair labor practice to: threaten, coerce, or restrain any person where an object thereof is: forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of § 159 of this title. In comparison, a claim for tortious interference with contract and prospective economic advantage must establish: a valid business relationship (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. The interest protected is the reasonable expectation of economic advantage.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

HN12[] **Collective Bargaining & Labor Relations, Unfair Labor Practices**

Organizing campaigns are protected activity under § 7 of the National Labor Relations Act.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN13[] **Collective Bargaining & Labor Relations, Federal Preemption**

Preemption may be inappropriate in cases involving conduct that touches interests so deeply rooted in local feeling and responsibility that it cannot be inferred that Congress deprived the states of the power to act. However, these instances are limited to cases involving violence and imminent threats to the public order.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Types of Damages > Property Damages > General Overview

HN14[] **Collective Bargaining & Labor Relations, Federal Preemption**

The interest protected by the tort of interference with the right of contract and prospective advantage is the reasonable expectation of economic advantage. The state does not have an overriding concern in regulating economic loss caused by labor disputes.

Civil Procedure > Remedies > Damages > Monetary Damages

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Torts > Procedural Matters > Preemption > General Overview

HN15[] **Damages, Monetary Damages**

The very fact that the remedies provided by the state and federal law are different demands, rather than prohibits, preemption. The conflict between state and federal law lies not only in the conduct to be regulated but also in the remedies provided. The plaintiff may not circumvent the federal remedy established by Congress by seeking adjudication of a claim under the guise of a state tort claim.

Judges: ALESIA

Opinion by: JAMES H. ALESIA

Opinion

[*1086] MEMORANDUM OPINION AND ORDER

This matter is before the Court on the parties' objections to Magistrate Judge W. Thomas Rosemond's Report and Recommendation ("Report") on Defendant Local 196's Motion to Dismiss Counts II and III of Plaintiff's First Amended Complaint. Plaintiff Ehredt Underground, Inc. ("Ehredt") filed a four-count complaint against Commonwealth Edison Company ("Com Ed") and International Brotherhood Of Electrical Workers, AFL-CIO, Local No. 196 ("Local 196"). Count II is directed at both defendants and alleges that they engaged in unlawful combinations and conspiracies in restraint of trade in violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C.*

§§ 1, *2*. Count III is directed solely at Local 196 and is a state law claim of tortious interference with the right of contract and prospective advantage. Magistrate Judge Rosemond recommended denying the defendant's motion to dismiss Count II and granting defendant's motion to dismiss Count III. For the reasons stated below the Court accepts **[**2]** the recommendations of the Magistrate Judge and accordingly denies defendant's motion to dismiss count II and grants defendant's motion to dismiss count III.

I. FACTS [1]

Plaintiff Ehredt is a corporation engaged in the business of underground excavation and installation of electrical cables. Ken Ehredt is its President.

Defendant Local 196 is a labor organization affiliated with the International Brotherhood of Electrical Workers, AFL-CIO ("the International"). Harold Eastwood and Dave Lindsey are business managers for Local 196.

Commonwealth Edison Co. ("Com Ed") and Illinois Bell Telephone Company ("Illinois Bell") divide responsibility for installation of electrical and telephone cable. Contractors laying cable for Com Ed also act as agents for Illinois Bell and lay telephone cables at the same site and at the same time. Geographic areas are divided and either **[**3]** Com Ed or Illinois Bell accepts sole responsibility for installation.

In 1988, a construction foreman for Com Ed invited Ehredt to submit a bid for a contract to install cables. Ken Ehredt was told that his company must be a union contractor if he wanted to submit a contract proposal and do business with Com Ed. Ehredt received a packet of materials from Com Ed describing the bid proposal procedure and outlining the specifications of the project. Com Ed's bid proposal form requires bidding **[*1087]** parties to identify the union with which the bidding party has a labor contract.

Ehredt began discussions with several unions and finally entered into a collective bargaining agreement with International Brotherhood of Electrical Workers, AFL-CIO, Local 336 ("Local 336"). Local 336 is a labor organization affiliated with the International and represents many employees working for Illinois Bell and various cable television companies doing trenching and excavation work. An agreement between Ehredt and Local 336 was approved by the International.

On October 14, 1988, Ehredt submitted a bid to Com Ed on an excavation project. Shortly thereafter, on October 17, Ken Ehredt had a conversation with the **[**4]** president of Com Ed's Northbrook-area, in-house union. The union president told Enredt that Com Ed had an agreement with its union to sub-contract only with union subcontractors. Ehredt was awarded a contract with the agreement that Ehredt was to perform the work as a union contractor.

Beginning in November 1988, various representatives of Com Ed advised Ehredt that it should provide kickbacks for the award of work. Each and every time, plaintiff refused to do so. A Com Ed representative also told plaintiff that Trench-it had provided kickbacks to Com Ed supervisors. Trench-it is a union contractor in the excavation and cable installation industry and has a collective bargaining agreement with Local 196.

Sometime after Ehredt began working for Com Ed, Local 196 and the International began a campaign to pressure Ehredt to abandon Local 336 and sign a collective bargaining agreement with Local 196. Starting in late 1988, Ehredt's workers began noticing that they were being followed from job site to job site.

In April 1989, the union campaign escalated to physical violence when Ehredt's manager, Terry Counley, and one other worker were excavating at a remote, Com Ed job site. While **[**5]** the other employee was away getting equipment, two individuals approached Counley. Plaintiff believes they traced the crews' activities through routing information improperly furnished by Com Ed. They asked to see Counley's union card, which he produced for them. After inspecting the card, the two men picked up some of Counley's equipment and dropped it in the trench. When

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[1] As the parties do not object to the factual allegations as set out in the Report, the Court restates them here as they appeared in the Report.

Counley bent over to pick up the equipment, the two men began to beat Counley. They told Counley that is what he could expect if he ever worked at that site again. After leaving Counley lying in the trench, the two men released the brake on Ehredt's earth-moving equipment and departed.

Moments later Local 196's business agent, Dave Lindsey, arrived at the job site and questioned Counley about whether Ehredt's employees would switch from Local 336 to Local 196. Counley told Lindsey that he could not give him an answer and asked for Lindsey's card. Lindsey then handed him Harold Eastwood's business card. As noted above, Harold Eastwood was a business manager for Local 196.

On another occasion, Eastwood told Ken Ehredt and Counley that Ehredt's workers were in the wrong union and that they should switch to Local **[**6]** 196 because the work they were performing was within Local 196's jurisdiction. He said Local 196 was determined to get all the work it felt was within its jurisdiction. Eastwood told Ehredt that Local 196 had only one more contractor (Illinois Hydraulic) to get and then the union could claim all of Com Ed's excavation and cable installation contractors as members. Eastwood also told Ehredt that there was a Com Ed Board member who assisted him in either getting rid of non-union excavation and cable installation contractors or in getting them into Local 196.

Throughout the contract period with Ehredt, Com Ed expressed its satisfaction with Ehredt's work. In fact, between October 1988 and March 1990, plaintiff's contract was extended three times by Com Ed. During this same period, Com Ed entered into an agreement with Trench-it to perform identical work in the same geographic area. The work was allocated by Com Ed between the contractors on a work order basis.

Meanwhile, Doug Hill, a supervisor in the underground construction department of Com Ed's Crystal Lake District, repeatedly **[*1088]** threatened to terminate Ehredt and replace it with Trench-it. Hill and other Com Ed supervisors also repeatedly **[**7]** gave away plaintiff's contracted work to Trench-it. In addition, Hill often falsely blamed Ehredt for falling behind in its work and threatened to give the work to Trench-it.

On one occasion, plaintiff was blamed for misconduct attributable to Trench-it. When Hill discovered that a contractor had left open a television cable trench, Hill blamed Ehredt and threatened to terminate Ehredt's contract. Later, however, when Hill discovered that Trench-it was responsible, he took no action.

Ehredt believes that a Com Ed foreman, who assigned work, had a financial investment in excavating equipment used by Trench-it and assigned favored work to Trench-it to protect his investment. Also, Com Ed made equipment and facilities available to Trench-it at very favorable terms which were not available to plaintiff.

In January 1990, Com Ed began to solicit bids for a second contract. In connection with this bid, Hill told Ehredt that once Trench-it won the contract, most of Ehredt's employees would probably quit to work for Trench-it. Since the contract had not yet been awarded, Ehredt understood this to mean that Trench-it would receive special consideration in the bidding process.

Ken Ehredt **[**8]** took his concern to Forrest Stahmer, Com Ed's Contract Coordinator. Stahmer assured Ehredt that the bidding procedure was kept as apolitical as possible and invited Ehredt to submit a bid on the contract. Prior to the award, another Com Ed representative contacted Ken Ehredt to request that he lower some of his contract prices. Since this was necessary to win the contract, Ehredt agreed to do so.

On March 23, 1990, Ehredt was awarded a second contract to perform work in the same territory - the Crystal Lake District - for a two-year period running from April 1, 1990 to March 31, 1992 with the understanding that the work would be performed as a union contractor. Approximately three days after the contract was awarded, Hill called Ehredt's manager, Terry Counley, into his office. Hill told Counley that he did not think Ehredt Underground could handle the work they had contracted to do and that he would keep an eye on them. Hill threatened that, if Ehredt did not meet his standards, he would pull them off the job and give the work to Trench-it.

Trench-it had bid unsuccessfully for the Crystal Lake District work. Plaintiff believes Trench-it was unhappy to have lost this work and attributed **[**9]** the loss to lesser wages paid by plaintiff. Ehredt further believes that Trench-it communicated its concerns to Local 196 and to Com Ed. Subsequently, agents of Local 196 and laid-off employees of Trench-it communicated threats of property damage and other harm to plaintiff through various Com Ed supervisors.

In conjunction with Local 196's campaign to recruit Ehredt, Local 336 began a parallel campaign to oust Ehredt, presumably under pressure from the International. By letter dated July 17, 1990, Local 336's president and business manager, Albert Franzen, advised Ehredt that the work being performed by Ehredt's workers pursuant to the Com Ed contract was out of Local 336's jurisdiction, even through similar work was performed by employees of Illinois Bell who were represented by Local 336. Franzen recommended that Ehredt cease doing such work. Ehredt refused to breach its contract with Com Ed and Local 336 terminated it collective bargaining agreement with Ehredt on August 21, 1990.

Ehredt then began discussions with other unions to replace Local 336. Ehredt considered the Congress of Independent Unions ("CIU"). The CIU is a labor organization which is not affiliated with the **[**10]** AFL-CIO. The wage scale which would have been implemented under a collective bargaining agreement with the CIU was roughly comparable to the wages plaintiff paid under the Local 336 contract.

Ehredt informed James Harper, purchasing agent for Com Ed, that his company was being put out of Local 336. When Ehredt offered to work as a non-union contractor, Harper refused. Consequently, plaintiff told Harper he was going to negotiate a contract with the CIU. At first, Harper accepted the **[*1089]** idea, however, he said he would have to clear it though the legal department. About three weeks later, Harper replied that Com Ed refused to do business with any contractor whose employees were represented by a union that was not an AFL-CIO affiliate.

As a result of the conduct of Local 336 and the restrictions placed on Ehredt by its contract with Com Ed (to-wit, that the company must be an AFL-CIO affiliated union contractor), Ehredt was forced to seek another AFL-CIO union to represent its employees if it wanted to keep its contract with Com Ed. Consequently, Ehredt began discussions with several AFL-CIO affiliated unions, including Local 196, International Union of Operating Engineers Local 150, and **[**11]** IBEW Local 117. At one point Com Ed representative Hill told Ehredt, "We don't want 150. Why don't you go with 196 and make everybody happy?

On September 26, 1990, the president of CIU filed a petition to represent Ehredt workers for purposes of collective bargaining. Consequently, the National Labor Relations Board ("NLRB") scheduled an election for Ehredt's employees on November 19, 1990. Approximately one week prior to the election, Local 196 redoubled its efforts to pressure Ehredt and its employees to join Local 196. Specifically, agents of Local 196 now attempted to get the local on the election ballot. Agents from the International contacted Ehredt's employees at their homes in an effort to rally enough employee support.

Having tried previously but failing to solicit support from Ehredt's employees, agents of Local 196 contacted Ken Ehredt and arranged a meeting with him on November 10, 1990. At that meeting, Ehredt was told that if Local 196 was given a collective bargaining agreement with Ehredt, the Local would assist in obtaining Com Ed's consent to the contract price changes which would be necessary given Local 196's significantly higher wage structure. Ehredt was also **[**12]** promised that the union would allow him to continue running the company with his current employees as he had under Local 336. On the basis of these oral agreements, he agreed that he would not oppose Local 196's appearance on the NLRB election ballot and he so notified his employees.

On November 19, 1990, the employees of Ehredt elected Local 196 as their exclusive collective bargaining representative and the union later was certified as such by the NLRB. Ehredt signed a collective bargaining agreement with Local 196 on December 17, 1990. Ehredt had previously been shown the agreement during the November 10 meeting. Ehredt claims there was and could be no negotiation over terms. The agreement became effective January 1, 1991 and provided for a wage scale that was nearly ninety percent (90%) higher than wages under the agreement with Local 336.

As a result of the termination of the collective bargaining agreement with Local 336 and the new agreement with Local 196, plaintiff determined that an equitable adjustment in its contract with Com Ed was necessary. Plaintiff was led to believe by Com Ed and Local 196 that a contract adjustment would be made. Ehredt sent Com Ed a letter on **[**13]** November 9, 1990 to notify them that it needed to revise its contract rates because the original bid for the project was based on Local 336's lower wage structure.

Ken Ehredt requested a meeting to discuss the renegotiation of the contract. He was asked to send a new proposal in preparation for that meeting. On November 28, 1990, Ehredt and his accountant met with Com Ed's representatives. At the meeting, they were told that the revised proposal was generally acceptable except for approximately eight items. Ehredt offered to cut the revised bid for those items by fifty percent (50%).

On December 13, 1990 (after Local 196 was certified as the collective bargaining union, but four days before an agreement was signed between Ehredt and Local 196), Com Ed advised Ehredt that his revised bid was rejected. Ehredt was further told that unless he could stick to his original bid, he would lose the contract to Trench-it. On January 14, Com Ed terminated plaintiff's contract and awarded it to Trench-it. Trench-it hired eighty percent (80%) of plaintiff's employees -- many of whom were ultimately replaced by children of Com Ed employees.

[*1090] Plaintiff filed its original Complaint against Com Ed **[**14]** and Local 196 on April 19, 1991. Plaintiff subsequently filed an Amended Complaint ("the Complaint") on December 20, 1991. Plaintiff alleges that Local 196 and Com Ed (a non-labor party) engaged in a conspiracy to eliminate open-shop contracting. Plaintiff claims Local 196, Com Ed, Trench-it, the International, and Local 336 all conspired to eliminate open-shop contractors from performing trenching services in the relevant marketplace in violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*. Plaintiff also asserts that Local 196's actions amount to tortious interference with contract and prospective advantage.

Defendant Local 196 moved to dismiss Counts II and III of Plaintiff's Amended Complaint. Local 196 contends it is entitled to the labor exemption to the antitrust laws and therefore Count II of the Complaint should be dismissed. Defendant also argues that Count III of the Complaint should be dismissed because this state law claim of tortious interference with the right of contract is preempted by federal labor law.

Magistrate Judge Rosemond recommended that defendant's motion to dismiss Count II be denied and the motion to dismiss **[**15]** Count III be granted. Defendant objects to the Magistrate Judge's recommendation to deny its motion to dismiss Count II, while Plaintiff objects to the Magistrate Judge's recommendation to dismiss Count III.

II. DISCUSSION

HN1[] A district court reviewing the Report and Recommendation of a Magistrate Judge makes a *de novo* determination of the record "of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions." *FED. R. CIV. P. 72(b)*; *28 U.S.C. § 636(b)(1)*. Therefore, the court will review the objections of both parties and shall only dismiss a count for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. The court accepts all well pleaded facts in the complaint as true and views allegations in a light most favorable to the plaintiff. **[**16]** *Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1039 (7th Cir. 1987)*.

A. Count II - Antitrust Claims

Defendant makes four objections to the Magistrate Judge's recommendation that defendant's motion to dismiss Count II be denied. First, the Defendant objects to the factual finding that agents of Local 196 engaged in physical violence or threats of physical violence against employees of plaintiff. Specifically, defendant argues the Complaint alleges only that two unknown men beat plaintiff's employee and that "even the most generous reading of the Amended Complaint does not allege that the two unnamed persons were Agents of Local 196." (Defendant's Objections to the Magistrate Judge's Report, at p. 2). The court disagrees.

HN2[] When deciding a motion to dismiss, the court should "take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the fight most favorable to the plaintiffs." *Ellsworth v. City of Racine, 774 F.2d 182, 184 (7th Cir. 1985)*. It is reasonable to conclude from the Complaint that the men who came to Ehredt's job site in April **[**17]** of 1989 and destroyed equipment and beat one of Ehredt's employees were acting as agents of Local 196.

Several allegations in the Complaint make this a reasonable inference. First, plaintiff alleges that two unknown men showed up at an Ehredt job site in April 1989. (Plaintiff's First Amended Complaint, at p. 14, P 39). These men allegedly had traced Ehredt to this remote job site (this site was not visible to general traffic and was not a matter of public knowledge) through information improperly provided by Commonwealth Edison. *Id.* Once they arrived at the job site, they beat Terry Counley, an employee of Ehredt, and destroyed much of the equipment at the job site. *Id.* They told Counley that these attacks would continue if Ehredt worked in Cary, Illinois again. *Id.* Just moments after **[*1091]** these men left, Dave Lindsey, the business agent for Local 196, arrived at the Ehredt job site to convince Counley and his employer Ehredt to switch from Local 336 to Local 196. *Id.*

The short period of time that passed between Lindsey's arrival at the job site and the attack by the two unnamed men, combined with the ability of both Lindsey and the two unknown men to find plaintiff's **[**18]** worksite location, information that was not a matter of general knowledge and which allegedly was provided improperly by Com Ed, leads the court to the reasonable inference that the two unknown men were agents of defendant Local 196. Accordingly, the defendant's objection is overruled.

Defendant's second, third and fourth objections are made to the Magistrate Judge's legal conclusion that the defendants are not entitled to an exemption from the antitrust laws. Specifically, defendant Local 196 objects to the "legal conclusion that a conspiracy was properly pled, . . . that the statutory exemption to Anti-Trust Law does not apply [and] the legal conclusion that the non-statutory exemption [does] not apply." (Defendant's Objections to the Magistrate Judge's Report, at p. 1). The Court disagrees for the reasons that follow.

1. History of the Labor Exemption

HN3[] The labor exemption to the antitrust laws reflects the accommodation between the congressional policies favoring free competition in the marketplace as reflected by federal antitrust laws, and the labor policies favoring collective bargaining and other union activities reflected by the National Labor Relations Act ("NLRA"), **[**19]** *29 U.S.C. § 151 et seq.* "There is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment." *H.A. Artists & Associates, Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 713, 68 L. Ed. 2d 558, 101 S. Ct. 2102 (1981)*. The obvious tension between these two policies became apparent shortly after the passage of the first ***antitrust law*** in 1890.

HN4[] *Section 1* of the Sherman Act states "every contract, combination . . . or conspiracy in restraint of trade . . . is illegal." *15 U.S.C. § 1 (1992)*. Immediately after its passage a sharp controversy arose as to whether this act applied to labor union activities, especially collective bargaining agreements. *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 801, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*. Soon after the Sherman Act was passed, courts adopted the view that "a combination of laborers to obtain a raise in wages was itself a prohibited monopoly," and began to hold labor unions liable for violations of the **[**20]** antitrust laws. *Id. at 802*. Congress responded by passing sections 6 and 20 of the Clayton Act. With the passage of these provisions, "Congress sought to specifically exempt labor union activity" from antitrust liability. *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881, 884 (7th Cir. 1982)*. Section 6 states that "the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held . . . to be illegal combinations or conspiracies in restraint of trade." *15 U.S.C. § 17 (1988)*. Section 20 limited the power of federal courts to issue injunctions in cases arising out of a labor "dispute concerning terms or conditions of employment." *29 U.S.C. § 52 (1988)*.

Sections 6 and 20 of the Clayton Act, however, failed to promote the national labor policies due to courts' continued application of the Sherman Act to union activities. Specifically, the courts defined a labor dispute very narrowly and limited the application of the Clayton Act to union **[**21]** activities directed at an employer by its own employees. *See Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 71 L. Ed. 916, 47 S. Ct. 522 (1927)*; *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 65 L. Ed. 349, 41 S. Ct. 172 (1921)*.

Congress then enacted ***HN5***[] the Norris LaGuardia Act, *29 U.S.C. § 101 et seq.*, to expand the protection for labor unions from antitrust liability. The act prohibits injunctions against employees engaged in various **[*1092]** activities during a labor dispute, even where a claim is made of an unlawful combination or conspiracy. "The Clayton and Norris-LaGuardia Acts combined to provide a comprehensive exemption from antitrust liability for union activity." *Mid-America, 675 F.2d at 884*. Even though the language of the Act does not explicitly exempt union activity from antitrust liability "it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *Id.*

Labor unions, however, do not have absolute immunity from liability under the antitrust laws; they remain accountable **[**22]** for certain anticompetitive activities. Two distinct exemptions to the antitrust laws exist. *Mid-America, 675 F.2d at 884*. The first is a statutory exemption based on various sections of the Clayton and Norris-LaGuardia Acts, and the second is a nonstatutory exemption based on an "accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*.

We turn, therefore, to an examination of each of these exemptions to demonstrate that neither applies to activity allegedly engaged in by defendant Local 196.

(a) The Statutory Labor Exemption

The defendant objects to the Magistrate Judge's conclusion that the defendant, Local 196, is not entitled the statutory exemption to the ***antitrust law***. Because the Court finds that the Complaint adequately pleads conduct outside the statutory exemption we overrule the objections and adopt the findings of the Magistrate Judge.

The Supreme Court, in *United States v. Hutcheson,* held **[**23]** that ***HN6***[] whether a labor union has violated the antitrust laws can be determined only by reading the Sherman Act, the Clayton Act and the Norris LaGuardia Act together, "as a harmonizing text of outlawry of labor conduct." *312 U.S. 219, 231, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*. Pursuant to this reading the court announced a broad rule for what has come to be known as the statutory exemption to the antitrust laws:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232. So long as a union acts unilaterally and in its own interest, therefore, it will not be liable for resulting restraints on trade. *Connell, 421 U.S. at 623*. However, once a union conspires with employers to restrain trade, that union forfeits its statutory exemption because the purpose of the exemption is not to "immunize labor unions who aid and abet [businessmen] in violating **[**24]** the Sherman Act." *Allen Bradley, 325 U.S. at 810-11*. Furthermore, a plaintiff's complaint alleges conduct outside this exemption where the complaint shows the union did not act in its own self-interest or when "a conspiracy between the union and a non-labor entity was properly pled." *Mid-America, 675 F.2d at 886*.

Defendant Local 196 here contends that the Complaint is inadequate on two grounds. First, defendant argues that the Complaint fails to properly plead a conspiracy, and objects to the Magistrate Judge's finding that a conspiracy did exist. As to this objection, the court believes that plaintiff has alleged sufficient facts to show a conspiracy, and accordingly sustains the conclusions of the Magistrate Judge.

First, all the parties to this alleged conspiracy had a motive to force plaintiff out of the market. Trench-it was a competitor of the plaintiff, and had been losing Com Ed bids to Ehredt. (Plaintiff's First Amended Complaint, at p. 12, P 33.) If the campaign to eliminate Ehredt from the marketplace was successful, Trench-it would receive more jobs.

Com Ed also had a financial interest in putting Ehredt **[**25]** out of business. When **[*1093]** Trench-it received bids from Com Ed, it allegedly gave kickbacks to Com Ed employees. *Id.* at P 34. Ehredt had refused to pay these kickbacks. Additionally, a Com Ed foreman had a financial investment in excavation equipment used by Trench-it. *Id.* at p. 10, P 27. Ehredt's elimination from the marketplace served to protect his investment.

Similarly, Local 196 wanted to corner the market on Com Ed business in the far north region. They could only do so by forcing Ehredt to adopt a collective bargaining agreement with 196 or force them out of business.

Furthermore, several facts show that the parties acted on their motivations and formed a conspiracy to eliminate Ehredt from the market place. When Ehredt first began to receive Com Ed jobs, Trench-it expressed concern to Local 196 and to Com Ed. It complained that Ehredt was able to bid lower because it paid their employees lower wages. Shortly after Trench-it spoke to Local 196, the union began to pressure Ehredt to abandon Local 336 and sign a collective bargaining agreement with Local 196.

During the campaign to force plaintiff to sign with Local 196, agents of the defendant union were able to follow **[**26]** plaintiff's employees from jobsite to jobsite. These men were apparently able to follow plaintiff only with the help of Com Ed. The location of these jobsites was available through a routing sheet prepared by Com Ed, which Com Ed allegedly improperly disclosed to the Union. *Id.* at p. 14, P 39.

Plaintiff was also told by the business representative of Local 196 that "there was a Board member of Com Ed who assisted him in getting rid of non-union excavation and cable installation contractors or get them into Local 196." *Id.* at p. 15, P 40. Laid-off employees of Trench-it and agents of Local 196 also allegedly communicated threats of property damage and other harm to the plaintiff through Com Ed supervisors.

Finally, plaintiff agreed to not oppose Local 196 as the collective bargaining agent of its employees. Plaintiff placed Local 196 on the ballot during elections. In exchange, Local 196 agreed to help Ehredt renegotiate its contract with Com Ed to compensate for the significantly higher wage scale Local 196 would impose. Com Ed also led plaintiff to believe renegotiation was possible. However, once Local 196 was certified as the collective bargaining agent of Ehredt's employees, **[**27]** Com Ed refused to make any changes to the original contract price. The court believes these allegations suffice to show that plaintiff can prove a claim which would entitle it to relief based on a conspiracy between Local 196, Trench-it and Com Ed.

Defendant also contends that it is entitled to the statutory exemption because the conduct in which it engaged was part of an organizing campaign and collective bargaining agreement. Defendant argues that no conspiracy exists because it was simply imposing its areawide wage scale. The court disagrees. ***HN7***[] While a union is free to unilaterally impose the same wage scale on every employer with whom it bargains, and it need not be concerned that the wages it is imposing will be too high for certain employers to pay, "the union loses the antitrust labor exemption . . . when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Mid-America, 675 F.2d at 887*. However, when such a collective bargaining agreement is part of a conspiracy in restraint of trade, the plaintiff must show that the union conspired with a non-labor entity to impose the wage **[**28]** scale on the plaintiff; that the non-labor entity is in a position to directly benefit from the resulting restraint on trade; and that the union and non-labor groups share an anti-competitive purpose. *675 F.2d at 889*.

Plaintiff's Amended Complaint has met these requirements. As was stated above, the Complaint contains sufficient factual allegations that Local 196, Trench-it and Com Ed conspired to force the plaintiff into a collective bargaining agreement with Local 196 at Local 196's standard wage scale. This coercion was designed to lock plaintiff into a wage scale significantly higher than the wages plaintiff was paying at the time, and ultimately causing Ehredt to breach its contract **[*1094]** with Com Ed due to an unplanned increase in employee wages. Local 196 benefited because they were able to take over all the Com Ed trenching and excavation business on the north side. Trench-it and employees of Com Ed both were in a position to benefit financially from Ehredt's elimination from the market place, as stated above. Finally, all three parties shared the anticompetitive purpose of eliminating Ehredt from the market place.

(b) The Non-Statutory Exemption

[29]** The court also agrees with the Magistrate Judge's finding that Local 196's actions do not fall within the non-statutory exemption. ***HN8***[] In order to "accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, *29 U.S.C. § 151 et seq.*, certain union-employer agreements [are] accorded a limited nonstatutory exemption from antitrust sanctions." *Mackey v. National Football League, 543 F.2d 606, 611-12 (8th Cir. 1976)*. The non-statutory exemption is designed to allow unions and employers freedom in the collective bargaining process. The exemption applies to those terms or conditions of a collective bargaining agreement which are intended to eliminate competition over wages or working conditions, and only indirectly restrain trade in the business market. *Connell, 421 U.S. at 623*; *Mid-America, 675 F.2d at 892*. Those agreements that are intended to restrain competition in the business market are not exempt. *Mid-America, 675 F.2d at 892*. **[**30]**

The non-statutory exemption was not intended to protect the type of conspiracy allegedly entered into by Local 196, Trench-it, and Com Ed. This exemption was designed to protect the parties to a collective bargaining agreement from antitrust liability when they bargain for terms or conditions which indirectly restrain trade. In the case at bar the parties to the collective bargaining agreement are not the same parties to the conspiracy. Rather, Local 196, Trench-it and Com Ed have allegedly acted in concert to force a collective bargaining agreement upon Ehredt so that it could not compete with Trench-it. Far from trying to impose a better wage scale, Local 196 has sought to directly restrain the business market by eliminating a participant. Therefore, they are not entitled to the non-statutory exemption.

Thus, plaintiff has properly pled the elements of an antitrust action. Based on the allegations in the Complaint, defendant is not entitled to either the statutory or non-statutory exemption to the antitrust laws. We therefore sustain the finding of the Magistrate Judge that Count II of Plaintiff's First Amended Complaint states a claim upon which relief can be granted. Defendant's **[**31]** motion to dismiss Count II is denied.

B. Count III - Preemption of State Claims

Count III of plaintiff's First Amended Complaint alleges that defendant Local 196, together with Local 336, the International and Trench-it, tortiously interfered with plaintiff's right of contract and prospective advantage. This claim is based upon state tort law. In his Report the Magistrate Judge concluded that this state law claim was preempted by federal labor law and recommended that the claim be dismissed. The court agrees with this conclusion.

HN9[] When a state law or remedy interferes with federal labor policy or specific provisions of the NLRA, any state claims brought pursuant to that state law are preempted. The leading case on federal preemption of state claims involving labor-management disputes is *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959)*. In *Garmon* the court defined the situations when a state claim is preempted:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, . . . [or] **[**32]** when an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. . . .

[*1095] *359 U.S. at 245*. The first question must therefore be whether the actions complained of are subject to Board regulation. *United Ass'n of Journeymen & Apprentices v. Borden, 373 U.S. 690, 694, 10 L. Ed. 2d 638, 83 S. Ct. 1423 (1963)*. If they are, then the state claim is preempted by federal labor law. Thus, we turn first to whether plaintiff's allegations are directed at conduct that is arguably prohibited by § 8 of the NLRA.

HN10[] In deciding whether the basis of a state law claim is arguably prohibited by the NLRA "the critical . . . is . . . whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 197, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978)*. We think the allegations presented to this court in plaintiff's state tort claim are the same as an unfair labor practice claim brought pursuant **[**33]** § 8(b)(4)(C) of the NLRA, *29 U.S.C. § 158(b)(4)(C)*. ***HN11***[] That section states that it is an unfair labor practice to:

> threaten, coerce, or restrain any person . . . where . . . an object thereof is -
>
> > (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

In comparison, a claim for tortious interference with contract and prospective economic advantage must establish:

> a valid business relationship (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. The interest protected is the reasonable expectation of economic advantage.

Rock Falls v. Chicago Title & Trust Co., 300 N.E.2d 331, 333, 13 Ill. App. 3d 359, (3d Dist. 1973); **[**34]** *See also* *Heying v. Simonaitis, 466 N.E.2d 1137, 1141-42, 126 Ill. App. 3d 157, , 81 Ill. Dec. 335 (1st Dist. 1984)*.

Plaintiff, thus, must prove the same set of facts to recover under the federal and state claims. Recovery under plaintiff's state claim is premised upon a finding by this court that Local 196 intentionally interfered with plaintiff's contract with Com Ed and that such interference caused plaintiff to breach its contract. In this regard, plaintiff points to several factors to show interference. Plaintiff alleges defendant Local 196 engaged in a "heavy-handed effort to convince the International president to force IBEW Local 336 to cancel Ehredt's contract with knowledge that Edison required Ehredt to be a union contractor and knowing that IBEW Local 196 was the only acceptable alternative union." (Plaintiff's Objection to the Magistrate Judge's Report, at p. 6). The essence of plaintiff's claim of interference is that Local 196 forced Ehredt, who already had a collective bargaining agreement with Local 336, to enter into a collective bargaining agreement with Local 196. The change from Local 336 to Local 196 resulted in a substantial **[**35]** increase in wages that plaintiff was unable to pay due to a previous contractual agreement with Com Ed. Plaintiff was thereby forced to breach its contract with Com Ed.

An unfair labor practice claim brought pursuant to § 8(b)(4)(C) would also inquire into whether Local 196 actually engaged in conduct that forced Ehredt to enter into a collective bargaining agreement with defendant, despite an already existing agreement with Local 336. Although Local 336 had refused to bargain with Ehredt before Ehredt had entered into a collective bargaining agreement with Local 196, the defendant had waged its campaign to organize Ehredt long before the collective bargaining agreement between plaintiff and Local 336 was terminated. This campaign began in the early part of 1988, and escalated to violence in April of 1989. (Plaintiff's First Amended Complaint, PP 38, 39.) Plaintiff's agreement with Local 336, however, was not terminated **[*1096]** until October 31, 1990 -- nearly two years after Local 196's coercive campaign had begun.

Under both federal labor and state tort law, it is essential for plaintiff to show that Local 196 improperly forced the termination of plaintiff's collective bargaining agreement **[**36]** with local 336 and forced plaintiff to sign an agreement with local 196. Thus, the crucial issue to be litigated under either claim is the same. Therefore, jurisdiction must first lie with the NLRB.

Defendant's conduct is also arguably protected by § 7 of the NLRA. Defendant Local 196's actions were part of an organizing campaign. ***HN12***[] Organizing campaigns are protected activity under § 7. The NLRB could determine that the action defendant took did not amount to an unfair labor practice, but rather was part of a legitimate organizational campaign and as such is protected activity under § 7.

Plaintiff's state law claim is based on alleged conduct that is arguably concerted activity protected by § 7 and unfair labor practices prohibited by § 8. The proper tribunal to address these complaints is the National Labor Relations Board. Count III of plaintiff's Complaint is, therefore, preempted.

Plaintiff argues that it should be allowed to pursue this claim here because the tort of interference with the right of contract expresses an overriding state interest. The Supreme Court has recognized that ***HN13***[] preemption may be inappropriate in cases involving conduct that "touches interests so deeply rooted **[**37]** in local feeling and responsibility that . . . [it] could not infer that Congress had deprived the States of the power to act." *Garmon, 359 U.S. at 244*. However, these instances have been limited to cases involving "violence and imminent threats to the public order." *359 U.S. at 247*. No such issue is involved in plaintiff's Complaint.

Although the Complaint does allege that acts of violence were part of defendant's campaign to force Ehredt to switch local unions, they do not seek recovery for any injuries or property damage as a result of those attacks. Rather, plaintiff's Complaint seeks compensation for economic loss caused by coercion into a collective bargaining agreement with Local 196. ***HN14***[] "The interest protected by the tort of interference with the right of contract and prospective advantage] is the reasonable expectation of economic advantage." *Rock Falls,* 300 N.E.2d at 333, 13 Ill. App. 3d at __. The state does not have an overriding concern in regulating economic loss caused by labor disputes. Preemption is appropriate in this matter.

Finally, plaintiff argues that its **[**38]** tort claim should not be preempted because it requests money damages for economic harm -- a remedy the NLRB is unable to provide. On the contrary, however, ***HN15***[] the very fact that the remedies provided by the state and federal law are different demands, rather than prohibits, preemption. The conflict between state and federal law lies not only in the conduct to be regulated but also in the remedies provided. *Garmon, 359 U.S. at 247*. Congress has already determined what it believes to be the appropriate remedy for defendant's conduct. The plaintiff may not circumvent that remedy by seeking adjudication of its claim under the guise of a state tort claim. [2] Plaintiff's Objection to the Magistrate Judge's recommendation to dismiss Count III is overruled and the conclusion of the Report is adopted.

[39] III. CONCLUSION**

For the reasons stated above, the findings of the Magistrate Judge's Report and Recommendation are accepted. The defendant's motion to dismiss Count II of Plaintiff's First Amended Complaint is denied. The Defendant's motion to dismiss Count III of Plaintiff's First Amended Complaint is granted.

Date: JUL 16 1993

JAMES H. ALESIA

United States District Judge

End of Document

[2] It should also be noted that pursuant to *29 U.S.C. § 187* plaintiff may bring a claim for damages in the United States District Court against Local 196 for any violations of *29 U.S.C. § 158(b)(4) (1988)*.

Forsyth v. Humana, Inc.

United States District Court for the District of Nevada

July 21, 1993, Decided ; July 21, 1993, Filed

CV-S-89-249-PMP (LRL)

Reporter

827 F. Supp. 1498 *; 1993 U.S. Dist. LEXIS 10406 **; 1993-2 Trade Cas. (CCH) P70,379; 17 Employee Benefits Cas. (BNA) 1439

MARY FORSYTH, MARRIETTA CADE; WILLIE ANDREWS; MARY LOU BUEHLER; HELEN STAVES; RANDOLPH BRATTON; and SEARLE AUTO GLASS, INC., doing business as BEST GLASS COMPANY, Plaintiffs, v. HUMANA, INC., a Delaware corporation; HUMANA HEALTH INSURANCE OF NEVADA, INC., a Nevada corporation; and DOES I through X, inclusive, Defendants.

Subsequent History: Partial summary judgment granted by, Motion denied by *Forsyth v. Humana, Inc., 1994 U.S. Dist. LEXIS 20148 (D. Nev., Jan. 28, 1994)*

Partial summary judgment granted by, Motion granted by *Cade v. Humana, 1994 U.S. Dist. LEXIS 20147 (D. Nev., June 1, 1994)*

Affirmed by, in part, Reversed by, in part, Remanded by *Forsyth v. Humana, Inc., 99 F.3d 1504, 1996 U.S. App. LEXIS 28869 (9th Cir. Nev., 1996)*

Motion granted by *Forsyth v. Humana, Inc., 2014 U.S. Dist. LEXIS 12324 (D. Nev., Jan. 31, 2014)*

Core Terms

Premium, discount, insureds, co-payments, damages, Payor, fiduciary duty, summary judgment motion, profits, antitrust, fiduciary, monopolization, acute care hospital, patients, breach of fiduciary duty, calculated, defraud, claim for breach, summary judgment, claim for relief, market power, insurance business, relevant market, competitors, mail, relevant time period, hospital service, plans, individual beneficiaries, insurance policy

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] Discovery, Methods of Discovery

Pursuant to *Fed. R. Civ. P. 56*, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] Judgment as Matter of Law, Directed Verdicts

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Hearings > General Overview

Civil Procedure > ... > Summary Judgment > Hearings > Oral Arguments

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Supporting Materials > Memoranda of Law

HN3[] **Summary Judgment, Evidentiary Considerations**

If the party seeking summary judgment meets its burden of showing the absence of a genuine issue of material fact, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. Likewise, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Summary Judgment, Entitlement as Matter of Law**

For purposes of summary judgment, a material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN5[] **Summary Judgment, Opposing Materials**

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims.

Civil Procedure > Judgments > Summary Judgment > General Overview

HN6[] **Judgments, Summary Judgment**

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules of Civil Procedure as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Governments > Fiduciaries

Pensions & Benefits Law > ... > Remedies > Damages > Extracontractual Damages

Pensions & Benefits Law > ERISA > Civil Litigation

Pensions & Benefits Law > ERISA > Civil Litigation > General Overview

Pensions & Benefits Law > ERISA > Fiduciaries > General Overview

***HN7*[]** **Governments, Fiduciaries**

The substantive remedies afforded by the Employment Retirement Income Security Act ("ERISA"), *29 U.S.C.S. § 1109*, are limited, and *29 U.S.C.S. § 1109* does not allow for the recovery of extra-contractual damages by individual beneficiaries. Even though ERISA requires plan fiduciaries to serve the interests of participants and beneficiaries, *29 U.S.C.S. § 1109* provides remedies for breach of fiduciary duties only on behalf of the plan, and not the individual beneficiary.

Pensions & Benefits Law > ERISA > Civil Litigation

***HN8*[]** **ERISA, Civil Litigation**

The remedies allowed under *29 U.S.C.S. § 1132(a)(3)* are limited, and *29 U.S.C.S. § 1132(a)(3)* emphasizes the protection of the plan, not the direct protection of the beneficiaries.

Pensions & Benefits Law > ERISA > Civil Litigation

***HN9*[]** **ERISA, Civil Litigation**

A fair contextual reading of *29 U.S.C.S. § 1109* makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary. The entire text of *29 U.S.C.S. § 1109* demonstrates that Congress did not intend to authorize any relief except for the plan itself.

Governments > Fiduciaries

Pensions & Benefits Law > ERISA > Fiduciaries > General Overview

Pensions & Benefits Law > ERISA > Civil Litigation

Pensions & Benefits Law > ERISA > Civil Litigation > General Overview

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > General Overview

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Suits to Recover Plan Benefits

Pensions & Benefits Law > ... > Remedies > Equitable Relief > General Overview

***HN10*[]** **Governments, Fiduciaries**

Under the Employment Retirement Income Security Act ("ERISA"), *29 U.S.C.S. § 1001 et seq.*, an individual beneficiary may bring a fiduciary breach claim, but must do so for the benefit of the plan. An individual beneficiary may not pursue a fiduciary breach claim to recover benefits or remedies beyond those provided by a plan. Any recovery for a violation of *29 U.S.C.S. §§ 1109* and *1132(a)(2)* must be on behalf of the plan as a whole, rather than inuring to individual beneficiaries. The fiduciary duty provisions in ERISA are primarily concerned with protecting the integrity of the plan, which in turn protects all beneficiaries, rather than remedying each wrong suffered by individual beneficiaries.

Governments > Fiduciaries

Pensions & Benefits Law > ERISA > Civil Litigation

Pensions & Benefits Law > ... > Remedies > Equitable Relief > General Overview

HN11[] **Governments, Fiduciaries**

The United States Supreme Court has held that equitable relief under the Employment Retirement Income Security Act, *29 U.S.C.S. § 1001 et seq.*, is limited to relief protecting the integrity of the plan as a whole and does not extend to individual plan participants.

Governments > Fiduciaries

Pensions & Benefits Law > ERISA > Civil Litigation

HN12[] **Governments, Fiduciaries**

The Employment Retirement Income Security Act, *29 U.S.C.S. § 1001 et seq.*, grants no private right of action by a beneficiary qua beneficiary; rather it accords beneficiaries the right to sue on behalf of the entire plan if a fiduciary breaches the plan's terms.

Governments > Fiduciaries

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Breach of Fiduciary Duty

Pensions & Benefits Law > ERISA > Fiduciaries > General Overview

HN13[] **Governments, Fiduciaries**

See *29 U.S.C.S. § 1109(a)*.

Governments > Fiduciaries

Pensions & Benefits Law > ERISA > Civil Litigation

Torts > Intentional Torts > Breach of Fiduciary Duty > Remedies

Pensions & Benefits Law > ERISA > Fiduciaries > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN14[] Governments, Fiduciaries

Under 29 U.S.C.S. § 1132(a)(3), a beneficiary may seek other appropriate equitable relief to redress breaches of fiduciary duty or to enforce the provisions or terms of the plan.

Governments > Fiduciaries

Pensions & Benefits Law > ERISA > Civil Litigation

Pensions & Benefits Law > ERISA > Fiduciaries > General Overview

HN15[] Governments, Fiduciaries

Where there has been a breach of fiduciary duty, the Employment Retirement Income Security Act, 29 U.S.C.S. § 1001 et seq., grants to the courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries. Notwithstanding this, any loss or profit that is disgorged as a result of a breach of fiduciary duty must have a causal connection with the breach. Uncertainties in the determination of damages, however, should be resolved against the wrongdoer.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] Sherman Act, Claims

In order to prevail on a claim of monopolization under the Sherman Act, 15 U.S.C.S. § 2, a plaintiff must demonstrate: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. To establish a 15 U.S.C.S. § 2 claim for an attempt to monopolize, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. Both market definition and market power are essentially questions of fact, whereas questions of whether specific conduct is anti-competitive or whether a party has standing to assert a violation of the Sherman Act, 15 U.S.C.S. § 2, are questions of law.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] Regulated Practices, Market Definition

Although prior Ninth Circuit law has held that a detailed market analysis is not uniformly fatal to a claim under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, in order to avoid such an analysis a plaintiff must be able to demonstrate that the anti-competitive acts alleged actually resulted in detrimental effects on competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Regulated Practices, Market Definition**

The United States Supreme Court has held that an inquiry into market definition and market power is a prerequisite for a claim of attempted monopolization under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN19[] **Regulated Practices, Market Definition**

Even though courts have allowed proof of excessive profits to be used as evidence of market power, such proof may be misleading and subject to various interpretations. As such, citing excessive profits without a more detailed analysis of the meaning of such profits is unsatisfactory proof of market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] **Monopolies & Monopolization, Attempts to Monopolize**

Under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, defining the relevant market is indispensable to a monopolization claim. A market is typically defined as the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand. The determination of a market usually requires an inquiry into the nature of the product and the geographic areas of effective competition. For antitrust purposes, defining the product market involves the identification of the field of competition; the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business, while a geographic market is an area of effective competition where buyers can turn for alternate sources of supply. Finally, the plaintiff has the burden of proving the scope of the relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN21[] **Regulated Practices, Market Definition**

For antitrust purposes, the scope of the relevant market is not governed by the presence of a price differential between competing products.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Monopolies & Monopolization, Actual Monopolization**

For purposes of a monopolization claim under § 2 of the Sherman Act, 15 U.S.C.S. § 2, once a relevant market is established, the inquiry shifts to whether the alleged monopolist exercised or had the potential to exercise market power. Although no single factor has been held determinative, the evaluation of market power usually depends on an evaluation of market share and barriers to entry. A helpful framework for evaluating market share that has been used repeatedly by courts dictates that a 90 percent market share is enough to constitute a monopoly, a 60 percent market share is doubtful, and certainly 33 percent is not. In addition, declining market share may reflect the absence of market power. Output as opposed to capacity is a more accurate measure of market share, and excess capacity, if it can be reasonably be determined, may limit the exercise of market power.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN23[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Liability pursuant to 18 U.S.C.S. § 1962(c) requires a plaintiff to demonstrate (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. "Racketeering activity" is any act indictable under various provisions of Title 18 of the United States Code, see 18 U.S.C.S. § 1961, and includes the predicate acts of mail fraud and wire fraud pursuant to 18 U.S.C.S. §§ 1341, 1343.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN24[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

For purposes of the predicate acts required for a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. §§ 1961-1968, in order to commit mail fraud under 18 U.S.C.S. § 1341, plaintiffs must demonstrate that: (1) the defendants formed a scheme or artifice to defraud: (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud. Similarly, in order to commit wire fraud pursuant to *18 U.S.C.S. § 1343*, plaintiffs must show: (1) the formation of a scheme or artifice to defraud; (2) the use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Governments > Fiduciaries

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

Securities Law > RICO Actions > General Overview

HN25[] **Wire Fraud, Elements**

Under *18 U.S.C.S. §§ 1341*, *1343*, fraud refers to (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive. A failure to disclose or concealment may also serve a basis for a fraudulent scheme under mail and wire fraud statutes; however, such nondisclosure must arise from a failure to comply with an independent statutory or fiduciary duty.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN26[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

In determining whether defendants satisfy the intent requirement of the mail and wire fraud statutes (*18 U.S.C.S. §§ 1341*, *1343*), as predicate acts for a claim under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-1968*, plaintiffs must demonstrate that the fraud was active and not merely constructive. Specific intent may be shown by examining the scheme to determine whether it was reasonably calculated to deceive persons of ordinary prudence and comprehension.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN27[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

In order to maintain a cause under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-1968*, the plaintiff must show not only that the defendant's violation was a but for cause of his injury, but that it was the proximate cause as well. This requires that there must be a direct relationship between the injury asserted and the injurious conduct alleged. One principle underlying this requirement is that the less direct the injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > RICO Actions > General Overview

HN28[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Not all injuries are compensable under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-1968*, but rather only those which are proven by a concrete financial loss.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN29[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See *15 U.S.C.S. § 1012(b)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN30[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

In order to determine if the McCarran-Ferguson Act, *15 U.S.C.S. § 1012(b)*, precludes application of a particular federal statute, a court must apply the following four part test: (1) is the federal statute one which specifically relates to the business of insurance; (2) does the complained of activity constitute the business of insurance; (3) has the state enacted laws for the purpose of regulating the complained of activity; and (4) would the application of the federal statute invalidate, impair, or supersede the state legislation.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN31[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

For purposes of the McCarran-Ferguson Act, *15 U.S.C.S. § 1012(b)*, it is not necessary that a state have a specific statute banning a particular practice. The inquiry is whether the state involved has adopted a regulatory scheme which possesses jurisdiction over the challenged activity.

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Judges: PRO

Opinion by: PHILIP M. PRO

Opinion

[*1501] *MEMORANDUM DECISION AND ORDER*

Plaintiffs are employers and employees who contracted for health insurance, **[**2]** through employee benefit plans, with Defendant Humana Health Insurance of Nevada, Inc. ("Humana Insurance"), during the period 1985 to 1988. One group of Plaintiffs used the health care services of Humana Hospital-Sunrise ("Sunrise Hospital"), an acute care facility located in Las Vegas, Nevada, which is owned and operated by Defendant Humana, Inc. ("Humana"), and a Participating Hospital under the insurance agreements. The insurance agreements required those insured with Humana Insurance to pay all expenses up to the designated deductible amount, and 20% of the expenses beyond that, with the insurance company to pay the other 80%. The liability of an insured had a cap called a "personal expense limit" which was the maximum the insured would have to pay in any given year, regardless of the total health care expenses.

In 1984, Humana Insurance and Sunrise Hospital entered into an agreement whereby Humana Insurance would pay Sunrise Hospital a discounted amount for that portion of the hospital charges for which it was responsible. However, the portion of the charges paid by the insureds was not discounted but was still based on the usual and customary rates. Plaintiffs assert that **[**3]** Humana Insurance failed to pass along the discounts it had arranged for itself to its insureds either in the form of reduced premiums or reduced co-payments.

Previous Orders of this Court have granted Plaintiffs' Motions for Class Certification, thereby permitting both a Premium Payor Class and a Co-Payor Class to maintain this action. By their Second Amended Complaint (#370), filed August 12, 1991, Plaintiffs assert three claims for relief. Plaintiffs' First Claim for Relief is brought by the Co-Payor Class which consists of employees who obtained health insurance benefits under an employee benefit plan as defined under the Employment Retirement Income Security Act (ERISA), *29 U.S.C. § 1001, et seq.* There Plaintiffs allege that Defendants breached fiduciary duties owed to the Co-Payor Class under ERISA; engaged in transactions prohibited by ERISA; and retained excessive compensation. Plaintiffs' Second Claim for Relief alleges a violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2* and is brought on behalf of the Co-Payor Class and Premium Payor Class, which consists of individuals or entities paying all **[**4]** or a portion of the Humana-Insurance premiums during the period 1985 to 1988. Plaintiffs' Third Claim for Relief, brought on behalf of both the Co-Payor Class and Premium Payor Class, alleges that Defendants engaged in a scheme to defraud in violation of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §§ 1961-1968*.

Before the Court is a Motion for Summary Judgment (#804), filed on June 22, 1993, by **[*1502]** Defendants Humana and Humana Insurance. On July 7, 1992, Defendants filed a Correction (#808). Plaintiffs filed their Opposition (#820) on August 7, 1992, which was followed by an Errata (#822) filed on August 12, 1992. Defendants filed their Reply (#841) accompanied by a Supplemental Affidavit (#842) on October 19, 1992.

Additionally, the parties have filed the following supplementary motions:

(1) supplement to Plaintiffs' Opposition (#834), filed on September 30, 1992.

(2) Second supplement to Plaintiffs' Opposition (#849), filed on November 16, 1992.

(3) Defendants' Supplemental Memorandum (#868), filed on February 22, 1993. Plaintiffs filed a Third Supplement and Opposition (#890) on May 17, 1993. On June 2, 1993, Defendants **[**5]** filed a Supplemental Memorandum (#895) in response.
(4) Defendants' Second Supplemental Memorandum (#891), filed on May 21, 1993.
(5) Plaintiffs' Fourth Supplement to Opposition (#896), filed on June 8, 1993. Defendants filed a Response (#909), on July 1, 1993.
(6) Defendants' Third Supplemental Memorandum (#901), filed on June 23, 1993. Plaintiffs filed a Response to Defendants' Second and Third Supplemental Memoranda (#908) on July 1, 1993.
(7) Plaintiffs' Response to (#895) and Fifth Supplement to Opposition (#902), filed on June 25, 1993.
(8) Defendants' Supplemental Memorandum of Points and Authorities (#903), filed on June 29, 1993.
(9) Defendants' Fourth Supplemental Memorandum (#910), filed on July 2, 1993.

On July 7, 1993, this Court heard oral argument on Defendants' Motion for Summary Judgment and its progeny.

I. *STANDARD OF REVIEW*

HN1[] Pursuant to *Federal Rule of Civil Procedure 56*, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter **[**6]** of law.

HN2[] The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *See* *Adickes v. S. H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*; *Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883 (9th Cir. 1982)*. Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *California Arch. Bldg. Prods. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987)*, *cert.* **[**7]** *denied, 484 U.S. 1006, 98 L. Ed. 2d 650, 108 S. Ct. 698 (1988)*.

HN3[] If the party seeking summary judgment meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 88 S. Ct. 1575, 1593, 20 L. Ed. 2d 569 (1968)*; *Commodity Futures Trading Commission v. Savage, 611 F.2d 270 (9th Cir. 1979)*. Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978)*, *cert. denied, 440 U.S. 981, 60 L. Ed. 2d 241, 99 S. Ct. 1790 (1979)*. Likewise, "legal memoranda and oral argument are not evidence and do not create issues of fact **[*1503]** capable of defeating an otherwise valid motion for summary judgment." *Id.*

HN4[] A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing **[**8]** versions of the truth. *See* *Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 (9th Cir. 1982)*; *Admiralty Fund v. Jones, 677 F.2d 1289, 1293 (9th Cir. 1982)*.

HN5[] All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. *SEC v. Seaboard Corp., 677 F.2d 1297, 1298 (9th Cir. 1982)*.

The trilogy of Supreme Court cases cited above establishes that ***HN6***[] "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp., 477 U.S. at 327*, *quoting Fed. R. Civ. P. 1*). *See also Avia Group Int'l, Inc. v. L.A. Gear Cal., 853 F.2d 1557, 1560 (Fed. Cir. 1988)*. **[**9]**

II. *ERISA*

A. *Facts & Procedural History*

In their First Claim for Relief, Plaintiffs' Co-Payor Class seeks approximately $ 85 million in damages against Defendant Humana Insurance for violation of its fiduciary duties under ERISA.

At the heart of this entire case is a provision within the Humana Care Plus Policy under which members of the Co-Payor Class were insured. This provision states that the employee insured would pay 20% of all covered charges incurred while in a hospital up to a certain amount (usually $ 5,000), and that Humana Insurance would be responsible for the remaining 80%. See Opposition (#820), Exhibit 85 at 7-1 (Humana Insurance master group health insurance policy HCP-84-NV-1). [1] From 1984 to 1988, Humana Insurance obtained substantial discounts, allegedly between 40% and 96%, from Sunrise for services rendered to the insureds in the Co-Payor Class. Errata (#822) at 49-50, Exhibit #39; Opposition (#820), Exhibits 38, 40. Instead of sharing these discounts with the insureds by reducing the amount of co-payments due, Humana Insurance only applied the discount to the amount for which they would have been responsible under the policy. Motion for Summary **[**10]** Judgment (#804) at 10-12.

Based on these actions, the Co-Payor Class asserts that Humana Insurance breached several of its fiduciary duties under ERISA including:

> (1) Humana Insurance engaged in a transaction involving the plan on behalf of a party, Sunrise, whose interests were adverse to those of the health benefits plans and/or its participants or beneficiaries in violation of *29 U.S.C. § 1106(b)(2)*;
>
> (2) Humana Insurance dealt with plan assets in its own interest or for its own account by erroneously interpreting the individual insurance contracts as requiring co-payments based on gross charges and effectuating the co-payment billings through contract administration in violation of *29 U.S.C. § 1106* **[**11]** *(b)(1)*;
>
> (3) Humana Insurance received consideration (e.g. the discounts) from Sunrise involving the assets of the plan in violation of *29 U.S.C. § 1106(b)(3)*;
> (4) Humana Insurance did not act in the sole interest of the insureds in interpreting the insurance contracts in violation of *29 U.S.C. § 1104(1)(A)(i)*;
>
> (5) Humana Insurance failed to discharge its duties with respect to the plan in accordance with the documents and instruments **[*1504]** governing the plan in violation of *29 U.S.C. § 1104(1)(D)*.

See Errata (#822) at 173-193.

On September 26, 1989, this Court denied Defendant Humana Insurance's Motion to Dismiss (#13) the Co-Payor Class' claim for breach of fiduciary duty. In denying Humana Insurance's Motion, this Court held, citing *Sixty-Five Security Plan v. Blue Cross and Blue Shield, 583 F. Supp. 380, 387 (S.D.N.Y. 1984)*, *aff'd on reh'g, 588 F. Supp. 119 (1984)*, that given the discretion of Humana Insurance to negotiate reimbursement rates on behalf of the health benefit plans, Humana Insurance should **[**12]** be considered a fiduciary under ERISA. Order (#79) at 9. This Court further held that the plain meaning of the contract language indicated that the insureds should have paid 20% of the net hospital charge and not the gross charge, and consequently, by failing to distribute the negotiated

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[1] Accordingly, in addition to any premiums which were paid to Humana Insurance by the employer or employee, the employee insured would ultimately be responsible for up to $ 1,000 (20% of $ 5,000) before Humana would absorb 100% of covered hospital charges. Errata (#822) at 123-125.

discount among the Co-Payor Class, Humana Insurance may have violated its fiduciary duties. *Id.* at 10. Finally, this Court found that Humana Insurance's failure to reduce its insurance premiums did not constitute a breach of fiduciary duty and that the establishment of co-payment rates was distinguishable from the fiduciary duties imposed in the approval or denial of insurance claims. *Id.* at 6-9, 10.

On July 9, 1991, this Court entered a second Order (#364) which again refused to dismiss the Co-Payor Class' claim for breach of fiduciary duties under ERISA. In the Order, this Court reaffirmed its holding that Humana Insurance was a fiduciary under *Sixty-Five Security Plan* and acknowledged that the Co-Payor Class was also asserting that Humana Insurance engaged in prohibited transactions in violation of 29 U.S.C. § 1106(b). Order (#364) at 4. **[**13]** This Court went on to hold that Plaintiffs were not asserting a claim for benefits [2], but instead were "seeking recovery for having overpaid hospital stays, because Humana Insurance as fiduciary should have acted in their interest and assured that Plaintiffs were not paying based on a 'fraudulent' rate." *Id.* at 6. In addition, in rejecting Humana Insurance's argument that Plaintiffs could not assert a claim for breach of fiduciary relief in their individual capacity, this Court found that:

> This case presents a unique situation in that the whole plan was affected by the alleged breach by Humana Insurance, but there was only monetary harm to individual participants and beneficiaries if and when they were required to pay copayments. The only meaningful remedy is recovery by these individual Plaintiffs, and the provisions of § 1132(a)(3) permit such recovery.

Id. at 14. [3]

[14]** In support of the instant Motion for Summary Judgment on Plaintiffs' ERISA claim, Defendant Humana Insurance advances three alternative arguments: (1) Plaintiffs are precluded from bringing a claim for breach of fiduciary duty since they are seeking relief to benefit only themselves (e.g., the Co-Payor Class) and not the plan as a whole [4]; (2) Humana Insurance did not act as a fiduciary in entering into the discount arrangement with Sunrise; and (3) if a claim for breach of fiduciary duty is allowed, monetary relief should be limited to recovery of the allegedly excessive coinsurance payments. **[*1505]** Motion for Summary Judgment (#804) at 14-35.

[15]** Plaintiffs respond that: (1) this Court has already correctly ruled that regardless of the fact that only the Co-Payor Class was financially injured by Humana Insurance's discounting scheme, since all the insureds were "affected" by the scheme, the Co-Payor Class may properly pursue a constructive trust for Humana Insurance's alleged violations of fiduciary duty; (2) this Court correctly ruled that Humana Insurance was rendered a fiduciary by negotiating a discount with Humana Hospital Sunrise since such an act constituted discretion in the administration of a plan; and (3) under ERISA, damages for Humana Insurance's alleged breach of fiduciary duty should be measured by the sum of the total discount received by Humana Insurance from Sunrise and not simply the percentage of the discount that Humana Insurance should have shared under the terms of the insurance contract.

B. *Discussion*

1. *May the Co-Payor Class Assert a Claim for Breach of Fiduciary Duty?*

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[2] In the Order, this Court defined a "claim for benefits" as a situation where "an insured puts in a claim and the insurance company denies it." Order (#364) at 6.

[3] In so doing this Court primarily relied upon a broad interpretation of *Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406 (9th Cir. 1988)* and distinguished the holdings of *Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985)* and *Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986)*.

[4] Defendant Humana Insurance claims that the total number of insureds who had a co-payment obligation to Humana Hospital Sunrise as a percentage of the number of total insureds was 11.68% (16,412/140,487), whereas the total number of insureds whose co-payment obligation would have declined if their coinsurance was calculated on the discounted amount as a percentage of the number of total insureds was 9.54% (13,049/140,487). Plaintiffs state that the 9.54% is not supported by the evidence, but do concede that not all employees covered under the various health plans were hospitalized at Humana Hospital Sunrise. Opposition (#820), Exhibit 93; Errata (#822) at 207, n. 404.

Notwithstanding this Court's Order (#364) of July 9, 1991, Humana Insurance once again asserts that the Co-Payor Class may not pursue its claims for breach of fiduciary duty, as the class seeks monetary relief on behalf **[**16]** of themselves as individuals and not on behalf of their respective employee benefit plans. In support of its position, Humana Insurance cites two recent Ninth circuit cases, *Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412 (9th Cir. 1991)* and *Williams v. Caterpillar, Inc., 944 F.2d 658 (9th Cir 1991)*, as new authority upon which this Court should rely to reverse its earlier decision. Although it does not appear that either of these cases charts new waters in the rough seas of ERISA interpretation, these decisions do present a forceful argument for reconsidering this Court's earlier interpretation of *Russell, Sokol,* and *Murdock.* See Order (#364) at 7-14.

To begin, this Court reaffirms its earlier interpretation of *Russell* to the effect that ***HN7***[] the substantive remedies afforded by *29 U.S.C. § 1109* are limited, and that *§ 1109* does not allow for the recovery of extra-contractual damages by individual beneficiaries. See Order (#364) at 8-9; *Russell, 473 U.S. at 142-144*. In coming to this conclusion, the Supreme Court in *Russell* specifically **[**17]** found that even though ERISA requires plan fiduciaries to serve the interests of participants and beneficiaries, *§ 1109* provides remedies for breach of fiduciary duties only on behalf of the plan, and not the individual beneficiary. [5] **[**18]** *Id.* Subsequently, the Ninth Circuit adopted the reasoning used in *Russell* to foreclose the availability of extra-contractual damages under *29 U.S.C. § 1132(a)(3)*. *See Sokol, 803 F.2d at 534-537*. In doing so, the Ninth Circuit emphasized, just as the Supreme Court did in *Russell,* that ***HN8***[] the remedies allowed under *§ 1132(a)(3)* are limited and that *§ 1132(a)(3)* "emphasizes the protection of the *plan,* not the direct protection of the beneficiaries." *Id. at 536-537*. [6]

The two recent cases cited by Defendant Humana Insurance, *Horan* and *Williams,* restate the interpretation of *Russell* and *Sokol* summarized above. For example, in holding that Plaintiffs in *Horan* could not bring a claim for breach of fiduciary duty under *§ 1132(a)(3)*, the Ninth Circuit stated:

> ***HN10***[] An individual beneficiary may bring a fiduciary breach claim, but must do so for the benefit of the plan. An individual beneficiary may not pursue a fiduciary breach **[*1506]** claim to recover benefits or remedies beyond those provided by a plan. Any recovery for a violation of *sections 1109* and *1132(a)(2)* must be on behalf of the plan as a whole, rather than inuring to individual beneficiaries. The Supreme Court reasoned the fiduciary duty provisions **[**19]** in ERISA are primarily concerned with protecting the integrity of the plan, which in turn protects all beneficiaries, rather than remedying each wrong suffered by individual beneficiaries.
>
> We have extended the reasoning in *Russell* to *section 1132(a)(3)* which allows recovery of 'other appropriate equitable relief.' *Section 1132(a)(3)* also does not provide an action for an individual beneficiary to recover extra-contractual remedies. Under *Russell* and *Sokol,* the plaintiffs fail to present a fiduciary breach claim if the only remedy sought is for their own benefit, rather than for the benefit of the Plan as a whole.

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[5] More specifically, the Supreme Court stated:

> ***HN9***[] A fair contextual reading of (*§ 1109*) makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary. . . . *The entire text of (§ 1109) persuades us that Congress did not intend to authorize any relief except for the plan itself.*
>
> *Russell, 473 U.S. at 142, 144* (emphasis added).

[6] This Court also recognizes that the position adopted by the Ninth Circuit in *Sokol* directly contradicts Justice William Brennan's interpretation of *§ 1132(a)(3)* found in his concurring opinion in *Russell.* See Order (#364) at 9; *Russell* (Brennan, J., concurring) at 153-155; *Sokol, 803 F.2d at 534-538*.

Horan 947 F.2d at 1417-18 (citations omitted). Similarly, in *Williams* the Ninth Circuit recognized that **HN11**[] "the Supreme Court has held that equitable relief under ERISA is limited to relief protecting the integrity of the plan as a whole and does not extend to individual plan participants." Williams, 944 F.2d at 665.

In this Court's previous Order (#364) of July 9, 1991, it found that, based on *Murdock* and § 1132(a)(3), the only "meaningful remedy" in this case would be to allow the Co-Payor **[**20]** Class to sue Humana Insurance for breach of fiduciary duty. See Order (#364) at 14. In light of the additional clarification yielded by the *Horan* and *Williams,* this Court now recognizes that this conclusion was incorrect.

First, it is undisputed that the members of the Co-Payor Class are seeking approximately $ 85 million in damages in their individual capacity for various breaches of fiduciary duty pursuant to § 1132(a)(3). As set forth in *Sokol, Horan,* and *Williams,* however, § 1132(a)(3) does not allow individual beneficiaries to sue for a breach of fiduciary duty on their own behalf. *See* Horan 947 F.2d at 1417-18; Williams, 944 F.2d at 665; Sokol, 803 F.2d at 536-537.

Second, this Court's previous reliance on *Murdock* as authority for allowing the Co-Payor Class to seek damages under § 1132(a)(3) must be acknowledged as tenuous. Although the Court in *Murdock* did allow plan beneficiaries (and not the plan itself) to benefit from a constructive trust funded with the ill-gotten profits of the plan administrator, the Court in *Murdock* also limited its ruling to **[**21]** the "circumstances of this case." Murdock, 861 F.2d at 1417. These circumstances included the fact that (1) the ERISA plan which had been defrauded no longer existed, (2) under the terms of the plan (which were altered by the errant fiduciary) any damages paid to the plan would have simply reverted to the wrongdoer, and (3) the damages to be received for the breach of fiduciary duty were to be put into a constructive trust in favor of *all* plan participants. Id. at 1408-09, 1417.

Here, although Defendants' conduct as alleged by Plaintiffs is clearly questionable, the level of impropriety alleged is less severe than that which occurred in *Murdock.* [7] The injury in *Murdock* was directed primarily against the plan and not against particular beneficiaries, the various benefit plans purportedly affected by Humana Insurance's breach of fiduciary duty still exist, and, most importantly, this Court's prior Order (#364) would afford relief only to a select group of beneficiaries. Upon reconsideration and based on these distinctions, this Court finds that *Murdock* does not provide persuasive authority to support this **[**22]** Court's earlier interpretation of § 1132(a)(3). [8]

[23] [*1507]** Finally, this court also recognizes that a claim for breach of fiduciary duty is neither the only nor the most appropriate remedy for the wrongs asserted by the Co-Payor Class. After careful consideration of the facts and the injury alleged by the Co-Payor Class in this case, it is clear that the crux of the current dispute rests on the reasonableness of Humana Insurance's interpretation of the co-payment provision in the insurance contract. Such a claim is more appropriately brought pursuant to 29 U.S.C. § 1132(a)(1)(B) which allows a beneficiary to seek benefits due under the terms of the plan. *See e.g.,* Eaton v. Blue Cross and Blue Shield of Alabama, 681 F. Supp. 759, 760-62 (S.D. Ala. 1988). Accordingly, this Court finds that the cause of action provided by ERISA to

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[7] In *Murdock,* the fiduciary used plan assets to further a "greenmail" scheme to benefit his own individual assets. After the scheme was successful (with both the plan and the fiduciary making substantial profits as a result), the fiduciary then amended the plan so that any excess funds would revert to the administrator. With the plan so changed, the fiduciary then paid all beneficiaries the value of their vested interests under the plan and retained all excess monies for himself (e.g. the profits made by the plan based on the use of its assets in the greenmail scheme). Murdock, 861 F.2d at 1408-1409.

[8] In the July 9, 1991 Order (#364), this Court also cited Call v. Sumitomo Bank, 881 F.2d 626, 631-32 (9th Cir. 1989) for the proposition that the *Russell* decision should not be narrowly construed. This Court now concludes that the language used for this proposition was dicta, and furthermore, that the Court in *Call* itself recognized that **HN12**[] "'ERISA grants no private right of action by a beneficiary *qua* beneficiary; rather it *accords beneficiaries the right to sue on behalf of the entire plan* if a fiduciary breaches the plan's terms.'" Id. at 632, n. 13 (citing *Sokol). See also* Murdock, 861 F.2d at 1417.

compensate the Co-Payor Class for the questionable conduct of Humana Insurance is a claim for benefits pursuant to § 1132(a)(1)(B) and not a claim for breach of fiduciary duty under § 1109 or § 1132(a)(3). [9]

[24]** In sum, based on the holdings in *Horan, Williams* and *Sokol,* the limited precedential value of *Murdock,* and the availability of a more appropriate remedy pursuant to § 1132(a)(1)(B), this Court finds that the Co-Payor Class should not be allowed to pursue claims against Humana Insurance for breach of fiduciary duty. Accordingly, this Court hereby modifies its earlier Order (#364) of July 8, 1991, and will grant Humana Insurance's Motion for Summary Judgment as to the first claim for relief set forth in Plaintiffs' Second Amended Complaint (#370). Plaintiffs' Co-Payor Class will be permitted, however, to file a Third Amended Complaint seeking appropriate relief under § 1132(a)(1)(B).

2. *Damages*

This Court also finds that even if it were to allow Plaintiffs' Co-Payor Class to seek a claim for breach of fiduciary duty, Humana Insurance would still be entitled to partial summary judgment on the issue of damages.

Plaintiffs argue that "equity and poetic justice" require that Humana Insurance pay to the beneficiaries the entire discount it obtained from Sunrise. [10] Errata (#822) at 126. In contrast, Humana Insurance asserts that Plaintiffs' calculations are incorrect, **[**25]** and that the appropriate measure of damages in this case would be simply a refund of the overcharged co-payment. See Reply (#841) at 22-27.

[26]** *Section 1109(a)* provides that:

> **[*1508]** ***HN13***[] Any person who is a fiduciary with respect to the plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including the removal of such fiduciary.

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[9] This Court also recognizes that in its Motion for Summary Judgment (#804), Humana Insurance concedes that such a claim is proper, and has stipulated that to the extent the Co-Payor Class would be required to exhaust their administrative remedies prior to bringing a claim for benefits, such a requirement would be waived. See Motion for Summary Judgment (#804) at 22. In addition, this Court finds that to avoid any unjust enrichment on the part of Humana Insurance, Plaintiffs would be entitled individually to obtain prejudgment interest for any relief provided under § 1132(a)(1)(B). *Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692 (7th Cir. 1991)*; *Short v. Central States, S.E. & S.W. Areas Pension Fund, 729 F.2d 567, 576 (8th Cir. 1984)*; *see also Blanton v. Anzalone, 760 F.2d 989, 992-93 (9th Cir. 1985)*.

[10] The following discussion regarding the proper manner in which to calculate damages is applicable to a theory of liability predicated upon both § 1132(a)(1)(B) and breach of fiduciary duty. Thus, although this Court has disallowed Plaintiffs' fiduciary duty claim, this ruling does not affect the measure of damages to be awarded to Plaintiffs. Using the example provided by Plaintiffs, assume the following:

> (1) Gross hospital charge = $ 5,000.
>
> (2) Amount paid by insured = $ 1,000 (.20 X $ 5,000).
>
> (3) Amount paid by Humana Insurance after taking an 89% discount = $ 550 (.89 X $ 5,000).
>
> (4) Total amount paid to Sunrise = $ 1,550 ($ 1,000 + $ 550).

Plaintiffs argue that appropriate damages for Humana Insurance's breach of fiduciary duty would be to require it to "disgorge the entire 'secret' discount" obtained by Humana Insurance from Sunrise. Based on their statement that "disgorgement of the unilateral discounts actually requires Humana Insurance to pay 80% of the gross charges," this amount would presumably be $ 3,450 ($ 4,000 (.80 X $ 5,000) - $ 550). See Errata (#822) at 123-26.

Similarly, ***HN14***[] under *§ 1132(a)(3)*, a "beneficiary" may seek "other appropriate equitable relief" to redress breaches of fiduciary duty or to enforce the provisions or terms of the plan.

HN15[] "Where there has been a breach of fiduciary duty, ERISA grants to the Courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries." *Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th Cir. 1983)*, *cert. denied, 464 U.S. 1040, 79 L. Ed. 2d 169, 104 S. Ct. 704 (1984)*. Notwithstanding this, any loss or profit which is disgorged as a result of a breach of fiduciary duty **[**27]** must have a causal connection with the breach. *Leigh v. Engle, 727 F.2d 113, 137 (7th Cir. 1984)*. Uncertainties in the determination of damages, however, should be resolved against the wrongdoer. *Kim v. Fujikawa, 871 F.2d 1427, 1431 (9th Cir. 1989)*; *Leigh, 727 F.2d at 138-39*.

Plaintiffs argue that they are entitled to the entire discount yielded by Sunrise as this amount constitutes the ill-gotten profits Humana Insurance obtained as a result of its breach. The difficulty with Plaintiffs' position, however, is that their calculation ignores the facts of the case and has no "causal connection" to the breach.

To illustrate this, assume, as Plaintiffs do, that on a gross hospital charge of $ 5,000, the insured beneficiary paid $ 1,000 in co-payments and Humana Insurance paid $ 550 on its obligation. The net amount received by Sunrise equals $ 1,550, and the net discount given by the hospital amounts to $ 3,450. [11] Assuming Plaintiffs are correct in their interpretation of the co-payment provision that the insureds were responsible for 20% of the net charges and not the gross charges, [12] **[**28]** the amount which should have been paid by the insureds is $ 310 (.20 X $ 1,550). Therefore, since the insured paid $ 1,000 rather than the $ 310 which was required under the contract, the insured overpaid, and Humana Insurance profited, $ 690.

As illustrated above, it is clear that the amount asserted by Plaintiffs, or $ 3,450, is not a true measure of Humana Insurance's "ill-gotten profit." To adopt this figure would ignore the reality that the gross hospital charge ($ 5,000) was never in fact paid and would contradict Plaintiffs' interpretation of the co-pay provision that the 20/80 split should apply only on the net **[**29]** hospital charge ($ 1,550). Accordingly, since Plaintiffs' measure of damages fails to establish a "causal connection" between the actual profits obtained by Humana Insurance and its breach of fiduciary duty, their calculation of damages must be rejected.

The proper measure of damages would be to restore the trust beneficiaries to the position they would have occupied but for the breach of trust. *Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2nd Cir. 1985)*. Applying this remedy to the facts of the present situation, Humana Insurance would be required to disgorge the amount of the discount which it should have paid under the proper interpretation of the co-pay provision. Using the hypothetical insured described by Plaintiffs, this would amount to $ 690. In so doing, the primary purpose of *§ 1109(a)* to "undo" the harm caused by the breach of fiduciary duty would be realized. The interests of the beneficiaries would be furthered by removing the fiduciary's ill-gotten profits, and consistent with the holding in *Leigh,* only those profits which are "causally connected" with Humana Insurance's breach of fiduciary duty would **[*1509]** be disgorged. *See* *Leigh, 727 F.2d at 138-139*; **[**30]** *Bierwirth, 754 F.2d at 1056*. [13]

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[11] Note that the net discount given on the hospital bill is 69% ($ 3,450/$ 5,000) and the net discount given on the portion of the bill for which Humana Insurance was responsible is 86.25% ($ 3,450/$ 4,000) Accordingly, Plaintiffs' assertion that Humana Insurance received an 89% discount is inaccurate. See *supra,* n. 10; Errata (#822) at 124-125.

[12] See Second Amended Complaint (#370) at 8.

[13] In their Fourth Supplemental Opposition (#896) Plaintiffs argue that the recent United States Supreme Court case *Mertens v. Hewitt Assocs., 124 L. Ed. 2d 161, 113 S. Ct. 2063, 61 U.S.L.W. 4510 (1993)*, stands for the proposition that this Court has the ability to create a trust composed of all discounts yielded by Sunrise to Humana Insurance as a remedy for Humana Insurance's alleged breach of fiduciary duty. This Court disagrees. The primary holding of *Mertens* is that "appropriate equitable relief" under *§ 1132(a)(3)* does not permit compensatory losses for breaches of fiduciary duty, but rather only traditional forms of equitable relief such as injunction, mandamus, and restitution of ill-gotten profits. *61 U.S.L.W. at 4513-14*. Such a holding does not aid Plaintiffs because, as discussed above, Plaintiffs' argument that the entire discount yielded by Sunrise to Humana Insurance are Humana Insurance's "ill-gotten profits" is erroneous.

[31]** Accordingly, even if the Co-Payor Class could assert a claim for breach of fiduciary duty under the present facts, partial summary judgment would still be appropriate in this case with respect to Plaintiffs' excessively broad view of "ill-gotten profits." [14]

Leave to Amend Plaintiffs' Complaint

In their Opposition, Plaintiffs argue that in the "unlikely event that this Court completely reverses itself and rules that ERISA offers no remedy to Plaintiffs," this Court should allow Plaintiffs to reinstate their state law claims. Errata (#822) at 95, n.2. This Court disagrees.

First, under this Order, Plaintiffs are not without an ERISA remedy. The Co-Payor Class properly may file an Amended Complaint to state a claim under *§ 1132(a)(1)(B)*. See **[**32]** *supra* at 17. Moreover, Plaintiffs' state law claims (which would apply to Plaintiffs' recent proposed claim under Nevada's RICO statute, *N.R.S. § 207.470*) are preempted by ERISA. See Order (#79) at 14-15; *Olson v. General Dynamics Corp., 960 F.2d 1418, 1420-23 (9th Cir. 1991)*, *cert. denied, 119 L. Ed. 2d 588, 112 S. Ct 2968 (1992)*; *Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 493-494 (9th Cir. 1988)*, *cert. denied, 492 U.S. 906, 106 L. Ed. 2d 566, 109 S. Ct. 3216 (1980)*.

Finally, as this Court has indicated previously, given the procedural history of this case which has seen three extensive rounds of dispositive motions, to allow the parties to address new theories of liability would strain the letter and spirit of *Fed. R. Civ. P. 15(a)*.

Accordingly, Plaintiffs' request to reinstate their prior state law claims was properly denied in this Court's October 13, 1992 Order (#840), and will not be reconsidered here.

III. *ANTITRUST*

A. *Facts*

Plaintiffs' Second Claim for Relief seeks approximately $ 181 million in damages against Defendants Humana and Humana Insurance for monopolization or attempted **[**33]** monopolization under *section 2* of the Sherman Act, *15 U.S.C. § 2*. The "Antitrust Class" consists of individual employees and employers who allegedly paid excessive policy premiums and co-payments to Humana and Humana Insurance between 1985 and 1988. See Second Amended Complaint (#370) at 11, P 41; 17, P 51.

In their opposition, Plaintiffs argue that Humana and Humana Insurance monopolized or attempted to monopolize two independent submarkets including: (1) Clark County for-profit acute care hospitals; and (2) those hospitals used by Humana Insurance's insureds. Errata (#822) at 290-292.

As proof of this actual or attempted monopolization, the Antitrust Class alleges that during the relevant time period, Humana made "supracompetitive" or "monopoly" profits. [15] Plaintiffs maintain that with regard **[*1510]** to the for-profit acute care hospital submarket, Sunrise had "60% of the licensed beds" and derived "58.6% of the total gross patient revenues excluding medicare and medicaid patients" during the relevant time period. *Id. at 305*. Also, with

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[14] In light of this Court's findings regarding the Co-Payor Class' inability to pursue a claim for breach of fiduciary duty, this Court need not address Defendants' second argument that Humana Insurance was not a fiduciary when it negotiated the discount with Sunrise.

[15] In support of the assertion that Humana made "supracompetitive" profits, Plaintiffs allege that: (1) Nevada hospitals have the highest profit margins in the country and that Sunrise was the most profitable hospital in Nevada; (2) Sunrise was the most profitable hospital in the Humana organization; (3) Notwithstanding the fact that Sunrise's market share decreased during the relevant time period, its net operating revenue during this period increased; and (4) During 1988 when Nevada's cost containment statute was in place, Sunrise's operating margin was excessive compared to other hospitals nationally.

Errata (#822) at 278-81.

respect to the submarket of hospitals used by Humana Insurance's insureds, Plaintiffs allege that Sunrise enjoyed **[**34]** an 80% share within this market. *Id.* [16]

Plaintiffs claim that in order to maintain or enhance its monopolistic position, Defendants acted anti-competitively **[**35]** in several ways, including: (1) Humana refused to unbundle level III neonatal care to other health care plans; (2) Humana improperly diverted critical care patients to other hospitals; (3) Humana threatened to revoke physician office space if they did not admit patients to Sunrise; (4) the discount arrangement between Humana and Humana Insurance allowed Sunrise to understate hospital profits and avoid regulatory cost containment while misleading its insureds; (5) Humana threatened physicians and lawmakers who challenged its practices; and (6) Humana Insurance improperly tied use of its insurance policy with treatment at Sunrise. Errata (#822) at 283-290.

Finally, with regard to the antitrust injury suffered by the Antitrust Class, Plaintiffs allege that, as a result of Defendants' monopolistic activity, its members were forced to pay excessive co-payments and insurance premiums. Errata (#822) at 276-77, 308-311.

B. *Discussion*

1. *Elements of a Section 2 Claim*

HN16[] In order to prevail on a claim of monopolization under *Section 2* of the Sherman Act, a plaintiff must demonstrate: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of **[**36]** that power; and (3) causal antitrust injury. *Oahu Gas Service, Inc. v. Pacific Resources, Inc., 838 F.2d 360, 363 (9th Cir. 1988)*, *cert. denied, 488 U.S. 870, 102 L. Ed. 2d 149, 109 S. Ct. 180 (1988)*.

To establish a *Section 2* claim for an attempt to monopolize, a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury. *McGlinchy v. Shell Chemical Co., 845 F.2d 802, 811 (9th Cir. 1988)*.

Both market definition and market power are essentially questions of fact, whereas questions of whether specific conduct is anti-competitive or whether a party has standing to assert a violation of the Sherman Act are questions of law. *Austin v. Blue Cross and Blue Shield of Alabama, 903 F.2d 1385, 1387 (11th Cir. 1990)*; *Oahu, 838 F.2d at 363, 368*.

2. *The Need for Market Analysis*

As an initial matter, Plaintiffs argue that they need not formally define a "relevant market," **[**37]** as Humana and Humana Insurance made "supracompetitive profits" during the relevant time period, and that this alone adequately demonstrates market power. Errata (#822) at 278-283. Such an argument is without merit.

First, by definition, any allegation that Defendants made "excessive" profits necessarily requires that Plaintiffs compare the profit performance of Humana with that of its competitors. See Kinter, *Federal **Antitrust Law**,* § 12.10, at 361 (1980). To argue, as Plaintiffs do, that Defendants' profits were "excessive" without knowing what the relevant market was or who its competitors were renders any antitrust analysis vacuous.

Second, ***HN17***[] although prior Ninth Circuit law has held that a detailed market analysis is not uniformly fatal to a claim under the Sherman Act, in order to avoid such an analysis a plaintiff must be able to demonstrate that the anti-competitive acts alleged actually resulted in detrimental effects on competition. **[*1511]** *Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413* (9th Cir.), *cert. denied, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991)*; *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1489 n.3 (9th Cir. 1991)*; **[**38]** *Thurman Industries, Inc. v. Pay*

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[16] The only evidence that Plaintiffs submit in support of this allegation of market share is a December 7, 1984 memo which states that "non-Humana usage was 19%" for Humana insurance insureds. Errata (#822) at 305; Exhibit 132.

' N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989); Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1448 (9th Cir. 1988) (no need for detailed market analysis where evidence clearly demonstrated competitive harm to patient market in Helena through increase of price and decrease in competition for anesthesiological services). In the present case, Plaintiffs rely on conclusory allegations that Defendants made excessive profits and do not explain how these profits have resulted from anti-competitive conduct. See Errata (#822) at 278-83. Such allegations clearly do not demonstrate a definable market or demonstrate market power which would obviate the need of a proper market analysis. [17]

[39]** Finally, ***HN19***[] even though courts have allowed proof of excessive profits to be used as evidence of market power, such proof may be misleading and subject to various interpretations. See Kinter, § 12.10; Areeda & Turner, ***Antitrust Law**,* § 507-516 (1978). As such, citing excessive profits without a more detailed analysis of the meaning of such profits is unsatisfactory proof of market power. *Telerate Systems, Inc. v. Caro, 689 F. Supp. 221, 238 (S.D.N.Y. 1988)*.

Accordingly, since allegations of Defendants' "excessive" profits do not clearly demonstrate market power or detrimental effects on competition, Plaintiffs still have the burden of proving that Defendants exercised monopoly power within the boundaries of a properly defined competitive market.

3. *Defining the Relevant Market*

HN20[] Under *Section 2*, "defining the relevant market is indispensable to a monopolization claim." *Thurman Industries, Inc., 875 F.2d at 1373*. A market is typically defined as the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand. *Morgan, 924 F.2d at 1489*; **[**40]** *Thurman, 875 F.2d at 1373*. The determination of a market usually requires an inquiry into the nature of the product and the geographic areas of effective competition. *Oahu, 838 F.2d at 364*. "For antitrust purposes, defining the product market involves the identification of the field of competition; the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business," while "a geographic market is an area of effective competition where buyers can turn for alternate sources of supply." *Morgan, 924 F.2d at 1489-90*; *see also Bhan, 669 F. Supp. 998, 1018-19 (E.D.Cal. 1987)*, *affirmed, 929 F.2d 1404* (9th Cir.), *cert. denied, 116 L. Ed. 2d 639, 112 S. Ct. 617 (1991)* (another consideration in defining product market may be production dimension which is the ability of competing firms to easily supply a good or service if one firm limits its output). Finally, the plaintiff has the burden of proving the scope of the relevant market. *Id. at 1019*. **[**41]**

4. *Plaintiffs' Relevant Markets*

Plaintiffs offer two distinct markets which they contend Defendants monopolized or attempted to monopolize. These include: (1) those hospitals used by Humana Insurance insureds; and (2) all major for-profit acute care hospitals in Clark County, Nevada. Errata (#822) at 290-292. Plaintiffs, however, fail to present sufficient evidence to support these market definitions.

a. *Hospitals Used by Humana Insurance Insureds*

With regard to those hospitals used by Humana Insurance insureds, Plaintiffs offer no facts to support such a market definition other than to refer to a recent United **[*1512]** States Supreme Court decision *Eastman Kodak Co. v. Image Technical Services, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*, and conclude that the hospitals used by Humana Insurance insureds should be considered a relevant submarket. Errata (#822) at 291-292; 304-305. Providing no factual or legal basis for such a submarket, Defendants are entitled to summary judgment on this

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[17] This Court also recognizes that the Ninth Circuit's decisions on this point have been called into doubt by the United States Supreme Court's recent decision, *Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. *Spectrum Sports* ***HN18***[] held that an inquiry into market definition and market power is a prerequisite for a claim of attempted monopolization under *§ 2* of the Sherman Act. *Id.* at 891-92. Even without regard to *Spectrum Sports,* however, it is clear that Plaintiffs have not satisfied Ninth Circuit precedent which limits the necessity of a market analysis.

aspect of Plaintiffs' Section 2 claims. *See* Seidenstein v. National Medical Enterprises, Inc., 769 F.2d 1100, 1106 (5th Cir. 1985); Drs. Steuer & Latham v. Nat. Med. Enterprises, 672 F. Supp. 1489, 1514 (D.S.C. 1987). **[**42]** [18]

[43]** b. *Major For-Profit Acute Care Hospitals*

The second market which Plaintiffs maintain Defendants monopolized or attempted to monopolize is that of major for-profit acute care hospitals in Clark County. This market allegedly consists of three hospitals, including Sunrise, valley Hospital ("Valley"), and Desert Springs Hospital ("Desert Springs"), and excludes Clark County's five remaining acute care hospitals, Boulder City Hospital ("Boulder City"), Community Hospital of North Las Vegas ("Community"), St. Rose De Lima Hospital ("St. Rose"), University Medical Center ("UMC"), and Women's Hospital ("Women's"). Errata (#822) at 291. In support of this market definition, Plaintiffs assert the following facts:

(1) Only Sunrise, Valley, Desert Springs, and University Medical Center ("UMC") have a comparable range of hospital services;

(2) Humana Insurance contracted with Boulder City, Community, and St. Rose to be preferred providers in its insurance program;

(3) Donald Stewart, Executive Director of Sunrise, when testifying before the Nevada Senate, stated that the smaller primary care hospitals in Clark County do not compete against the large hospitals; [19] **[**45]**

(4) UMC did **[**44]** not compete in the same market since it charged lower prices for its services and, being a non-profit county hospital, was perceived to be the "indigent" hospital in Clark County; [20]

Errata (#822) at 290-305.

In analyzing Plaintiffs' second alleged market, the primary issue to be decided is **[*1513]** whether Plaintiffs have presented sufficient evidence to support their allegation that the relevant service market for antitrust purposes

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[18] Even if this Court were to accept the argument that the hospitals used by Humana Insurance insureds could constitute a relevant submarket, Plaintiffs fail to address: (1) the fact that Humana insureds were able to (and did) easily switch health insurance policies; (2) the fact that under the Humana policy, Plaintiffs were not precluded from choosing hospitals other than Sunrise; and (3) what other hospitals were competing within this market. See Reply (#841) at 72-75. Failure to address these facts clearly precludes finding the existence of Plaintiffs' proposed submarket.

Further, to the extent Plaintiffs rely on the *Kodak* decision to support a claim for an illegal tying arrangement between Humana and Humana Insurance, such a claim is without merit as the undisputed facts indicate that Humana Insurance never possessed sufficient market share to exercise market power within the group health insurance market. See Reply (#841), Exhibit N, Supplemental Affidavit of Barry C. Harris at 16-22 (Humana Insurance's share of Clark County residents covered by commercial health insurance was the following - 1984/4%, 1985/18%, 1986/24%, 1987/17%, 1988/15%); Barry v. Blue Cross of California, 805 F.2d 866, 870-74 (9th Cir. 1986); Ezpeleta v. Sisters of Mercy Hospital Corp., 800 F.2d 119, 121-122 (7th Cir. 1986).

[19] More specifically, on May 20, 1987, Donald Stewart testified:

> Large, full service hospitals with the latest in medical technology compete vigorously against each other for market share. However, smaller primary care hospitals, charging less and not providing as specialized or technical care have found a niche in the market. For the most part, the larger hospitals do not compete against them.
>
> That will change with this bill. By forcing a rollback of our billed charges and a deep reduction in revenue per admission, the state will prevent us from being the kind of hospital we want to be, and force us and other large hospitals into markets we currently avoid.
>
> If you limit our prices and our revenue per admission, the only response left to us in the market is to increase our volume. This will require expanding into markets we don't currently pursue and competing directly for the segments of the market that are the mainstay of smaller hospitals. . . . The marketplace is dynamic and changing. You cannot change that by legislation.

See Errata (#822), Exhibit 125, at 7-8.

[20] Plaintiffs also allege that physicians who practiced at Valley often did not admit its patients to UMC. See Errata (#822) at 299. Even if this fact is true, this Court fails to see how it helps to establish that UMC and Sunrise were not competitors.

consists of Clark County's major for-profit acute care hospitals. [21] This Court finds that Plaintiffs have failed to do so.

[46]** Plaintiffs' assertion that Boulder City, Community, St. Rose, and Women's are not competitors of Sunrise because they do not offer a comparable range of hospital services misconstrues the alleged injury in this case. Although this Court would agree with the proposition that certain hospital services under certain facts may constitute a relevant submarket, n22 throughout this litigation Plaintiffs have not claimed or offered any evidence regarding the monopolization of specific hospital services such as open heart surgery or renal dialysis, etc. See Errata (#822) at 297. The antitrust injury alleged by Plaintiffs in this case is the actual or attempted monopolization of the general acute care hospital market in Clark County. See Errata (#822) at 313-315. Given that Boulder City, Community, St. Rose, and Women's all offer a variety of hospital services within this market, these hospitals have the ability to deprive Sunrise of significant levels of business and therefore, must be considered to be competitors of Sunrise. See Reply (#841) at 99-105; Errata (#822) at 296-97; *Morgan, 924 F.2d at 1489* (competitors are "the group or groups of sellers or producers **[**47]** who have actual or potential ability to deprive each other of significant levels of business"); *Thurman, 875 F.2d at 1374-1377* (specialty stores selling same products as more comprehensive home centers within same competitive market); *see also United States v. Rockford Memorial Corp., 898 F.2d 1278, 1284 (7th Cir. 1990)*, *cert. denied, 498 U.S. 920, 111 S. Ct. 295, 112 L. Ed. 2d 249 (1990)*; *Weiss v. York Hosp., 745 F.2d 786, 826 (3rd. Cir. 1984)*, *cert. denied, 470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985)*; *United States v. Carilion Health Service, 707 F. Supp. 840, 847 (W.D. Va. 1989)*, *aff'd, 892 F.2d 1042 (4th Cir. 1990)*. [21]

[48]** Plaintiffs further allege that Boulder City, Community, and St. Rose are not competitors of Sunrise because these three hospitals are also preferred providers under the Humana insurance policy. Although it is true that to Humana Insurance insureds, having preferred provider status at Boulder City, Community, and St. Rose made these hospitals more competitive with Sunrise and with each other, the simple fact remains that the acute care hospital service market in Clark County does not serve only Humana Insurance insureds. See *supra* at n. 18 (Humana Insurance's percentage of Clark County residents with medical insurance was 15% to 24% during relevant time period). Accordingly, because these institutions competed for patients independent of any relationship which they might have had with Humana Insurance, any argument raised by Plaintiffs that these hospitals did not compete in the same market as Sunrise must be rejected. [23]

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[21] There is really no dispute as to the geographic market in this case. As established by Defendants' experts, the consumers in the market in which Sunrise competes regularly seek care at hospitals throughout Clark County. See Motion for Summary Judgement (#804) at 64-72; Reply (#841) Exhibit N, Supplemental Affidavit of Barry Harris, at 6-8, 13-14; Exhibit Z, Supplemental Affidavit of Harold M. Ting, at 21. Although Plaintiffs raise the point that UMC may be in a different geographic area than Sunrise, such an assertion is easily refuted by the analysis presented by Defendants' experts, the fact that UMC is only 3 miles away from Sunrise, and the fact that Valley Hospital, which Plaintiffs assert is a competitor of Sunrise, is in the same "western" location and is further from Sunrise than UMC. See *id.;* Reply (#841), Exhibit N, Supplemental Affidavit of Harold M. Ting, at Exhibit 4.

[21] *See, e.g., Morgan, 924 F.2d at 1488-89* (radiology services constitute relevant market); *Oltz, 861 F.2d at 1446-48* (patient anesthesiological services constitute relevant market.).

[23] Plaintiffs also rely on the affidavit of Victor Brewer and the testimony of Donald Stewart to support their argument that the smaller hospitals did not compete in the same market as Sunrise. With regard to Victor Brewer's affidavit, except for his statement regarding physician overlap between Community and Sunrise, the statements contained therein are conclusory allegations insufficient to raise a question of material fact. See Errata (#822), Exhibit 112. As to Donald Stewart's testimony, apart from being in the context of trying to sway the Nevada legislature from further regulating the hospital industry, the clear gravamen of these statements was that even though the larger hospitals in Clark County participated in the same marketplace as the smaller hospitals, they chose not to focus their marketing resources on pursuing this share of the market. See *supra* at n.19. Furthermore, to the extent that Stewart's statements could be inferred to support Plaintiffs' conclusion that Sunrise did not seek to compete vigorously against the smaller hospitals in Clark County, this statement alone does not raise a material question of fact with regard to whether these smaller hospitals acted as a competitive constraint on the same general acute care hospital services offered by the larger hospitals.

[49]** **[*1514]** Finally, Plaintiffs argue that UMC should not be considered a competitor of Sunrise because UMC charged lower prices than other hospitals, and because it is a non-profit county hospital, UMC was perceived to be the "indigent" hospital. This Court finds such arguments unpersuasive.

First, the facts in this case reveal that during the relevant time period UMC offered a wide range of acute care hospital services and had contracts for these services with nearly all managed care plans in Nevada. See Motion for Summary Judgment (#804) at 74-76; Exhibit #120; Exhibit #122; Exhibit #123; Exhibit #125 at 51-60. In addition, UMC competed with Sunrise for beds under Certificate of Need applications, attempted to recruit doctors from other Las Vegas hospitals, upgraded its facilities and equipment, and advertised to improve its public image. *Id.* at 77-78; Exhibit #122; Exhibit #125 at 60-62; Exhibit #129; Exhibit #131; Exhibit #133; see also Supplemental Affidavit of Harold M. Ting (#842), Exhibit 8 (UMC's 1989-1990 marketing plan which identifies Sunrise as a competitor). Such factors clearly demonstrate that UMC was a significant competitor for patients in Clark County's acute care **[**50]** hospital market.

With regard to Plaintiffs' pricing argument, as the Ninth Circuit has recognized before, ***HN21***[] "the scope of the relevant market is not governed by the presence of a price differential between competing products." *Twin City Sportserv., Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975)*. This is particularly so where, as here, the pricing for hospital services commonly is subject to discounting through third-party payors, and where other factors such as location, physician affiliation, and the perceived quality of the institution are more likely to affect competition than price. See Motion for Summary Judgment (#804), Exhibit #8, Affidavit of Harold M. Ting at 9; Exhibit #120, at 17. Although it is no doubt true that being perceived as an "indigent hospital" negatively affected UMC's ability to attract commercially-insured patients, the facts also clearly demonstrate that this did not deter UMC from actively pursuing and providing services to them. See *supra* at 34-35; Reply (#841), Supplemental Affidavit of Barry C. Harris, Exhibit N, at 14-16; Supplemental Affidavit of Harold M. Ting, Exhibit Z, at 17-21; *see also* **[**51]** *Rockford Memorial Corp., 717 F. Supp. at 1284-85 (N.D. Ill. 1990)*; *Nonprofit Hospital Mergers: Proceed With Caution,* 20 Cumb. L. Rev. 719, 720-28 (1989-90) (describing generally the market forces which cause nonprofit hospitals to compete with for-profit hospitals). To argue that UMC, the second largest acute care hospital in Clark County, was entirely removed from the competitive market for hospital services because it was perceived by some as a "county hospital" which also served indigent patients simply ignores the competitive reality of the Clark County hospital market.

This Court concludes that, based on the record in this case, the Antitrust Class has failed to properly establish either of its proposed submarkets. To the extent a relevant competitive market is defined by the parties, this market would be the general acute care hospital service market in Clark County consisting of Boulder City, Community, Desert Springs, St. Rose, Sunrise, UMC, Valley, and Women's hospitals.

5. *Monopoly Power Within the Relevant Market*

HN22[] Once a relevant market is established, the inquiry shifts to whether the alleged monopolist **[**52]** exercised or had the potential to exercise market power. Although no single factor has been held determinative, the evaluation of market power usually depends on an evaluation of market share and barriers to entry. *See Oahu, 838 F.2d at 366*. A helpful framework for evaluating market share which has been used repeatedly by courts was articulated by Judge Learned Hand in *United States v. Alum. Co. of America, 148 F.2d 416, 424 (2d Cir. 1945)*, where he found that a ninety percent market **[*1515]** share is enough to constitute a monopoly, a sixty percent market share is doubtful, and "certainly thirty-three percent is not." *Id.; Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995 (9th Cir. 1986), cert. denied, 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987)*; *Rebel Oil Co., v. Atlantic Richfield Co., 808 F. Supp. 1464, 1468 (D. Nev. 1992)*; *see also Barry, 805 F.2d at 874*; Areeda & Turner, ***Antitrust Law**,* § 518.3 at 522-523 (1991 Supp.). In addition, declining market share may reflect the absence of market power. Output **[**53]** as opposed to capacity is a more accurate measure of market share, and excess capacity, if it can be reasonably be determined, may limit the exercise of market power. *Oahu, 838 F.2d at 366*; *Carilion, 707 F. Supp. at 848-49*; Areeda & Turner, ***Antitrust Law**,* §§ 520(a), 521(e) (1991 Supp.).

In determining the market share of hospitals, facts that need to be examined include the percentage shares of patient days and admissions of the various competitors. Facts which are relevant to hospital capacity include the number of licensed beds within the hospitals as well as their respective occupancy percentages. An examination of these facts in the present case reveal the following:

(1) Patient Days - Sunrise's market share of Clark County hospital patients in terms of patient days was 35% in 1985, 33% in 1986, 32% in 1987, and 32% 37 in 1988; [24]

(2) Admissions - Sunrise's market share of Clark County hospital patients in terms of admissions was 34% in 1985, 32% in 1986, 30% in 1987, and 30% in 1988; [25]

(3) Number of Licensed Beds - Sunrise's percentage of licensed beds in Clark County was 36% in 1985, 35% in 1986, **[**54]** 35% in 1987, and 35% in 1988; [26]

(4) Occupancy Percentage - Sunrise's capacity utilization of all beds was 52% in 1985, 48% in 1986, 52% in 1987, and 53% in 1988 compared to a Clark County average utilization rate of 53% in 1985, 44% in 1986, 56% in 1987, and 58% in 1988. [27]

As can be seen from the above figures, throughout the relevant time period, Sunrise had approximately one third of the Clark County market for acute care hospital services. Although **[**55]** it is true that at the time in question, Nevada's Certificate of Need requirements acted as a potential entry barrier to new participants, the evidence also demonstrates that during the relevant time period there was substantial excess bed capacity at existing hospitals. This excess capacity would temper any competitive advantage Sunrise might have realized from such regulations. [28]

Accordingly, this Court further finds that Plaintiffs have failed to establish that Defendants had the ability to exercise monopoly power within Clark County's acute care hospital market during the relevant time period. *See Thurman, 875 F.2d, at 1377-80*; *Barry, 805 F.2d at 874*; **[**56]** *Bhan, 669 F. Supp. at 1022-23*. [29]

[*1516] 6. *Antitrust Injury*

Finally, even if this Court could find that Plaintiffs have adequately defined a relevant competitive market and have shown Defendants monopolized or attempted to monopolize that market, this Court would nevertheless **[**57]** have to conclude that Plaintiffs have not adequately demonstrated antitrust injury. Although Plaintiffs claim that they have suffered antitrust injury as a result of paying excessive premiums and/or co-payments, such monetary losses relate, if at all, to Defendant Humana Insurance's allegedly erroneous interpretation of the health insurance contract, and not the alleged anti-competitive acts of Sunrise (e.g. the diversion of critical care patients and refusal to unbundle level III neonatal services). This, coupled with the fact that Plaintiffs were only indirect purchasers of hospital services whose premiums and co-payments were undoubtedly subject to a number of other influences (e.g.

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[24] See Motion for Summary Judgement (#804), Exhibit 7, Affidavit of Barry C. Harris at Exhibit 2a; Reply (#841), Supplemental Affidavit of Barry C. Harris at Exhibit 1.

[25] *Id.*

[26] Reply (#841), Supplemental Affidavit of Barry C. Harris at Exhibit 1.

[27] See Motion for Summary Judgment (#804), Exhibit 7, Affidavit of Barry C. Harris at Exhibit 4. Also included in his exhibit are the individual utilization rates of the various individual hospitals in Clark County. These rates are approximately 40% to 60% during the relevant time period.

[28] In fact, an argument could be made that the Nevada's Certificate of Need requirements actually injured Sunrise's competitive position since of the 245 additional beds which were licensed between 1979 and 1988, only 16 of these were given to Sunrise. See Reply (#242), Supplemental Affidavit of Harold M. Ting, Exhibit Z, at Exhibit 5.

[29] Even if this Court were to assume that the smaller hospitals in Clark County were not within the same competitive market as Sunrise, such a fact does not alter the conclusion that Sunrise did not have sufficient market share within Clark County to exercise market power during the relevant time period. Using only Desert Springs, Sunrise, Valley, and UMC as the competitive market, in total patient days Humana had market shares of 40% in 1985, 38% in 1986, 36% in 1987, and 36% in 1988 and in admissions Humana had market shares of 38% in 1985, 39% in 1986, 36% in 1987, and 35% in 1988. See Opposition (#820), Exhibit 107 (data relating to inpatient days and admissions for Desert Springs, Sunrise, Valley, and UMC).

competition in the health insurance market, state regulation, etc.) external to the cost of hospital services, clearly demonstrates that Plaintiffs' Antitrust Class has not suffered "antitrust injury." *Cf.* Austin, 903 F.2d at 1390-93.

C. *Conclusion*

In light of Plaintiffs' failure to adequately demonstrate the alleged submarkets, the fact that Defendants could not exercise market power, and the failure of Plaintiffs to demonstrate antitrust injury, Defendants are **[**58]** entitled to summary judgment on Plaintiffs' Second Claim for Relief.

IV. *RICO*

A. *Overview*

The Third and final Claim for Relief alleged by Plaintiffs in their Second Amended Complaint is a violation of RICO pursuant to 18 U.S.C. § 1964(c) brought by Plaintiffs Co-Payor Class and Premium Payor Class. In support of this claim, both classes of Plaintiffs assert that during 1985 to 1988: (1) Humana and Humana Insurance acted as members of an "association in fact" enterprise or, alternatively, that Humana, a person within the meaning of 18 U.S.C. § 1964(3), associated with Humana Insurance, an enterprise within the meaning of 18 U.S.C. § 1961(4); (2) that Humana and Humana insurance entered into a secret agreement to discount amounts owed by Humana Insurance for hospital charges incurred by Humana Insurance insureds; (3) Humana and Humana Insurance concealed and/or misrepresented this agreement to Plaintiffs in the numerous mailings, telephone calls, and television/radio advertisements; and (4) that such acts (a) were intended to and did induce the Premium Payor Class **[**59]** into buying policies they would not have otherwise purchased, and (b) defrauded the Co-Payor Class into paying excessive co-payments. Second Amended Complaint (#370) at 18, 22-23; Errata (#822) at 103-109, 221-223, 251-253.

In support of their Motion for Summary Judgment (#804), Defendants Humana and Humana Insurance assert the following arguments:

(1) Plaintiffs cannot prove that the alleged misrepresentations and/or omissions of Defendants were intended to defraud them since (a) it is undisputed that the Humana Insurance policy mirrored other health plans in place during the relevant time period and, (b) the discount arrangement was disclosed to Nevada regulators. Motion for Summary Judgment (#804) at 98-116;

(2) New precedent requires this Court to reverse its prior ruling that Humana is a "person" distinct from Humana Insurance, the "enterprise," under 18 U.S.C. § 1962(c). Motion for Summary Judgment (#804) at 131-136;

(3) The Premium Payor Class cannot show that they suffered RICO injuries, or even assuming they could, that these injuries were proximately caused by Defendants' actions. Motion for Summary Judgment (#804) at 116-126; **[**60]**

(4) Under RICO, the only damages which the Co-Payor Class is entitled to recover is the amount of excess co-payments which the class paid as a result of Defendants' allegedly improper interpretation of the policy. Motion for Summary Judgment (#804) at 126-131;

[*1517] (5) The McCarran-Ferguson Act Precludes Plaintiffs' RICO cause of action. Motion for Summary Judgment (#804) at 136-146.

B. *Requirements of RICO, 18 U.S.C. § 1962(c)*

HN23[] Liability pursuant to 18 U.S.C. § 1962(c) requires a Plaintiff to demonstrate (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Sun Savings and Loan Assoc. v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987). "Racketeering activity" is any act indictable under various provisions of Title 18 of the United States Code, *see* 18 U.S.C. § 1961, and includes the predicate acts alleged in this case of mail fraud and wire fraud pursuant to 18 U.S.C. §§ 1341, 1343. *Id.*

HN24[] In order to commit mail fraud under *§ 1341*, Plaintiffs must demonstrate **[**61]** that: "(1) the defendants formed a scheme or artifice to defraud: (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Schreiber Distributing v. Serv-Well Furniture Co., 806 F.2d 1393, 1400 (9th Cir. 1986)*. Similarly, in order to commit wire fraud pursuant to *§ 1343*, Plaintiffs must show: "(1) the formation of a scheme or artifice to defraud; (2) the use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Id.*

HN25[] Under these provisions, fraud refers to "'(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive.'" *United States v. Bonallo, 858 F.2d 1427, 1433 (9th Cir. 1988)*. A failure to disclose or concealment may also serve a basis for a fraudulent scheme under mail and wire fraud statutes; however, such nondisclosure must arise from a failure to comply with an independent statutory or fiduciary duty. **[**62]** *California Arch. Bldg. Prods. v. Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1987)*, *cert. denied, 484 U.S. 1006, 98 L. Ed. 2d 650, 108 S. Ct. 698 (1988)*; *United States v. Dowling, 739 F.2d 1445, 1449 (9th Cir. 1984)*, *rev'd on other grounds,* *473 U.S. 207, 87 L. Ed. 2d 152, 105 S. Ct. 3127 (1985)*.

C. *Plaintiffs' Failure to Demonstrate Intent to Defraud*

The first argument raised by Defendants in support of their Motion for Summary Judgment (#804) on Plaintiffs' RICO claims is that there is no evidence to suggest that Defendants had "specific intent to deceive or defraud" the Plaintiffs. More specifically, Defendants contend that insofar as the development of the policy in question is concerned:

> (1) during the period in question, the health care industry was just beginning to experiment with preferred provider arrangements, and no industry standards were in place governing how co-payment discounts should be administered; (2) that the policy in question was simply modeled after one developed and already in place in Florida; (3) Medicare employs an analogous system for the payment of co-payments; (4) confidentiality **[**63]** clauses were common in the industry for such discount arrangements to ensure the protection of proprietary information; and (5) that only 9.54% of all Humana Insurance insureds resulted in paying higher co-payments if the discount given Humana Insurance would have been shared.

Motion for Summary Judgment (#804) at 99-108.

Defendants further assert that various parties other than Defendants were aware of the co-payment arrangement, that Defendants disclosed the discount arrangement to Nevada regulators at various times between 1984 and 1986, and that on June 6, 1986, while at hearings before the Nevada Department of Insurance ("DOI"), Defendants directly informed DOI officials that bills issued to insureds did not reflect any discounts received by Humana Insurance from Humana. Motion for Summary Judgment (#804) at 110-116.

Plaintiffs respond that notwithstanding any disclosures made by Defendants to third parties, Defendants failed to disclose the co-payment scheme to Plaintiffs directly, and **[*1518]** even had attempted to conceal it. According to Plaintiffs, Defendants' Motion for Summary Judgment (#804) raises a material question of fact regarding whether Defendants had the requisite **[**64]** "intent" required under the mail and wire fraud statutes. See Errata (#822) at 146, 219-221.

HN26[] In determining whether Defendants satisfy the "intent" requirement of the mail and wire fraud statutes, Plaintiffs must demonstrate that the fraud was active and not merely constructive. *United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir. 1980)*, *cert. denied, 447 U.S. 928, 65 L. Ed. 2d 1122, 100 S. Ct. 3026 (1980)*. Specific intent may be shown by examining the scheme to determine whether it "was reasonably calculated to deceive persons of ordinary prudence and comprehension." *Sun Savings, 825 F.2d at 196*; *Schreiber, 806 F.2d at 1400*; *Bohonus, 628 F.2d at 1172*; *see also* *United States v. Green, 745 F.2d 1205, 1209 (9th Cir. 1984)*, *cert. denied, 474 U.S. 925, 88 L. Ed. 2d 266, 106 S. Ct. 259 (1985)* (specific intent to defraud means to deceive or mislead, and does not include situations where act involved was the result of ignorance, mistake, or accident).

Notwithstanding the facts asserted by Defendants, viewing all inferences in favor of Plaintiffs **[**65]** as this Court must do, it is clear that a material question of fact exists as to whether Defendants' interpretation of the co-payment provision, which was furthered through the use of United States mails or wires, was specifically intended to mislead or deceive Plaintiffs or whether it was the result of ignorance, mistake, or accident. Accordingly, Defendants Motion for Summary Judgment (#804) on this ground must be denied.

D. *Person/Enterprise Distinction*

Plaintiffs next allege that Humana and Humana Insurance acted as members of an "association in fact" enterprise or, alternatively, that Humana, a person within the meaning of *18 U.S.C. § 1964(3)*, associated with Humana Insurance, an enterprise within the meaning of *18 U.S.C. § 1961(4)*, to defraud Plaintiffs. As this Court recognized in its July 9, 1991 Order (#364), such allegations satisfy the "person/enterprise" requirements of U.S.C. *§ 1962(c)*. *See River City Markets v. Fleming Foods West, 960 F.2d 1458, 1460-62 (9th Cir. 1992)*; *U.S. v. Feldman, 853 F.2d 648, 656-59 (9th Cir. 1988)*, *cert.* **[**66]** *denied, 489 U.S. 1030, 103 L. Ed. 2d 222, 109 S. Ct. 1164 (1989)*; *cf. Glessner v. Kenny, 952 F.2d 702, 710-14 (3rd Cir. 1991)*. Accordingly, Defendants are not entitled to summary judgment on this ground.

E. *RICO Damages for the Premium Payor Class*

The third argument asserted by Defendants in support of summary judgment is that the Premium Payor Class has not demonstrated the requisite causal nexus between the RICO damages they seek and the fraud alleged as a predicate act. This Court agrees.

At the outset, the Premium Payor Class notes that the nondisclosure of the discounting arrangement between Humana and Humana Insurance induced its members into obtaining Humana Insurance policies. Errata (#822) at 221-222. The Premium Payor Class then asserts that numerous television and direct mail advertisements promised that employers and employees would "share in reduced hospital costs through premium reductions." Errata (#822) at 104, 222, 235. [30] The damages which the Premium Payor Class contend they have suffered as a result of these actions is "the difference in the actual price of the insurance product that they purchased (the premiums actually paid) **[**67]** and what the premiums should have been if premiums were calculated to include the discounts that Humana Insurance was receiving." Errata (#822) at 222.

[*1519] In *Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303 (9th Cir. 1992)*, *cert. denied, 123 L. Ed. 2d 266, 113 S. Ct. 1644 (1993)*, the Ninth Circuit clarified the requirements of proximate causation and recoverable damages under RICO. With respect to the issue of proximate causation, the Court in *Imagineering* stated: **[**68]**

> ***HN27***[] In order to maintain a cause under RICO then, the plaintiff must show not only that the defendant's violation was a "but for" cause of his injury, but that it was the proximate cause as well. This requires that there must be a direct relationship between the injury asserted and the injurious conduct alleged. . . . One principle underlying this requirement is that the less direct the injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors.

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[30] The language from the advertisements to which the Premium Payor Class refer is as follows:

> (1) "Tap Dance" commercial: "Because we can control costs, both you and your company can save a great deal of money without the song and dance;"
>
> (2) "Mumbo Jumbo" commercial: "We can save you and your company money without insurance mumbo jumbo;"
>
> (3) "Cuts" commercial: "Humana is a hospital company, so we can control costs, saving employers and employees money."

Errata (#822) at 33; Reply (#841) at 35.

Id. at 1311, citing *Holmes v. Securities Investor Protection Corp., 117 L. Ed. 2d 532, 112 S. Ct. 1311, 1317-18 (1992)*. Consistent with this view of proximate cause, the Court in *Imagineering* held that **HN28**[] not all injuries are compensable under RICO, but rather only those which are proven by a "concrete financial loss." *Id. at 1310*; *see also* *Oscar v. University Students Co-operative Ass'n, 965 F.2d 783, 785 (9th Cir. 1992)* (en banc), *cert. denied, 121 L. Ed. 2d 581, 113 S. Ct. 655 (1992)*.

The claim by the Premium Payor **[**69]** Class that Humana Insurance's advertising campaign misrepresented that its members would "share in reduced hospital costs through premium reductions," is without merit. The advertisements to which Plaintiffs refer are nothing more than puffery and plainly do not contain any representations which would indicate how insurance premiums would be calculated. As such, this alleged predicate act cannot be viewed as the proximate cause of the Premium Payor Class' asserted RICO injury. *See, e.g.,* *Berent v. Kemper Corp., 973 F.2d 1291, 1295-96 (6th Cir. 1992)*.

The Premium Payor Class also argues that had its members known how Humana Insurance would calculate co-payments under its policy, they would not have purchased Humana polices. This argument is problematic for several reasons.

First, as stated by Defendants, the logical injury which would follow from a "fraudulent inducement" would be that the Premium Payor Class could have obtained comparable policies elsewhere for less and instead chose Humana as their insurance carrier. See Reply (#841) at 36-37. Plaintiffs do not present any evidence in this regard. See Errata (#822) at 227-236.

Plaintiffs argue instead **[**70]** that they did not get the benefit of what they bargained for: an insurance policy under which co-payments would be calculated with consideration of any hospital discounts received. See Errata (#822) at 224. Plaintiffs may be correct, although there is no evidence in the record to demonstrate that they are. Unlike the Co-Payor Class, however, the members of the Premium Payor Class never incurred a hospital bill or made a co-payment. Its members simply paid the premiums they had previously agreed to pay assuming that any hospital discounts obtained by Humana Insurance would be reflected in their co-payment determinations. Accordingly, even though it is clear that the members of the Premium Payor class could have *potentially* been defrauded by Defendants' calculation of co-payments, under the undisputed facts, no such injury actually occurred.

Plaintiffs' additional argument that their "injury" arose from the fact that Sunrise's discount to Humana Insurance should have been included in calculating their initial premiums must be rejected for two reasons. First, although this argument enables Plaintiffs to state a more direct injury, it completely ignores the fact that the fraud **[**71]** which supposedly induced Plaintiffs to purchase the Humana policy involved representations about how co-payments were to be determined. Nothing in the record suggests that the Defendants fraudulently represented how **[*1520]** they would calculate premiums. [31] Even if Humana Insurance did err in its calculation of the initial premiums, this error was independent of the predicate acts which Plaintiffs have alleged throughout this litigation.

Second, Plaintiffs' argument ignores other factors, such as the price of competing insurance products, that were used to determine the price of premiums paid by the Premium Payor Class. See Errata (#822) at 228. Assuming that simply deducting the cost of the discounts in Defendants' actuarial formula would lead to a fair market price that the Premium Payor Class would have **[**72]** paid for the Humana policy ignores the competitive realities of the group health insurance market.

Accordingly, given the failure of the Premium Payor Class to adequately demonstrate a "direct relationship between the injury asserted and the injurious conduct alleged" or a "concrete financial injury" for purposes of RICO, Defendants are entitled to summary judgment. *Imagineering, 976 F.2d at 1311*.

F. *RICO Damages for the Co-Payor Class*

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[31] Indeed, Plaintiffs indirectly acknowledge this point in their Opposition when they admit that their argument is not that "Defendants' fraud 'caused' Defendants to charge improper premiums." See Errata (#822) at 224.

This Court previously has analyzed how to calculate the damages incurred by the Co-Payor Class which would be causally connected to Defendants' alleged breach of fiduciary duties under ERISA. *See* 827 F. Supp. at 1507-09. This Court finds that the reasoning of the Ninth Circuit in *Imagineering* and *Oscar* regarding the requirements of proximate cause and concrete financial injury applies with equal force in the context of damages available under RICO. Accordingly, Defendants are entitled to summary judgment on the Co-Payor Class' RICO claim to the extent that the Co-Payor Class seeks damages in excess of the amount that they could have recovered under a proper interpretation of the co-payment provision.

G. **[**73]** *McCarran-Ferguson Act Exception*

Finally, Defendants argue that the McCarran-Ferguson Act precludes Plaintiffs from pursuing their RICO claim. This Court agrees.

Section § 1012(b) of the McCarran-Ferguson Act provides:

> **HN29**[] No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b).

The purpose of this provision is to impose a clear-statement rule "that state laws enacted 'for the purpose of regulating the business' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *United States Dept. of the Treasury v. Fabe, 124 L. Ed. 2d 449, 113 S. Ct. 2202, 61 U.S.L.W. 4579, 4583 (1993)* (citation omitted).

HN30[] In order to determine if *Section 2(b)* precludes application of a particular federal statute, a court must apply the following four part test: (1) is the federal statute one which specifically relates to the business of insurance; (2) does the complained of activity constitute **[**74]** the business of insurance; (3) has the state enacted laws for the purpose of regulating the complained of activity; and (4) would the application of the federal statute invalidate, impair, or supersede the state legislation. *See* *LeDuc v. Kentucky Central Life Ins. Co., 814 F. Supp. 820, 826-27 (N.D. Cal. 1992)*; *Thacker v. New York Life Ins. Co., 796 F. Supp. 1338, 1341 (E.D. Cal. 1992)*.

There can be no dispute that RICO does not specifically relate to the business of insurance. *See* *LeDuc, 814 F. Supp. at 827*; *Thacker, 796 F. Supp. at 1341*.

It is equally clear that Plaintiffs' complained of activities constitute the "business of insurance." The crux of the RICO claim brought by the Premium Payor Class is that nondisclosure of the discount arrangement between Humana and Humana Insurance in advertisements and other communications fraudulently induced its members into purchasing the Humana Insurance policies. See Second Amended Complaint (#370) at 18-23. **[*1521]** The gravamen of the RICO claim brought by the Co-Payor Class is that nondisclosure of the discount arrangement **[**75]** between Humana and Humana Insurance fraudulently induced its members into paying excessive co-payments. *Id.* Since these alleged acts directly relate to the purchase and execution of Humana Insurance policies, they fall squarely within the meaning of the "business of insurance." *See* *Fabe, 61 U.S.L.W. at 4582* ("the actual performance of an insurance contract falls within 'the business of insurance'. . . to hold otherwise would be mere formalism."); *WEXCO, Inc. v. IMC, Inc.,* No. CV-92-758, 1993 WL 121227 at *3-*5 (M.D. Pa. April 16, 1993) to be reported at *820 F. Supp. 194*; *LeDuc, 814 F. Supp. at 828*; *but see,* *Thacker, 796 F. Supp. at 1342*. Accordingly, Defendants also satisfy the second prong of the McCarran-Ferguson test.

In evaluating whether Nevada has enacted laws governing the activities complained of in Plaintiffs' RICO claims, **HN31**[] it is not necessary that a state have a specific statute banning a particular practice. The inquiry is whether the state involved has adopted a regulatory scheme which possesses jurisdiction over the challenged **[**76]** activity. *See Feinstein v. Nettleship Co. of Los Angeles, 714 F.2d 928, 933 (9th Cir. 1983)*, *cert denied, 466 U.S. 972, 80 L. Ed. 2d 820, 104 S. Ct. 2346 (1984)*; *WEXCO, 820 F. Supp. at 197*.

In 1971, Nevada adopted the Trade Practices and Frauds; Financing of Premiums Act ("Act"), *N.R.S. § 686A.010, et seq.* This Act was designed to regulate the business of insurance as recognized in the McCarran-Ferguson Act "by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined and determined." *N.R.S. § 686A.010*. Under this Act, Nevada recognized that the Commissioner of Insurance "has exclusive jurisdiction" in regulating the trade practices of the business of insurance. *N.R.S. § 686A.015*. Furthermore, the Act specifically prohibits the dissemination of false or misleading information relating to the sale of policies or the benefits obtained thereto, *N.R.S. §§ 686A.030*, *686A.040*, and those violating the Act are subject to enforcement of its provisions by the Commissioner. *N.R.S. §§ 680A.200*, *686A.160*, **[**77]** *686A.170*, and *686A.310*. These statutes and others requiring the approval of forms used by insurers, *N.R.S. §§ 687B.120*, *687B.130*, clearly demonstrate an attempt by Nevada to regulate the conduct complained of in this case through the adoption of a comprehensive regulatory scheme. [32] Accordingly, this Court finds that the third prong of McCarran-Ferguson test is also satisfied. *See also WEXCO, 820 F. Supp at 197*; *LeDuc, 814 F. Supp. at 829*; *Thacker, 796 F. Supp at 1341-42*.

Finally, under the McCarran-Ferguson test, this Court must consider whether the application of RICO would **[**78]** invalidate, impair, or otherwise supersede Nevada legislation. As acknowledged by Plaintiffs in their Opposition (#822), the Nevada Commissioner of Insurance, in enforcing the Act, can prohibit unfair trades practices, impose fines, and withdraw approval of insurance plans. See Opposition (#822) at 270-274; *N.R.S. §§ 686A.160*, *686A.170*, *686A.187*, and *687B.130*. As Plaintiffs contend, the State of Nevada does not proscribe the same harsh penalties which would be available under RICO (e.g. treble damages and attorney's fees) for Defendants' violation of unfair trade practices. See Errata (#822) at 270-274. As recognized by the courts in *WEXCO* and *LeDuc,* however, this is the very reason why the fourth prong of the McCarran-Ferguson test is met. *See WEXCO* 1993 WL 121227 at *6-*7; *LeDuc, 814 F. Supp at 829*; *but see Thacker, 796 F. Supp at 1343*. For this Court to allow Plaintiffs to pursue the harsher RICO penalties for behavior which the Nevada Legislature apparently did not deem worthy of such penalties, would be tantamount to allowing Congress to intercede in an area expressly left to the states under the McCarran-Ferguson **[**79]** **[*1522]** Act. Accordingly, this Court also finds that the fourth prong of the McCarran-Ferguson analysis is satisfied. [33]

[80]** This Court, therefore, concludes that the RICO claims alleged by the Premium Payor Class and the Co-Payor Class are barred by the McCarran-Ferguson Act. In doing so, the Court recognizes that Plaintiffs may view the interplay between the McCarran-Ferguson Act and ERISA as posing a preemptive "Catch-22," with McCarran-Ferguson precluding Plaintiffs' federal RICO claim and ERISA barring Plaintiffs' state RICO claim. The result is not

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[32] In fact, Plaintiffs tacitly admit that Humana Insurance's fraudulent activity was covered by the existing Nevada statutory scheme when they argue that Humana Insurance "cavalierly ignored" these "general legal requirements," thus requiring the Nevada legislature to pass in 1987 the more rigorous requirements of sharing discounts under AB 289. See Opposition (#822) at 271.

[33] At oral argument, Plaintiffs for the first time argued that since Defendants' conduct could arguably be sanctioned under Nevada's RICO statute, *N.R.S. § 207.470*, the harsh remedies afforded by the federal RICO statute cannot be seen to displace or supersede existing Nevada law. This Court disagrees.

As recognized earlier in this Order, Plaintiffs could not pursue a Nevada RICO claim in this case given the fact that ERISA preempts such a claim. *See supra* at 22. Beyond this, it is clear that in adopting the Act, the Nevada legislature intended the Insurance Commissioner to have "exclusive jurisdiction" over fraudulent insurance practices. See ***N.R.S. § 686A.015***. This, combined with the fact that the Nevada legislature specifically identified fraud on the part of the insured and *not* by the insurer as a possible predicate act under *N.R.S. § 207.470*, demonstrates an intent of the Nevada legislature to limit the amount of damages recoverable against an insurer for fraud. See *N.R.S. §§ 207.360(30)*, *680A.200*, ***686A.160***, *686A.170*, *686A.290*, *686A.291*, and *686A.310*.

entirely anomalous, however, given that Congress has occupied the field through ERISA by which certain well-defined remedies have been provided and others excluded.

V. ORDERS

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment (#804) is Granted to the extent that Judgment is hereby entered in favor of Defendants and against Plaintiffs as to Plaintiffs' First, Second, and Third Claims for Relief.

IT IS FURTHER ORDERED that Plaintiffs' Co-Payor Class only shall have to and including August 24, 1993, within which to file a Third Amended Complaint seeking relief on Plaintiffs' First Claim for Relief pursuant to *29 U.S.C. § 1132(a)(1)(B)*, consistent with Part II of this Memorandum Decision.

DATED: **[**81]** July 21, 1993

PHILIP M. PRO

United States District Judge

Sullivan v. Tagliabue

United States District Court for the District of Massachusetts

July 29, 1993, Decided

CIVIL ACTION NO.: 92-10915-H

Reporter

828 F. Supp. 114 *; 1993 U.S. Dist. LEXIS 10508 **; 1993-2 Trade Cas. (CCH) P70,411

CHARLES W. SULLIVAN, Plaintiff v. PAUL TAGLIABUE, ET AL., Defendants.

Core Terms

stadium, antitrust, anti trust law, refinancing, damages, stadia, stock, professional football, antitrust violation, injuries, factors, renovations, restrained, contends, indirect, lease, teams, antitrust action, alleged injury, franchise, Football, shares

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

The question of antitrust standing is one of law.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Costs & Attorney Fees, Clayton Act**

15 U.S.C.S. § 15 provides: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN3[] Clayton Act, Claims

Factors that are to be considered in the determination to confer antitrust standing and which narrow the class of persons entitled to recover private damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, include: (1) a causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex apportionment of damages.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] Clayton Act, Remedies

The availability of the remedy under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, to some person who claims its benefit is not a question of the specific intent of the conspirators.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN5[] Antitrust & Trade Law, Clayton Act

The fact that a plaintiff is not a participant in the relevant market is not in itself dispositive of the standing issue, but such a fact must be weighed heavily against a grant of standing.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] Antitrust & Trade Law, Clayton Act

An "inextricably intertwined" injury exists where the plaintiff's injury was a necessary step in effecting the ends of the alleged illegal conspiracy and the very means by which it is alleged that the defendants sought to achieve their illegal ends.

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Judges: HARRINGTON

Opinion by: EDWARD F. HARRINGTON

Opinion

[3]** **[*115]** *MEMORANDUM*

July 29, 1993

HARRINGTON, D.J.

In conjunction with an action brought by his father, William J. Sullivan, Jr., the Plaintiff Charles W. Sullivan has brought this action for damages against the Defendants, [1] **[**4]** alleging that their enforcement of a National Football League (NFL) rule constituted a violation of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*. The Plaintiff presses this suit both individually and as the assignee of the antitrust claim belonging to Stadium Management Corporation (SMC). In addition, the Plaintiff has alleged state law claims of breach of fiduciary obligations, interference with a prospective advantageous contract, unfair trade practices, and intentional infliction

[1] The Defendants named in this action are the NFL, current NFL Commissioner Paul Tagliabue, his predecessor Pete Rozelle, and the following 21 organizations owning NFL franchises: The Five Smiths, Inc.; Indianapolis Colts, Inc.; Buffalo Bills, Inc., Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Los Angeles Rams Football Co.; Minnesota Vikings Football Club, Inc.; New Orleans Saints, Ltd.; Chargers Football Co.; New York Jets Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; Tampa Bay Area NFL Football, Inc.; Pro-Football, Inc.; and Seattle Professional Football Club, Inc.

of emotional distress. The Defendants have moved for Summary Judgment on the Plaintiff's antitrust action, arguing that he lacks standing to bring such an action. [2]

William Sullivan was the founder and sole or managing owner of the New England Patriots Football franchise ("Patriots") from 1960 to 1988. In 1987, his son, the Plaintiff, was the sole stockholder of SMC, which owned the stadium at Foxborough, Massachusetts, then called Sullivan Stadium, where the Patriots played and continue to play their **[*116]** home games. That same year, William Sullivan sought to sell a 49 percent interest **[**5]** in the Patriots to an investment banking firm, which was not in the business of football, which, in turn, was to sell the shares of stock to the public. Through this transaction, the Plaintiff, through SMC, concurrently sought refinancing for the stadium. The Plaintiff alleges that SMC would have received a $ 40 million loan from the investment banking firm pursuant to the public offering of the Patriots' stock.

The Plaintiff contends that the Defendants combined to prevent the sale of Patriots stock by enforcing a league rule that prohibited the sale of the shares of interest of an NFL franchise to any company not engaged in the business of professional football (the "Rule"). This Rule could only have been changed or waived by a vote of three quarters of the NFL owners, a requirement that the Plaintiff argues was itself a restrictive rule of procedure. The Plaintiff alleges that by preventing the sale of stock, the Defendants also effectively blocked the refinancing of the stadium. He further contends that the Defendants intended this result, or, at the very least, were well aware that the stadium refinancing was being sought concurrently with the sale of Patriots' stock to the **[**6]** public and that their actions in prohibiting the sale would necessarily adversely affect SMC. Subsequent to William Sullivan's failed attempt to sell the shares to the public, SMC was forced into bankruptcy. During the bankruptcy proceedings, the Plaintiff received an assignment of all SMC's causes of action, including the antitrust claim he presses here, in consideration of the release of claims against SMC by the Plaintiff.

The Plaintiff claims that, if the sale of the Patriots' stock had gone through, negotiations for the refinancing would have been successfully completed, allowing him to pay off his debts, as well as those of the stadium, and to subsequently make renovations to the stadium. He contends that, consequently, he would still own the stadium, and would have reaped the benefits of the enhanced market value of the stadium as a result of the renovations he intended to make. The Plaintiff also alleges that, in 1987, SMC held a lease from the Patriots which extended until the year 2002, and that, if the sale of stock to the public through the investment banking company had been successful and the renovations completed, the Patriots would have extended the lease for another **[**7]** twenty years.

The Plaintiff has brought his action under Section 4 of the Clayton Act, *15 U.S.C. § 15*, which confers standing upon private parties to sue for damages under the Sherman Act. Section 4 provides for a private cause of action to enforce a public ***antitrust law*** to advance the public interest. This section provides:

> ***HN2***[] Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15. Although Section 4 appears on its face to provide a cause of action to anyone claiming an injury causally related to an antitrust violation, the Supreme Court has rejected such a literal interpretation of the statute.

[2] ***HN1***[] The question of antitrust standing is one of law. *Midwest Communications v. Minnesota Twins, Inc., 779 F.2d 444, 449 (8th Cir. 1985)*, *cert. denied,* ***476 U.S. 1163, 90 L. Ed. 2d 730, 106 S. Ct. 2289 (1986)***. In previously denying the Defendants' Motion to Dismiss in the instant case, this Court indicated that the Plaintiff's Complaint sufficiently alleged antitrust standing. *796 F. Supp. 56, 58 (D. Mass. 1992)*. On this Motion for Summary Judgment, this Court shall now examine the evidence presented by the Plaintiff to support this allegation. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*.

See Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 534-535, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983); **[**8]** Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982). As the Supreme Court has stated:

> An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

McCready, 457 U.S. at 476-77 (citation omitted). The Supreme Court has consequently enunciated **HN3**[] factors that are to be considered in the determination to confer **[*117]** antitrust standing and which narrow the class of persons entitled to recover private damages under Section 4. *See* Associated Gen. Contractors, 459 U.S. at 535-545. These factors include: (1) a causal connection between the alleged antitrust violation and harm to the plaintiff; (2) an improper motive; (3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress **[**9]** sought to redress with the antitrust laws; (4) the directness with which the alleged market restraint caused the asserted injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex apportionment of damages. *See id.; see also* Lovett v. General Motors Corp., 975 F.2d 518, 520 (8th Cir. 1992) (listing factors).

First evaluating these factors as they apply to the Plaintiff's claims brought on behalf of SMC, the Court notes that the Plaintiff has alleged, and presented evidence of, a causal connection between the application of the Rule and SMC's inability to refinance the stadium because the sale of Patriots' stock to the public was prohibited. The Plaintiff has also alleged an improper motive on the part of the Defendants in that they sought "to restrain and monopolize interstate commerce in professional football" and took the actions they did against SMC in furtherance of that goal. In addition, the Plaintiff has indicated that the Defendants intended to block the refinancing of the stadium by their actions, or at the very least, that such a harm was a foreseeable consequence of the application of the Rule **[**10]** as to the Patriots. The Court consequently finds that the Plaintiff has presented sufficient evidence to raise an issue as to improper motive. [3] The Court also notes that there appears to be no significant risk of duplicate recoveries or danger of complex apportionment in this case, in-that the injuries on which the Plaintiff sues are sufficiently distinct from those alleged by William Sullivan, the only other plausible litigant in this matter. [4] William Sullivan has initiated a separate antitrust action against the Defendants.

[11]** While the above factors arguably militate toward a ruling of standing, the remaining considerations, which are of far more controlling importance under these circumstances, counsel against such a ruling. The first such consideration concerns the nature of the Plaintiff's alleged injury and whether it is of the type that the antitrust laws sought to forestall. *Id. at 538*. As the Supreme Court has emphasized, the central interest of the antitrust laws is "in protecting the economic freedom of participants in the relevant market." *Id. at 538*. **HN5**[] The fact that a plaintiff is not a participant in the relevant market is not in itself dispositive of the standing issue, but such a fact "must be weighed heavily against a grant of standing." *South Dakota v. Kansas City S. Indus., 880 F.2d 40, 46 n.16 (8th Cir. 1989)*, *cert. denied sub nom. South Dakota v. Kansas City S. Ry. Co., 493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 726 (1990)*. The Plaintiff has alleged that the application of the Rule operated to restrain trade in the market of professional football. In the present case, however, SMC was "neither **[**12]** a consumer nor a competitor" in the market of professional football, nor can it be said that it was "a direct victim of the defendants' coercive practices." *Id. at 539, 540 n.44*. Moreover, there is no indication that the Defendants' actions had any palpable effect on overall competition in the stadia market, in which SMC was a participant. The Plaintiff nonetheless argues that the

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[3] The Court stresses that the improper motive inquiry is not, in and of itself, determinative of antitrust standing. *See* *Associated Gen. Contractors, 459 U.S. at 537* & n.37. As the Supreme Court has stated, **HN4**[] "the availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." *Id. at 537* (quoting *McCready, 457 U.S. at 479*).

[4] While there would exist a risk of duplicate recoveries and a danger of complex apportionment in this case as between the Plaintiff and SMC in light of their seemingly overlapping injuries, the Court will assume that such a problematic consideration can be avoided here, given that the Plaintiff brings his single action for the damages suffered by both.

application of the Rule as to William Sullivan restrained SMC individually, interfering with its ability to compete with other stadia by **[*118]** denying it a means of refinancing. In that the alleged violation had therefore, at most, an indirect and incidental effect upon competition in the stadia market by virtue of its impact on SMC, it cannot be said to be actionable under the antitrust laws, which "were enacted for the protection of *competition,* not *competitors." Brunswick Corp. v. Pueblo Bowl-O-Mat., Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (quoting *Brown Shoe v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* (emphasis in original)). In sum, SMC's alleged injury was not of the type that the antitrust laws were designed to prevent. [5]

[13]** Related to the inquiry concerning the nature of the injury are factors of comparable significance, namely the directness of the injury and the speculative nature of the Plaintiff's damages claim. Here, the Defendants allegedly conspired to create and apply a Rule that prohibited William Sullivan from selling 49 percent of the Patriots to an investment banking firm which would have, in turn, sold shares to the public. As a result, SMC was ostensibly denied the refinancing for Foxborough Stadium that it was negotiating as part of that sale. This refinancing, the Plaintiff contends, would have enabled SMC to pay off its debts, which, in turn, would have allowed the Plaintiff to continue ownership of the stadium, make renovations to it, and get an extension on the lease from the Patriots. It is obvious that any injury suffered by the SMC was only an indirect result of the alleged injury inflicted upon William Sullivan in preventing him from selling Patriots' shares to the public.

Further, the fact that William Sullivan, the party most directly harmed, is pursuing his own antitrust action here diminishes one possible rationale for allowing the Plaintiff to press SMC's separate antitrust **[**14]** claim. As the Supreme Court has stated,

> The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general. Denying the [plaintiff] a remedy on the basis of its allegations in [such a] case is not likely to leave a significant antitrust violation undetected or unremedied.

Associated Gen. Contractors, 459 U.S. at 542. Here, the SMC's injuries were only a consequence of those injuries suffered by William Sullivan, whose own antitrust action ensures that the alleged violation will be properly remedied.

The indirectness of the SMC's injuries informs the speculative nature of the Plaintiff's damages claim, which he contends is measurable in terms of the enhanced market value of the stadium that would have resulted from the renovation of the stadium. Given that an extended chain of independent events would have had to have occurred to give credence to the Plaintiff's damages claim on behalf of SMC, the Court finds the damages to be, at best, **[**15]** highly speculative. After an evaluation of the Plaintiff's case on behalf of SMC in light of the above factors set forth by the **[*119]** Supreme Court in *Associated Gen. Contractors,* the Court therefore concludes that the Plaintiff lacks standing to bring this suit on behalf of SMC.

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[5] The Court also finds that SMC's injury was not so "inextricably intertwined" with the injury that the Defendants sought to inflict upon William Sullivan and the professional football market as to confer standing upon him. In general, as the Supreme Court has indicated, ***HN6***[] an "inextricably intertwined" injury exists where the plaintiff's injury was "a necessary step in effecting the ends of the alleged illegal conspiracy" and "the very means by which it is alleged that [the defendants] sought to achieve their illegal ends." *See McCready, 457 U.S. at 479-81*; *see also Bodie-Rickett and Assocs. v. Mars, Inc., 957 F.2d 287, 291 (6th Cir. 1992)* (to show that injury is "inextricably intertwined," plaintiff must show that defendants actively manipulated or utilized him in order to harm competitors or participants in the relevant market); *Lovett, 975 F.2d at 521* (same); *Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 745-46 (9th Cir. 1984)*, *cert. dismissed,* ***469 U.S. 1200 (1985)*** ("inextricably intertwined" injury exists where Plaintiff's injury was necessary step or means employed by defendants to achieve anticompetitive ends); *Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 292, 294 (2d Cir. 1983)*, *cert. denied,* ***467 U.S. 1252, 82 L. Ed. 2d 841, 104 S. Ct. 3536 (1984)*** ("inextricably intertwined" injury found where boycott of plaintiff was alleged means of eliminating competition in relevant cable market and where plaintiff was most directly injured party). In the present case, however, the denial of stadium refinancing was not a necessary step in effecting and continuing a monopoly on professional football, nor was it the very means by which the Defendants sought to do so. It was merely a secondary consequence of the Defendants' alleged antitrust actions against William Sullivan.

Notwithstanding the above analysis, the Plaintiff contends that the Court of Appeals for the Ninth Circuit has already addressed the very issue of standing presented in this case, holding, in *Los Angeles Memorial Coliseum Commission v. NFL,* that an NFL stadium had standing to challenge an NFL rule on antitrust grounds. *See 791 F.2d 1356, 1364 (9th Cir. 1986)*. In that case, the Los Angeles Coliseum had been left without a major tenant after the Los Angeles Rams football franchise had moved to a new stadium in Anaheim, California. The L.A. Coliseum was consequently looking for a new NFL occupant. Soon thereafter, upon the expiration of his lease with the Oakland Coliseum, Al Davis, the Managing General Partner of the Oakland Raiders franchise, sought to relocate his team to the L.A. Coliseum. The NFL, however, invoked a league rule that prohibited teams from relocating to **[**16]** the home territory of another team without the approval of three-quarters of the 28 NFL member franchises. Insofar as the L.A. Coliseum was within a 75-mile radius of Anaheim, it was still in the Rams' home territory under the league's definition of that term. Over Davis' objection that the rule violated antitrust laws, the NFL member teams voted overwhelmingly against the move, denying Davis the requisite approval and blocking the move.

In holding that the L.A. Coliseum had standing to bring its subsequent antitrust suit in conjunction with the Oakland Raiders against the NFL and its member clubs, the Court of Appeals for the Ninth Circuit emphasized that "the NFL's territorial restraints in this case . . . *restrained competition in the 'stadia market' between rival stadia (such as the Oakland Coliseum and the L.A. Coliseum) that seek to secure NFL tenants." Id. at 1365* (emphasis added). Because the L.A. Coliseum was "a competitor in a market in which competition was restrained directly and foreseeably, if not also intentionally," the court held that the stadium was directly harmed. *Id.* The court was nonetheless careful to limit the reach **[**17]** of its decision:

> We are confident that our ruling will not be misinterpreted as being a broad endorsement of antitrust standing for all parties who might have contracted with the Raiders had they not been restrained in their relocation plans. Football stadia constitute a special market distinguished from those comprised by, say, hotels, laundering establishments, or limousine services, by their indispensable and intimate connection with professional football teams. An injury such as that suffered by the Coliseum in the present case cannot be characterized fairly as an indirect "ripple effect."

Id.

In spite of the Plaintiff's arguments to the contrary, this Court declines to interpret *L.A. Coliseum Commission* so broadly as to hold that stadiums always have standing to bring antitrust suits against the NFL by virtue of their relationship to professional football clubs. In commenting on the special connection between the stadia market and professional football, the Ninth Circuit was merely emphasizing the directness with which that particular rule, which necessarily affected the ability of stadiums to attract NFL occupants, impacted the stadia market as compared to various **[**18]** other markets, on which the rule had, at most, a tangential effect. The Rule in the present case has no similarly direct effect upon competition between rival stadia seeking to secure NFL tenants. In fact, in 1987, the year of the attempted sale, SMC had a lease with the Patriots that extended until the year 2002, regardless of the team's ownership, demonstrating that the stadium's ability to lease to the Patriots was not directly impacted by enforcement of the Rule. Instead, the Plaintiff argues that SMC would have received better financing then it had previously enjoyed if the NFL had allowed William Sullivan to sell shares of the Patriots to the public, and that this refinancing would have freed up enough money to pay off debts and make renovations that would have allowed SMC to be more competitive in the market. Such an antitrust injury is far too tangential **[*120]** and conjectural to be actionable under the antitrust laws.

For the above reasons, the Court accordingly finds that the Plaintiff lacks standing to bring an antitrust suit for damages on behalf of SMC. The Court also notes that the above analysis applies with even greater force to the Plaintiff's individual antitrust claims. **[**19]** The personal damages that the Plaintiff attributes to the NFL's alleged antitrust violation, which include payment of unnecessary interest and the inability to purchase debt at a discounted rate, merely flow from the alleged injuries to SMC. In that the Plaintiff himself was one step further removed from the alleged antitrust violation than was SMC, the injuries he claims personally are that much more indirect than those claimed on behalf of SMC. Consistent with the above ruling that SMC's injuries were too consequential to support standing, the Court finds that the Plaintiff's personal antitrust injuries, which are merely derivative of SMC's injuries, are too indirect and tangential to support his individual action. *See* *Associated Gen. Contractors, 459 U.S. at 545-46*.

In conclusion, the Court finds that the Plaintiff Charles Sullivan lacks standing to bring this antitrust action, either individually or on behalf of SMC. The Defendants' Motion for Summary Judgment is therefore granted on that claim. The Court also declines supplemental jurisdiction over his remaining state law claims, and they are therefore dismissed. [6]

[20]** EDWARD F. HARRINGTON

United States District Judge

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[6] The Court issued an Order granting Defendants' Motion for Summary Judgment on the federal antitrust claim and declining to exercise supplemental jurisdiction on July 15, 1993, with this Memorandum to follow.

Hertz Corp. v. City of N.Y.

United States Court of Appeals for the Second Circuit

May 6, 1992, Argued ; August 2, 1993, Decided

Docket No. 92-7369

Reporter

1 F.3d 121 *; 1993 U.S. App. LEXIS 19773 **; 1993-2 Trade Cas. (CCH) P70,343

THE HERTZ CORPORATION, Plaintiff-Appellant, v. THE CITY OF NEW YORK, O. PETER SHERWOOD, in his official capacity as Corporation Counsel of the City of New York, and MARK GREEN, in his official capacity as Commissioner of Consumer Affairs of the City of New York, Defendants-Appellees.

Prior History: [1]** Appeal from a judgment of the United States District Court for the Southern District of New York, Whitman Knapp, Judge. Plaintiff sought injunctive and declaratory relief that would bar enforcement of defendant city's local law that forbids rental-car companies doing business in New York City from considering their customers' residences in making rental and pricing decisions. The district court dismissed the complaint, but enjoined enforcement of the local law pending this appeal.

Disposition: Reversed and remanded.

Core Terms

local law, municipal, anticompetitive, immunity, regulation, rental, antitrust, district court, conspiracy, interstate commerce, restraint of trade, Sherman Act, residents, cases, state-action, rental-car, pricing, rent, antitrust liability, unilateral, rates, local government, state policy, rule-of-reason, articulated, contracts, rule of reason, boroughs, renter's, substantive due process

LexisNexis® Headnotes

Governments > Local Governments > Ordinances & Regulations

HN1[] **Local Governments, Ordinances & Regulations**

See New York City, N.Y., Admin. Code tit. 20, ch. 4.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Judicial Notice > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Standards of Review, De Novo Review**

Review of a grant of a motion under *Fed. R. Civ. P. 12(b)(6)* is de novo, and factual allegations in the complaint are construed in favor of the nonmoving party. Consideration is limited to facts stated on the face of the complaint and in documents appended to the complaint or incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken. Dismissal of the complaint is proper only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, is illegal. *15 U.S.C. S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

The broad language of the Sherman Act precludes only those restraints of trade that are unreasonable. Unreasonable contracts, combinations, and conspiracies in restraint of trade enacted by state and local governments are unconstitutional as preempted by federal antitrust laws.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of *§ 1* of the Sherman Act. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. Where private actors are thus granted "a degree of private regulatory power," the regulatory scheme may be attacked under *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Governments > Federal Government > Claims By & Against

Governments > Public Improvements > General Overview

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

The Sherman Act, *15 U.S.C.S. § 1*, does not apply when anticompetitive restraints are imposed by the states as an act of government. Under principles of federalism and state sovereignty, a state actor is accorded absolute immunity from antitrust liability. Local governments may be entitled to state-action immunity. While state action immunity does not apply directly to local governments, a municipality's restriction of competition may sometimes be an authorized implementation of state policy; if it is, then the municipality may share in the immunity accorded to state actions. A two-part test is applied to instances where private parties participate in a local government's price fixing regime. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Constitutional Law > Congressional Duties & Powers > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN7[] **Interstate Commerce, Prohibition of Commerce**

The United States Constitution's affirmative grant to Congress of powers over interstate commerce means that states have limited authority to erect barriers against interstate trade, a limitation that applies equally to municipal legislation.

Constitutional Law > Substantive Due Process > Scope

HN8[] **Constitutional Law, Substantive Due Process**

Economic regulation need only be rationally related to a legitimate governmental purpose.

Counsel: PAUL C. SAUNDERS, New York, NY, (Cravath, Swaine & Moore, New York, NY, of Counsel), for Plaintiff-Appellant.

ALAN G. KRAMS, New York, NY (O. Peter Sherwood, Corporation Counsel of the City of New York, Leonard Koerner, Lawrence S. Kahn, Barry P. Schwartz, June R. Buch, Julie Mertus, of Counsel), for Defendants-Appellees.

Timothy Dyk, Washington, D.C. (Jones, Day, Reavis & Pogue, Washington, D.C., of Counsel), for Amicus Curiae Chamber of Commerce of the United States of America.

Judges: BEFORE: FEINBERG, PRATT, and McLAUGHLIN, Circuit Judges.

Opinion by: PRATT

Opinion

[*123] PRATT, *Circuit Judge*:

Hertz Corporation appeals from a judgment of the United States District Court for the Southern District **[**2]** of New York, Whitman Knapp, *Judge*, that dismissed its complaint which sought to enjoin enforcement of Local Law No. 21 of 1992 of the City of New York, referred to informally as the "Hertz law".

FACTS AND BACKGROUND

On January 2, 1992, Hertz announced that it would increase the daily car-rental rates it charges by $ 56.00 for residents of the Bronx, $ 34.00 for residents of Brooklyn, $ 3.00 for residents of Manhattan, and $ 15.00 for residents **[*124]** of Queens. The increased rates were to be charged to persons residing in those four boroughs whenever they rented a car at a Hertz outlet in the New York metropolitan area, New Jersey, Southern Connecticut, or Eastern Pennsylvania. Out-of-city Hertz customers who rented a vehicle in one of these four boroughs would have no increased rates.

Hertz claims that renting cars to residents of these boroughs had resulted in extremely high liability expenses for the company. Specifically, Hertz alleges that although only about seven percent of Hertz's nationwide rentals occur in the New York area, more than 25 percent of its liability losses have occurred there. As one of the reasons, the company points to a state statute that holds car owners **[**3]** vicariously liable for any monetary damages caused by the operation of their vehicles. *See* N.Y. Veh. & Traf. § 388 (McKinney 1986). Another cause, says Hertz, is that juries in some of the affected boroughs have a history of awarding high damages to plaintiffs in personal injury cases. Hertz avers that its residency surcharges correspond directly to the average excess liability losses incurred per rental in the affected boroughs.

Hertz excludes several groups of renters from the increases: (1) those holding contracts with Hertz, such as federal and corporate accounts, and (2) certain other categories of renters -- those possessing airline tickets, members of the Manhattan Preferred Renters Club, and Platinum Service customers -- felt to be low-risk groups. In addition, members of the "Hertz Gold Club" are excluded, since they do not check in at a rental-car outlet and therefore could not practicably be notified of the increased rate. Hertz also has announced a "Responsible Renter Qualification Program", which permits those otherwise subject to the increased rates to apply for and receive an exemption upon meeting certain qualifications, including a safe driving record.

In response **[**4]** to Hertz's proposed surcharges for residents of four of its boroughs, the City of New York passed Local Law No. 21 of 1992 which amended chapter four of title 20 of the city's administrative code to provide that:

HN1[] No rental vehicle company shall refuse to rent a motor vehicle to any person otherwise qualified based on that person's residence, nor impose fees or charges based on that person's residence. Through this local law, the city contends, that it was "exercising its reasoned legislative judgment that the social costs of the [Hertz pricing] practice are too high, given its potential for polarization and the fact that the burden falls hardest on minorities and the working poor."

In addition to enacting Local Law No. 21, the city commenced an action in Supreme Court, New York County, claiming that Hertz's rate increases violated (1) state and local law because of their disparate impact on minorities, and (2) *section 396-z(10) of New York's General Business Law*. That action is pending.

On March 27, 1992, Hertz commenced this action in the United States District Court for the Southern District of New York. It sought a declaratory judgment that the Hertz law is invalid and an injunction **[**5]** against its enforcement. The complaint alleged that Local Law No. 21 (1) is preempted by state law regulating the rental-car industry, and (2) violates several provisions of the United States Constitution: (a) the contract clause, (b) the *commerce clause*, and (c) the *fourteenth amendment's* protection for substantive due process and its prohibition against uncompensated takings. Finally, Hertz charged that Local Law No. 21 compels a violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1 (1988)*, and therefore is preempted and invalid under the *supremacy clause of the United States Constitution*.

Four days after it was filed, Hon. Whitman Knapp, ordered Hertz's complaint dismissed, but he enjoined the city from taking any action to effectuate the law pending the outcome of any appeal by Hertz. Hertz appealed the dismissal; the city did not cross-appeal.

Because the determination of Hertz's state-law preemption claim involved issues that were important to the continuing development **[*125]** of state law and potentially dispositive of this appeal, on June 10, 1992, we certified to the New York State Court of Appeals the question of "whether New York State legislation **[**6]** addressing car rental practices sets forth a sufficiently comprehensive scheme of regulations to preempt further legislation in the field by the municipalities of the state." *Hertz v. City of New York, 967 F.2d 54, 57 (2d Cir. 1992)*. On December 22, 1992, the Court of Appeals answered this question in the negative. *See* *Hertz v. City of New York, 80 N.Y.2d 565, 607 N.E.2d 784, 592 N.Y.S.2d 637 (N.Y. 1992)*.

The case is now before us to review the district court's resolution of the remaining issues: (1) the city's antitrust liability under the Sherman Act, (2) the impact of Local Law No. 21 on interstate commerce, and (3) Hertz's claims under *42 U.S.C. § 1983 (1988)* based on takings law, the contract clause, and substantive due process.

DISCUSSION

HN2[] Review of the grant of a motion under *Fed. R. Civ. P. 12(b)(6)* is *de novo*, and we must construe in Hertz's favor factual allegations in the complaint. *Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991)*. Our consideration, like the district court's, is limited to facts stated on the face of the complaint and in documents appended **[**7]** to the complaint or incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken. *Id*. Dismissal of the complaint is proper only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* (footnote omitted).

A. *The Sherman Act*.

Section 1 of the Sherman Act ***HN3***[] provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal."

15 U.S.C. § 1.

Initially we note that by controlling one aspect of the pricing process for rental cars, the Hertz law on its face restrained trade within the meaning of *§ 1* of the Sherman act. *See* *National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* ("Price is the 'central nervous system of the economy,' and an agreement that 'interferes with the setting of price by free market forces' is illegal on its face."). In *National Soc'y of Professional Eng'rs* **[**8]** , the Supreme Court concluded that an agreement among competitors to refuse to discuss prices with potential customers until after negotiations had resulted in the selection of an engineer restrains trade within the meaning of *§ 1* of the Sherman Act. The Court aptly noted, "while this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id. at 692*. The agreement impeded the ordinary give and take of the market place. *Id*.

The fact that Local Law No. 21 does impose a restraint on trade only marks the beginning of our analytical journey, however, because ***HN4***[] the broad language of the Sherman Act precludes only those restraints of trade that are unreasonable. *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*; *see generally* Earl W. Kintner, 2 *Federal* ***Antitrust Law*** § 9.20, at 56 (1980). Unreasonable contracts, combinations, and conspiracies in restraint of trade enacted by state and local governments are unconstitutional **[**9]** as preempted by federal antitrust laws. *See generally* Phillip E. Areeda and Donald F. Turner, ***Antitrust Law*** P 209, at 60 (Supp. 1992).

The threshold requirement of the statute is that there be a "contract, combination, * * * or conspiracy" to restrain trade or commerce. This element of the statute is usually clear when the conduct at issue is that of private parties;

however, when the actor is a local governmental unit, two additional questions must be answered. The first arises from the Supreme Court's holding in **[*126]** *Fisher v. City of Berkeley, 475 U.S. 260, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)*, that in some circumstances, discussion of which follows, action by a city may not be a contract, combination, or conspiracy at all. *Id. at 266-68*. The second additional question addresses the extent to which the local governmental unit may be entitled to share in the immunity from antitrust liability that is accorded state actors, a topic that need be addressed only if we conclude that the challenged action conflicts with antitrust laws. *Id. at 264*. Finally, although courts have deemed some restraints so anticompetitive that **[**10]** they are held *per se* invalid, the presumption is that restraints are examined in light of the rule of reason -- a more flexible standard that demands consideration of a variety of factors. Thus, we must also consider the appropriate standard by which to measure the reasonableness of the city's action.

The antitrust issues we must address, therefore, can be summarized as follows: (1) whether there is a contract, combination or conspiracy, (2) whether the city enjoys state-action immunity from antitrust liability, (3) the possible applicability of *per se* analysis to the city's law, and finally, (4) whether the rule of reason is the appropriate measure of Sherman Act liability for this municipal defendant. We will discuss each issue as applied to Local Law No. 21.

1. *Contract, Combination, or Conspiracy*.

The Supreme Court addressed the issue of municipal antitrust liability in *Fisher*, where the City of Berkeley had promulgated a rent-control ordinance that was administered by an independent, quasi-judicial board. The board calculated the annual, general rent adjustments and processed individual claims for variances. Opponents of the ordinance argued that it required **[**11]** price-fixing that, under the traditional standards, was a *per se* unreasonable restraint of trade. The Supreme Co urt rejected this proposed analysis, and instead held that, on the facts before it, the city's action was not "concerted" -- it did not meet the threshold requirement of being a contract, combination, or conspiracy. This was so because "the rent ceilings imposed by the [city] Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control." *Fisher, 475 U.S. at 266*. Thus, the Court held the Berkeley ordinance to be a "unilateral action outside the purview of *§ 1*." *Id. at 266-67*.

The Court then re-examined its two earlier cases that had addressed governmental antitrust liability. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*; *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745 (1951)*. Despite the lack of an agreement between any of the regulated parties, the Supreme Court found in both *Midcal* and *Schwegmann Bros* **[**12]** . that the pertinent state statute called for private industry to engage in price-fixing, which the court held to be *per se* illegal. The *Fisher* Court explained that the factor distinguishing *Midcal* and *Schwegmann Bros.* was the role played by the governmental body in implementing the legislation. In both cases, the state had dictated price-setting that was to be performed not by the state, but by wholesalers and producers in the liquor industry.

The *Fisher* Court explained:

> ***HN5***[] Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of *§ 1*. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. Where private actors are thus granted "a degree of private regulatory power," the regulatory scheme may be attacked under *§ 1*.

475 U.S. at 267-68 (citations omitted).

Fisher can be read to require us to examine first whether Local Law No. 21 qualifies as a "unilateral" restraint; if it does it falls outside *§ 1* of the Sherman Act, because it is not a "contract, combination * * * or conspiracy." In **[**13]** dismissing Hertz's Sherman Act claim, the district court adopted the city's view that the local law was a unilateral municipal action.

[*127] The Hertz law, however, lacks several features of the "unilateral" Berkeley ordinance. First, the law is not a "pure regulatory scheme", *Fisher, 475 U.S. at 269*, because it is not a "scheme" at all; the law is simply a directive for all rental-car companies doing business in New York City to remove one factor from their competitive-pricing structures. Second, the law lacks the independent, quasi-judicial board that in *Berkeley* could adjust rates and provide relief in individual circumstances. Finally, the City of Berkeley was operating in an area vital to its municipal authority -- housing; less vital is the rental-car industry in New York City.

Nor does the Hertz law easily fit the fact pattern of the cases held to involve "hybrid" restraints -- those that restrain trade through some combination of governmental and private conduct. The three Supreme Court cases in this category involved the pricing of liquor. *324 Liquor Corp. v. Duffy, 479 U.S. 335, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987)*; *Midcal, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937*; **[**14]** *Schwegmann Bros., 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745*. Each involved classic price-setting that was delegated by statute or regulation to private industry but was left unsupervised by the state legislature. The Hertz law, in contrast, does not purport to authorize price-setting by private industry; it simply eliminates an element of price competition among industry members.

We reject the city's suggestion to apply *Fisher* expansively so as to view Local Law No. 21 as a unilateral action that lacks the degree of private-governmental agreement required to be a contract, combination, or conspiracy in restraint of trade. To do so would remove from the reach of the antitrust laws all local governmental actions not fitting the precise fact pattern of the liquor cases, and would preclude examination of their anticompetitive effects. At the same time, we also reject Hertz's contention that this case, like the "hybrid" liquor cases, presents a straight-forward example of price-fixing that is *per se* invalid. Present here are several anticompetitive risks, gleaned from the Supreme Court's antitrust jurisprudence, that might warrant antitrust scrutiny for this municipal entity. **[**15]** The Hertz law may permit the city to impose on an industry unnecessary monetary costs that will have an extraterritorial impact. *See*, *e.g.*, *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 405, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)* (plurality). The law may also obstruct regional efficiency and trigger economic Balkanization, because of the possibility that many independent local governments may follow suit and consequently distort the national market economy. *Id. at 404, 408*.

In short, while we have found no case dealing with a governmental act having attributes similar to the Hertz law, we conclude that the Hertz law is not a "unilateral" restraint. It is closer to, although not identical with, those actions categorized as "hybrid", because it removes one element of competition in car-rental pricing, but does not further regulate or review the prices set by rental companies. In addition, some of the risks of anticompetitive behavior enunciated in *City of Lafayette* and relied on in *324 Liquor Corp.* are present in Local Law No. 21.

Accordingly, we disagree with the district court's conclusion that the Hertz law is a unilateral **[**16]** restraint that lacks the requisite contract, combination, or conspiracy to warrant antitrust review. Local Law No. 21 calls for anticompetitive private conduct in setting rental rates and making rental decisions. The law thus merits hybrid treatment; however, we must first determine whether the city has pointed to sufficient state involvement in the enactment of Local Law No. 21 to entitle it to state-action immunity.

2. *State-Action Immunity from Antitrust Liability for Municipality*.

Having determined that the Hertz law is a contract, combination, or conspiracy in restraint of trade, we now turn to the issue of whether New York State has cloaked the City of New York with immunity for any antitrust violations created by the Hertz law. *Fisher, 475 U.S. at 264* (consideration of state-action immunity unnecessary **[*128]** unless actual conflict with antitrust laws is established).

The Supreme Court in *Parker v. Brown* held that ***HN6***[] the Sherman Act does not apply when anticompetitive restraints are imposed by the states "as an act of government". *317 U.S. 341, 352 (1943)*. Under principles of federalism and state sovereignty, a state actor **[**17]** is accorded absolute immunity from antitrust liability. *See City of Columbia v. Omni Outdoor Advertising, Inc., 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*.

Local governments may be entitled to state-action immunity. While *Parker* state-action immunity does not apply directly to *local* governments, a municipality's restriction of competition may sometimes be an authorized implementation of state policy; if it is, then the municipality may share in the immunity accorded to state actions.

City of Lafayette, 435 U.S. at 413 (municipal government shares in *Parker* immunity if its activity was pursuant to state policy to displace competition with regulation or monopoly public service).

The Supreme Court in *FTC v. Ticor Title Insurance Co.* reiterated the "two-part test applicable to instances where private parties participate in a [local government's] price fixing regime. 'First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.'" 112 S. Ct. 2169, 2176 (1992) (quoting Midcal, 445 U.S. at 105). **[**18]**

Thus, a municipality may benefit from the "state action" exemption only if it has acted pursuant to a clearly articulated state policy. Community Communications Co. v. City of Boulder, 455 U.S. 40, 52, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982) (plurality); *324 Liquor Corp.*, 479 U.S. at 343-45. As we held in an analogous Clayton Act context:

> The clarity of such [articulated state] policy is often a function of how broadly the legislation is drawn, with the existence of such policy being more readily discernible in narrowly drawn legislation. The legislation must contain an affirmative showing of intent, though it need do no more than authorize the challenged conduct. So long as the resulting anticompetitive activities are a foreseeable consequence of the state delegation, the "clear articulation" standard has been met. To meet this requirement the party claiming the state action defense must show that the "legislature contemplated the action complained of." "Active state supervision" -- is no longer required in the case of a municipality.

Cine 42nd St. Theater Corp. v. Nederlander Org., 790 F.2d 1032, 1043 (2d Cir. 1986) (citations omitted).

The **[**19]** State of New York has not granted New York City any particular authority over the car-rental field; instead the Hertz law represents an exercise of the city's home-rule powers granted by the state constitution and statutes. *See* N.Y. Const. art. IX, § 2(c)(i) (McKinney 1987) ("Every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government"); Municipal Home Rule Law § 10 (McKinney 1969). The Supreme Court has held that a similar home-rule provision in the Colorado state constitution reflected the state's position of "mere *neutrality*" regarding local activities undertaken pursuant to that provision. Community Communications Co., 455 U.S. at 55 ("A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought.").

Thus, local government actions that are grounded in home-rule authority are not carried out pursuant to a clearly articulated state policy. *See also* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985); **[**20]** Cine 42nd St., 790 F.2d 1032. In adopting Local Law No. 21 the City of New York did not operate from any clearly articulated state policy that encourages or foresees anti-competitive activity in the rental-car field. *Cf.* Cine 42nd St., 790 F.2d at 1043-44; *see also* Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 95 (2d **[*129]** Cir.) (citing Town of Hallie, 471 U.S. at 38), *cert. denied*, *479 U.S. 872, 93 L. Ed. 2d 172, 107 S. Ct. 248 (1986)*.

We conclude, therefore, that in this challenge to Local Law No. 21, New York City is not protected by state-action immunity from antitrust liability. We recognize that when a state or local governmental action compels *private* anticompetitive behavior, state-action immunity would additionally require a showing that the state actively supervised that private conduct. Midcal, 445 U.S. at 105. However, because we have determined that the lack of a clear state policy directing the city's legislative efforts prevents the city from enjoying state-action immunity here, we need not further address **[**21]** the active-supervision question.

Having determined, based on the allegations of the complaint, that the Hertz law comes closest to being a "hybrid" restraint, *i.e.*, a contract, combination, or conspiracy in restraint of trade, involving the city and the car-rental industry, and that the city has no state-action immunity, we must reverse the district court's dismissal of the complaint and remand for further analysis of the remaining antitrust issues. To assist the parties and the district court on the remand, we set forth some guidance for some of the problems that remain in this difficult case.

3. *Per Se Analysis*.

A *per se* rule is used in the relatively narrow circumstance where courts have sufficient experience with the activity to recognize that it is plainly anticompetitive and lacks any redeeming virtue. *Broadcast Music Inc. v. Columbia Broadcasting Sys. Inc., 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*; *see also* *Business Elecs., 485 U.S. at 723* (*per se* rule appropriate only for manifestly anticompetitive conduct that would almost always tend to restrict competition and decrease output); *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 107-08, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* **[**22]** (court reluctant to extend *per se* analysis where economic impact of challenged practice not immediately obvious). For example, an agreement to fix prices is invalid regardless of any offer of proof to establish that the resulting price is reasonable. *Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*; *see also* *Schwegmann Bros., 341 U.S. at 385-86*; *Catalano Inc. v. Target Sales Inc., 446 U.S. 643, 648, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)* (per curiam) (agreements between private competitors to eliminate discounts is *per se* an illegal price fixing scheme).

Hertz argues that this case is sufficiently akin to horizontal price fixing to warrant *per se* treatment. We disagree. The setting is inappropriate for *per se* analysis. Not only have courts had little exposure to issues surrounding efforts by local governments to restrain trade through regulation, but this particular effort involves the novel claim by the city that the local law promotes a non-economic objective: the virtue of anti-discrimination.

Moreover, this case cannot be easily grouped with previous cases: it is not a rate-setting case, *see* **[**23]** , *e.g.*, *Ticor Title Ins. Co.*, 112 S. Ct. at 2169 and *Fisher, 475 U.S. at 260*, as the law does not set a maximum or minimum price for rental cars in New York City; nor is it a zoning case, *see*, *e.g.*, *Columbia v. Omni Outdoor Advertising, Inc., 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*; a licensing case, *see*, *e.g.*, *Broadcast Music, Inc., 441 U.S. at 1* and *United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 1 L. Ed. 2d 465, 77 S. Ct. 490 (1957)*; or a franchise-granting case, *see*, *e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Finally, and most significantly, the Supreme Court has specifically suggested that *per se* treatment may not be well tailored to assessing municipal antitrust liability, noting that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." *Community Communications Co., 455 U.S. at 56 n.20* (quoting *City of Lafayette, 435 U.S. at 417 n.48*). **[**24]**

[*130] In short, we do not think it wise to adopt in this case, a restrictive *per se* rule that would require automatic invalidation of a local government's duly-passed legislation, without regard to the circumstances prompting its enactment.

4. *Rule-of-Reason*.

We next consider the applicability of the rule of reason to the Hertz law.

> Ordinarily, whether particular concerted action violates *§ 1* of the Sherman Act is determined through case-by-case application of the so-called rule of reason -- that is, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."

Business Elecs., 485 U.S. at 723 (citation omitted).

The traditional rule-of-reason approach requires the defendant to demonstrate that the procompetitive aspects of the agreement outweigh its anticompetitive aspects.

> [The Rule of Reason] has been used to give the [Sherman] Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any **[**25]** argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

National Soc'y of Professional Eng'rs, 435 U.S. at 688.

Agreements subject to a rule-of-reason analysis have

traditionally been evaluated for their competitive effect by

> analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. * * * . The purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692 (footnote omitted).

"'The factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" Business Elecs., 485 U.S. at 723 (quoting Continental T.V., Inc., 433 U.S. at 49). **[**26]**

Significantly, none of these rule-of-reason cases has involved a challenge to restraints on competition imposed by municipal activity. Application of the rule to this emerging legal field will require considerable tailoring to achieve even an approximate fit.

Under the rule-of-reason approach, the district court must balance the city's articulated justifications for promulgating the anticompetitive regulation against the antitrust harm caused by the regulation. National Soc'y of Professional Eng'rs, 435 U.S. at 688; *accord* National Collegiate Athletic Ass'n, 468 U.S. at 104 (under Sherman Act, one must judge validity of restraint on trade according to its impact on competition). The legality of the city's restraint on trade must be determined by weighing all the relevant factors -- including the history of the restraint, and the evil to be prevented, *see*, *e.g.*, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (rule of reason requires weighing of relevant circu mstances of case); United States v. National Soc'y of Professional Eng'rs, 404 F. Supp. 457, 460-61 (D.D.C. 1975) **[**27]** (same); the history and practices of the relevant industry, *see*, *e.g.*, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984) (inquiry into market power and market structure necessary to gauge combination under rule-of-reason approach); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343-44, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982) (same); the local government's reasons for adopting the particular restraint; and the end sought to be attained, *see*

Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1571 (5th Cir. 1984) (en **[*131]** banc) (Higginbotham, *J.*, concurring) (adaptation of rule of reason to anticompetitive local governmental conduct requires courts to consider factors not traditionally within rule, including above listed factors). Accordingly, the district court may consider the city's articulated concern of avoiding nondiscrimination by ensuring that Hertz's pricing and rental decisions do not burden minorities and the working poor. This places into the economic scale of traditional antitrust analysis noneconomic federal values embodied in the thirteenth and fourteenth amendments **[**28]** as well as in many of the federal statutes. We think consideration of such a federal policy is appropriate within the rule-of-reason analysis as it is applied to a municipality.

Hertz, of course, is entitled on remand to present evidence disputing the validity and strength of the city's justifications for this anticompetitive regulation. The city's justifications must be assessed in light of its stated end; this makes relevant Hertz's explanation for its price increase -- specifically, its claim to have experienced exceedingly high liability losses in certain boroughs. The city's history of negotiating with Hertz concerning what it felt to be an objectionable pricing policy is relevant, as is Hertz's consideration of less burdensome pricing methods. For example, the court may find relevant the city's contention that Hertz could recoup its losses by raising each renter's fee by $ 3.29 in the New York region.

In conclusion, on the antitrust issue, we remand to the district court for further proceedings.

B. Commerce Clause.

Hertz also contends that Local Law No. 21 impermissibly burdens interstate commerce. *See* *U.S. Const. art. I § 8 cl. 3*. ***HN7***[] The constitution's affirmative grant **[**29]** to congress of powers over interstate commerce means that states have limited authority to erect barriers against interstate trade, *see* *Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35, 64 L. Ed. 2d 702, 100 S. Ct. 2009 (1980)*, a limitation that applies equally to municipal legislation. *Dean Milk v. City of Madison, 340 U.S. 349, 356, 95 L. Ed. 329, 71 S. Ct. 295 (1951)*. Hertz alleged that the city's local law violates the *commerce clause* "to the extent that the Hertz Law effectively forces Hertz to raise its rental rates to residents of other states * * * ." Hertz outlines in its complaint and other papers several means by which it might comply with Local Law No. 21 and still avoid being overwhelmed by the increased costs of renting to city residents. The corporation could (1) cease entirely its operations in New York City; (2) raise its rates for out-of-state residents who rent in the New York area; or (3) raise rental rates in other states.

The district court rejected this *commerce-clause* claim. Judge Knapp found that Hertz has the additional option of raising its rates evenly throughout all of New York City, or "finding other ways of dealing with the problem". These options, said **[**30]** t he district court, take the sting out of the alleged injury to interstate commerce.

To make out a claim that this regulation impermissibly burdens the *commerce clause*, Hertz must sufficiently plead that the local law discriminates against interstate commerce either on its face, or in its effect. *Hughes v. Oklahoma, 441 U.S. 322, 336, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979)*. Local Law No. 21 does not burden out-of-state customers expressly; it states only that rental-car companies may not "impose fees or charges based on [a] person's residence." Since the law does not facially burden interstate commerce, it must be upheld unless the actual burden it "imposes on interstate trade [is] 'clearly excessive in relation to the putative local benefits'". *Maine v. Taylor, 477 U.S. 131, 138, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986)* (quoting *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970))*.

In its complaint, Hertz has not sufficiently alleged that Local Law No. 21 has a discriminatory impact on interstate commerce. First, Hertz does not allege that an *inter*state effect must flow from this *intra*state municipal regulation. Second, Hertz does not define what **[**31]** significant burden on interstate commerce is posed by Local Law No. 21. Hertz itself tells us that it can comply with the local law and maintain its profit level in New York City through a range of **[*132]** options, not all of which impact interstate commerce. Thus, Hertz has yet to explain how the city's car-pricing ordinance compels action that discriminates against interstate commerce.

Of course, there was little time available in the district court proceedings to fully explore the implications of Hertz's *commerce-clause* argument. Only four days elapsed between the filing of the complaint and the district court's order dismissing the complaint. Since this case must be remanded for the district judge to apply a rule-of-reason analysis to Hertz's Sherman Act claim, Hertz should have the opportunity, if it so desires, to develop further its contentions with respect to the law's impact on interstate commerce.

C. *Remaining Claims*.

Judge Knapp also dismissed Hertz's remaining contentions that Local Law No. 21 violates *42 U.S.C. § 1983* because it (1) is an unconstitutional regulatory taking, (2) impermissibly impairs existing contracts, and (3) offends **[**32]** principles of substantive due process.

1. *Regulatory Taking*.

Hertz has failed to state a claim that Local Law No. 21 imposes a regulatory taking in violation of the *fourteenth amendment*. *See*, *e.g.*, *Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984)*; *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922)* (regulation of property which goes too far may amount to taking). Even assuming that takings cases connected with the diminution of real estate values apply in this business setting, the local law does not effect a taking because Hertz and other rental-car companies retain the right to set rates in New York City at any level they desire. *See*, *e.g.*, *Sun Oil Co. v. United States, 215 Ct. Cl. 716, 572 F.2d 786, 818 (Ct. Cl. 1978)* (per curiam) (not every deprivation of use, possession, or control is "taking"; character and extent of interference must be examined). Hertz unquestionably retains an "economically viable" use of its property, *see*, *e.g.*, *Penn Cent. Transp. Co. v. New York*

City, 438 U.S. 104, 127, 138, n.36 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), and finally, the taking **[**33]** cases offered by Hertz relating to the public-utility industry do not apply here. *See* *Duquesne Light Co. v. Barasch, 488 U.S. 299, 306-08, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989)* (defining constraints posed by *takings clause* on state-rate regulation of public utility).

2. *Impairment of Contract*.

Hertz alleged that application of Local Law No. 21 to car-rental contracts in place before it takes effect would unconstitutionally impair those contracts by forbidding Hertz to collect fees for rental cars that it had already contracted to receive. *See* *U.S. Const. art. I, § 10*. The city, however, has removed the Hertz law from any collision with the dictates of the contract clause, having assured us that the law does not apply to these outstanding contracts.

3. *Substantive Due Process*.

HN8[] Economic regulation need only be rationally related to a legitimate governmental purpose. *New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106-07, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978)* (since demise of substantive due process in economic area, due process provides legislative bodies broad scope to experiment with economic problems); *Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978)* **[**34]** (citing *Ferguson v. Skrupa, 372 U.S. 726, 730-31, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963)* (searching scrutiny of economic legislation has long been abandoned; "vague contours" of due process clause do not permit courts to sit as superlegislature to weigh wisdom of legislation).

The city contends that the Hertz Law will help prevent discriminatory business practices in the rental-car industry, by requiring rental-car companies to refrain from using a renter's residence in pricing and renting decisions. The city's rationale is that rental-car companies must find other means of determining and dealing with the customers who are likely to cause them high liability expenses; thus, individual customers would enjoy rates more closely related to **[*133]** their own particular risk. Since it is not irrational to conclude that the city's regulation may cut down on incidents of discrimination in car rentals based on the renter's residence, the Hertz law passes this substantive due process challenge.

4. *Section 1983*.

42 U.S.C. § 1983 creates civil liability for deprivations of certain federal rights under color of state law. It is a procedural vehicle which permits **[**35]** suit for violations of constitutional and federal statutory provisions. *See generally* 1 Martin A. Schwartz & John E. Kirklin, *Section 1983* *Litigation: Claims, Defenses, and Fees* (2d ed. 1991). The district court dismissed Hertz's *§ 1983* claim because it rejected all of the underlying constitutional and antitrust claims. While we affirm the district court's dismissal of Hertz's claims of a regulatory taking, impairment of contracts, and violation of substantive due process, we are remanding for further consideration of its antitrust and *commerce-clause* claims, and leave it for the district court to determine what role, if any, *§ 1983* may have on the resolution of those claims.

CONCLUSION

Reversed and remanded for further proceedings in accordance with this opinion.

End of Document

Piazza v. Major League Baseball

United States District Court for the Eastern District of Pennsylvania

August 4, 1993, Decided ; August 4, 1993, Filed, Entered

CIVIL ACTION NO. 92-7173

Reporter

831 F. Supp. 420 *; 1993 U.S. Dist. LEXIS 10552 **; 1993-2 Trade Cas. (CCH) P70,315

VINCENT M. PIAZZA, et al. v. MAJOR LEAGUE BASEBALL, et al.

Core Terms

Baseball, exemption, team, plaintiffs', Partnership, anti trust law, exhibition, Sherman Act, antitrust, League, players, major league baseball, baseball game, ownership, rights, interstate commerce, stare decisis, Investors, relocate, professional baseball, decisions, federal government, cases, franchise, redress, entity, defendants', deprivation, color of state law, motion to dismiss

LexisNexis® Headnotes

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > General Overview

HN1[ ] **Elements, Color of State Law**

See *42 U.S.C.S. § 1983*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN2[ ] **Regulated Practices, Price Fixing & Restraints of Trade**

The Sherman Anti-trust Act, *15 U.S.C.S. § 1* provides, in pertinent part, that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States is declared to be illegal.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3[] **Antitrust & Trade Law, Sherman Act**

The Sherman Anti-trust Act, *15 U.S.C.S. § 2*, provides that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states shall be deemed guilty of a felony.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Dismissal is proper under *Fed. R. Civ. P. 12(b)(1)* only when the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Under *Fed. R. Civ. P. 12(b)(6)*, even if not wholly insubstantial, a claim may be dismissed if no facts have been alleged upon which relief may be granted.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN6[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A *Fed. R. Civ. P. 12(b)(1)* motion places the burden of persuasion on the plaintiff to show that his claims are not wholly insubstantial.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN7[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Under *Fed. R. Civ. P. 12(b)(6)*, the defendant bears the burden of showing that no claim has been stated.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN8[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A claim dismissed as legally insufficient under *Fed. R. Civ. P. 12(b)(1)* should properly be treated as having been dismissed pursuant to *Rule 12(b)(6)* where the plaintiff has approached the defendant's motion as having been made under *Rule 12(b)(6)*.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN9[] **Jurisdictional Sources, Constitutional Sources**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* requires the court to view all factual allegations in the complaint and all reasonable inferences that can be drawn from them as true. Every doubt is to be resolved in favor of the plaintiff, and the complaint can be dismissed only if the plaintiff has alleged no set of facts upon which relief can be granted.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN10[] **Procedural Due Process, Scope of Protection**

In most instances, the limitations of the *First* and *Fifth Amendments to the U.S. Constitution* restrict only federal government action, not the action of private entities. When governmental authority dominates the activities of a private entity to such an extent that the entity is deemed to act with the authority of the government, however, the entity will be subject to constitutional restraints.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Governments > Federal Government > Claims By & Against

HN11[] **Elements, Color of State Law**

Determining whether the conduct of a private entity should be attributed to the federal government requires employment of the two-part "state action" analysis asking first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in federal authority, and second, whether the private party charged with the deprivation could be described in all fairness as a federal actor.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

HN12[] **Elements, Color of State Law**

A government normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice of the defendant must in law be deemed to be that of the government.

Constitutional Law > Privileges & Immunities

Constitutional Law > Relations Among Governments > Privileges & Immunities

HN13[] **Constitutional Law, Privileges & Immunities**

See *U.S. Const. art. IV, § 2, cl. 1*.

Civil Rights Law > ... > Elements > Color of State Law > Joint Ventures

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Civil Rights Law > ... > Elements > Color of State Law > Participation as State Action

Civil Rights Law > ... > Elements > Color of State Law > State Agents

HN14[] Color of State Law, Joint Ventures

A private defendant's joint participation with a state official in a conspiracy to deprive another of constitutionally protected rights constitutes both state action essential to show a direct violation of a plaintiff's rights and action "under color of state law" for purposes of *42 U.S.C.S. § 1983*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Judicial Notice > Adjudicative Facts > Public Records

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > General Overview

HN15[] Defenses, Demurrers & Objections, Motions to Dismiss

A court may take judicial notice of matters of public record, without converting a motion to dismiss into a motion for summary judgment.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN16[] Pleadings, Heightened Pleading Requirements

Fed. R. Civ. P. 8(a)(2) requires that pleadings contain a short and plain statement of the claim showing that the pleader is entitled to relief. Under this Rule, the complaint must provide the defendant with fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN17[] Pleadings, Heightened Pleading Requirements

A federal court may not apply a pleading requirement more stringent than that provided for in the Federal Rules of Civil Procedure, even in *42 U.S.C.S. § 1983* litigation. Unless the Federal Rules provide for heightened specificity, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Civil Rights Law > ... > Elements > Color of State Law > State-Authorized Actions

Civil Rights Law > ... > Elements > Color of State Law > General Overview

HN18[] **Color of State Law, State-Authorized Actions**

The "close nexus" test requires a determination of whether the state in *42 U.S.C.S. § 1983* litigation has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice of a private entity must in law be deemed to be that of the government. And where the challenged conduct constitutes "state action," that conduct is deemed to be conduct under color of state law and will support a suit under *§ 1983*.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

HN19[] **Shareholder Actions, Actions Against Corporations**

A shareholder has standing to sue individually when he or she has been injured directly and independently of the corporation.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN20[] **Regulated Industries, Sports**

Absent a per se violation, a cause of action under the Sherman Anti-trust Act, *15 U.S.C.S. §§ 1* and *2*, requires, inter alia, an allegation of injury to competition in relevant product and geographic markets.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN21[] **Regulated Practices, Market Definition**

A relevant product market may be defined as a market for which the parties compete, as opposed to one in which they compete.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Private Actions, Standing**

To determine standing under the Sherman Anti-trust Act, *15 U.S.C.S. §§ 1* and *2*, courts balance the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; the existence of more direct victims of the alleged antitrust violations; and the potential for duplicative recovery or complex apportionment of damages.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN23[] **Private Actions, Standing**

The directness of injury and causation for antitrust standing purposes depends upon whether the plaintiff has alleged a direct causal connection between the defendant's purported antitrust activity and the plaintiff's alleged harm.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN24[] **Sports, Baseball**

Exemptions from the antitrust laws are to be narrowly construed.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN25[] **Regulated Practices, Market Definition**

A "market" may be defined as any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN26[] **Sports, Baseball**

Baseball's exempted market from antitrust laws includes the reserve system and matters of league structure.

Counsel: **[**1]** For VINCENT M. PIAZZA, VINCENT N. TIRENDI, PT BASEBALL, INC., PLAINTIFFS: BRUCE W. KAUFMANN, DILWORTH, PAXSON, KALISH & KAUFFMAN, 1735 MARKET STREET, 3200 THE MELLON BANK CENTER, PHILA, PA 19103, USA.

For MAJOR LEAGUE BASEBALL, AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS, NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, OFFICE OF THE COMMISSIONER OF MAJOR LEAGUE BASEBALL, FRED KUHLMANN, THE ORIOLES, THE BOSTON RED SOX BASEBALL CLUB, GOLDEN WEST BASEBALL CO., CHICAGO WHITE SOX, LTD., CLEVELAND INDIANS CO., JOHN E. FETZER, INC., KANSAS CITY ROYALS BASEBALL CORP., MILWAUKEE BREWERS BASEBALL CLUB, MINNESOTA TWINS, NEW YORK YANKEES PARTNERSHIP, THE OAKLAND ATHLETICS BASEBALL CO., SEATTLE BASEBALL, L.P., B.R. RANGERS ASSOCIATES, LTD., TORONTO BLUE JAYS BASEBALL CLUB, ATLANTA NATIONAL BASEBALL CLUB, INC., CHICAGO NATIONAL LEAGUE BALL CLUB, INC., THE CINCINNATI REDS, HOUSTON SPORTS ASSOCIATION, INC., LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB, LTD., STERLING DOUBLEDAY ENTERPRISES, L.P., THE PHILLIES, PITTSBURGH ASSOCIATES, ST. LOUIS NATIONAL BASEBALL CLUB, INC., SAN DIEGO PADRES BASEBALL PARTNERSHIP, SAN FRANCISCO GIANTS, FLORIDA MARLINS, INC., COLORADO ROCKIES BASEBALL PARTNERSHIP, **[**2]** 1993, LTD., DEFENDANTS: ARTHUR MAKADON, 30 S. 17TH ST., PHILA, PA 19103, USA.

Judges: Padova

Opinion by: JOHN R. PADOVA

Opinion

[*421] *OPINION*

Padova, J.

August 4, 1993

Plaintiffs allege that the organizations of professional major league baseball and an affiliated individual frustrated their efforts to purchase the San Francisco Giants baseball club (the "Giants") and relocate it to Tampa Bay, Florida. Plaintiffs charge these defendants with infringing upon their rights under the United States Constitution and violating federal antitrust laws and several state laws in the process.

Asserting that this Court lacks subject matter jurisdiction over plaintiffs' federal and state claims and that plaintiffs' federal claims fail to state a cause of action, defendants move to dismiss this suit. With regard to plaintiffs' federal antitrust claims, defendants also claim exemption from antitrust liability under *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922)*, and its progeny. For the following reasons, I will grant defendants' motion as to plaintiffs' direct claims under the Constitution; but I will deny defendants' motion in all other respects. **[**3]** As to defendants' assertion of exemption from antitrust liability, I hold that the exemption created by *Federal Baseball* is inapplicable here because it is limited to baseball's "reserve system."

[*422] I. *BACKGROUND*

A. *The Allegations* [1]

Plaintiffs are Vincent M. Piazza and Vincent N. Tirendi, both Pennsylvania residents, and PT Baseball, Inc. ("PTB"), a Pennsylvania corporation wholly owned by Piazza and Tirendi. Pursuant to a written Memorandum of Understanding ("Memorandum") dated August 18, 1992, Piazza and Tirendi agreed with four other individuals, all Florida residents, to organize a limited partnership for the purpose of acquiring the Giants. (The parties to the Memorandum will be referred to collectively as the "Investors".)

The Investors anticipated that they would form individual corporations to serve as general partners of the partnership. Accordingly, on August 26, 1992, PTB entered into a **[**4]** Limited Partnership Agreement (the "Partnership Agreement") with corporations owned by the other Investors. This Partnership Agreement implemented the intent of the Memorandum and created a partnership entity known as Tampa Bay Baseball Club, Ltd. (the "Partnership"). PTB agreed to contribute $ 27 million to the Partnership, making it the single largest contributor of Partnership capital.

Earlier, on August 6, 1992, the Investors had executed a Letter of Intent with Robert Lurie, the owner of the Giants, to purchase the Giants for $ 115 million. Pursuant to this Letter of Intent, Lurie agreed not to negotiate with other potential buyers of the Giants and to use his best efforts to secure from defendant Major League Baseball [2] **[**5]** approval of the sale of the Giants to the Partnership and transfer of the team to the Suncoast Dome, located in St. Petersburg, Florida. [3]

As required by the rules of Major League Baseball, the Partnership submitted an application to that organization on September 4, 1992 to purchase the Giants and move the team to St. Petersburg. In connection with this application, Major League Baseball and its "Ownership Committee" undertook or purported to undertake a personal background check on the Investors. On September 10, 1992, defendant Ed Kuhlmann, Chairman of the Ownership Committee, stated at a press conference that, among other things, the personal background check on the Investors had raised a "serious question in terms of some of the people who were part of that group" and that "a couple of investors will not be in the group." Complaint at P 53. Kuhlmann elaborated that there was a "background" question about two of the investors rather than a question of financial capability and that something had shown up on a "security check." *Id*. Kuhlmann also stated that the "money" **[**6]** of the two investors "would not have been accepted." *Id*. Immediately following Kuhlmann at the news conference, Jerry Reinsdorf, a member of the Ownership Committee, added that the Ownership Committee's concern related to the "out-of-state" money and that the "Pennsylvania People" had "dropped out." Complaint at P 56.

As the only principals of the Partnership who reside in Pennsylvania, Piazza and Tirendi **[*423]** aver that the clear implication of Kuhlmann's and Reinsdorf's comments, combined with the fact that Piazza and Tirendi are of Italian

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[1] The following relevant facts were taken either directly or inferentially from plaintiffs' complaint.

[2] Plaintiffs describe defendant Major League Baseball as an unincorporated association comprised of two professional leagues, the American League and the National League, and their 28 professional baseball teams.

In addition to Major League Baseball, plaintiffs have named the following as defendants: American League of Professional Baseball Clubs; National League of Professional Baseball Clubs; Office of the Commissioner of Major League Baseball; Ed Kuhlmann; The Orioles, Inc.; The Boston Red Sox Baseball Club; Golden West Baseball Co.; Chicago White Sox, Ltd.; Cleveland Indians Co.; John E. Fetzer, Inc.; Kansas City Royals Baseball Corp.; Milwaukee Brewers Baseball Club; Minnesota Twins; New York Yankees Partnership; The Oakland Athletics Baseball Co.; Seattle Baseball, L.P.; B.R. Rangers Associates, Ltd.; Toronto Blue Jays Baseball Club; Atlanta National Baseball Club, Inc.; Chicago National League Ball Club, Inc.; The Cincinnati Reds; Houston Sports Association, Inc.; Los Angles Dodgers, Inc.; Montreal Baseball, Ltd.; Sterling Doubleday Enterprises, L.P.; The Phillies; Pittsburgh Associates; St. Louis National Baseball Club, Inc.; San Diego Padres Baseball Partnership; San Francisco Giants; Florida Marlins, Inc.; and Colorado Rockies Baseball.

All defendants will be referred to collectively as "Baseball".

[3] On August 28, 1992, the Partnership entered into an agreement with the City of St. Petersburg, Florida for management and use of the Florida Suncoast Dome.

descent, was that the personal background check had associated them with the Mafia and/or other criminal or organized criminal activity. Piazza and Tirendi further allege that they have never been involved in such activity; nor had they "dropped out" of the Partnership. They also allege that they were never apprised by Baseball or anyone else of the charges against them nor given an opportunity to be heard.

On September 11, 1992, plaintiffs' counsel sent letters to Major League Baseball, Kuhlmann, and Reinsdorf requesting immediate correction of these statements and their implications. Plaintiffs' counsel never received a response to these letters, **[**7]** but on September 12, 1992, defendant Kuhlmann admitted to some members of the media that "there was no problem with the security check." Complaint at P 63.

On the same day that the Partnership submitted its application to purchase and relocate the franchise, Kuhlmann directed Lurie to consider other offers to purchase the Giants, in knowing violation of Lurie's exclusive agreement with the Partnership. On September 9, 1992, Bill White, President of the National League, invited George Shinn, a North Carolina resident, to make an alternative bid to purchase the Giants in order to keep the team in San Francisco. An alternative offer was ultimately made by other investors to keep the Giants in San Francisco. Even though this offer was $ 15 million less than the $ 115 million offer made by the Partnership, Major League Baseball formally rejected the proposal to relocate the Giants to the Tampa Bay area on November 10, 1992.

Plaintiffs allege that Baseball never intended to permit the Giants to relocate to Florida and failed to evaluate fairly and in good faith their application to do so. They claim that to avoid relocation of the Giants, Baseball set out to "destroy the financial capability **[**8]** of the Partnership by vilifying plaintiffs." Complaint at P 65. And in addition to preventing plaintiffs' purchase and relocation of the Giants, plaintiffs allege that Baseball's allegedly defamatory statements cost them the loss of a significant contract in connection with one of their other businesses, which depends upon "impeccable personal reputations." Complaint at P 69.

B. *The Claims*

1. *Federal claims*

Plaintiffs first claim that the above actions of Baseball violated the *First* and *Fifth Amendments to the United States Constitution* by (1) depriving them of their liberty and property interests and privileges without due process of law, (2) denying them equal protection of the laws, and (3) impairing their freedom of contract and association. In this connection, plaintiffs claim that Baseball's actions should be attributed to the federal government, to which the constraints of the U.S. Constitution apply, because the federal government has granted Baseball a unique exemption from the federal antitrust laws.

Plaintiffs next assert a claim under *42 U.S.C.A. § 1983 (West 1981)*, [4] alleging that Baseball acted under color of state **[**9]** law in unlawfully depriving them of the rights, privileges, immunities, freedoms, and liberties secured by *Article IV, Section 2 of the U.S. Constitution*, as well as the *First*, *Fifth* and *Fourteenth Amendments*. Plaintiffs claim that Baseball's actions took place under color of state law because (a) Baseball is exempt from liability under state antitrust laws; (b) there is a close nexus and symbiotic relationship between Baseball and state and local governments; and (c) Baseball acted in concert with the City of San Francisco to prevent the Giants from being relocated.

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> ***HN1***[] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C.A. § 1983.

[10]** Plaintiffs' final federal claim asserts violations of *sections 1* and *2* of the Sherman **[*424]** Anti-Trust Act, *15 U.S.C.A. §§ 1* and *2* (West 1973 & Supp. 1993). [5] Plaintiffs claim that Baseball has monopolized the market for Major League Baseball teams and that Baseball has placed direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition for such teams. Plaintiffs allege that these actions have unlawfully restrained and impeded plaintiffs' opportunities to engage in the business of Major League Baseball.

[11]** 2. *State claims*

Plaintiffs also assert claims against Baseball under Pennsylvania law for slander, libel, invasion of the right of privacy, false light, tortious interference with existing and prospective contractual business relations, unlawful restraint of trade, and civil conspiracy.

II. *DISCUSSION*

Plaintiffs aver that this Court has jurisdiction over their federal claims pursuant to *28 U.S.C. §§ 1331*, *1337*, and *1343*, and supplemental jurisdiction over their state law claims pursuant to *28 U.S.C. § 1367*. Defendants move under *Fed. R. Civ. P. 12(b)(1)*, lack of subject matter jurisdiction, and *Fed. R. Civ. P. 12(b)(6)*, failure to state a claim upon which relief can be granted, for an order dismissing plaintiffs' federal claims and, in the event the federal claims are dismissed, for an order directing dismissal of plaintiffs' state claims for lack of supplemental jurisdiction.

A. Standard of Review

The standards for dismissal of a claim under *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)* are different. ***HN4***[] Dismissal is proper under *Rule 12(b)(1)* "only when the claim 'clearly appears to be immaterial and **[**12]** made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" *Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409* (3d Cir.)(quoting *Bell v. Hood, 327 U.S. 678, 682 (1946))*, *cert. denied*, *111 S. Ct. 2839 (1991)*. ***HN5***[] Under *Rule 12(b)(6)*, however, the standard is lower; even if not wholly insubstantial, a claim may be dismissed if no facts have been alleged upon which relief may be granted. *See id. at 1409-10*; *Conley v. Gibson, 355 U.S. 41, 45-46 (1957)*. The respective burdens upon the parties differ as well. ***HN6***[] A *Rule 12(b)(1)* motion places the burden of persuasion on the plaintiff to show that his claims are not wholly insubstantial; ***HN7***[] under *Rule 12(b)(6)*, the defendant bears the burden of showing that no claim has been stated. *See Kehr Packages, 926 F.2d at 1409-10*.

Challenges for failure to state a cause of action "ordinarily should be made under *Rule 12(b)(6)*." *Id. at 1409*. The Third Circuit has held that ***HN8***[] a claim dismissed as legally insufficient under *Rule **[**13]** 12(b)(1)* should properly be treated as having been dismissed pursuant to 12(b)(6) where the plaintiff has approached the defendant's motion as having been made under *Rule 12(b)(6)*. *See id*. Until very recently, both plaintiffs and defendants have treated defendants' motion as having been made solely under *Rule 12(b)(6)* -- defendants informed plaintiffs and the Court that they were proceeding under *Rule 12(b)(1)* only after the Court raised the point during oral argument and after nearly all of the issues had been fully briefed by both parties. Even at this late stage, however, defendants have not called into question, as required by *Kehr Packages*, the authority of this Court to exercise jurisdiction over plaintiffs' claims under the *federal* Constitution, *federal* civil rights act, and *federal* antitrust laws. Thus, like *Kehr Packages*, plaintiffs' complaint here is more appropriately evaluated for legal sufficiency ***HN9***[] under *Rule 12(b)(6)*, which requires that this Court view all factual allegations in the complaint and all **[*425]** reasonable inferences that can be drawn from them as true. *See id. at 1410*. Every doubt is to be resolved in

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[5] *Section 1* of the Sherman Act ***HN2***[] provides, in pertinent part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ." *15 U.S.C.A. § 1*.

In pertinent part, *section 2* of the Sherman Act ***HN3***[] provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony . . . ." *15 U.S.C.A. § 2*.

favor **[**14]** of the plaintiff, and the complaint can be dismissed only if the plaintiff has alleged no set of facts upon which relief can be granted. *Id*.; Conley v. Gibson, 355 U.S. at 45-46.

B. *Direct Constitutional Claims*

HN10[] In most instances, the limitations of the First and Fifth Amendments to the U.S. Constitution restrict only federal government action, not the action of private entities. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982); Nguyen v. United States Catholic Conference, 719 F.2d 52, 54 (3d Cir. 1983). When governmental authority dominates the activities of a private entity to such an extent that the entity is deemed to act with the authority of the government, however, the entity will be subject to constitutional restraints. *See* Edmonson v. Leesville Concrete Co., Inc., U.S. , 111 S. Ct. 2077, 2082 (1991).

HN11[] Determining whether the conduct of a private entity should be attributed to the federal government requires employment of the two-part "state action" analysis set forth by the Supreme Court in Lugar v. Edmondson Oil, 457 U.S. at 937-42. **[**15]** *See* Leesville Concrete, 111 S. Ct. at 2082-83. The *Lugar* framework requires that this Court ask "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in [federal] . . . authority; and second, whether the private party charged with the deprivation could be described in all fairness as a [federal] . . . actor." Leesville Concrete, 111 S. Ct. at 2082-83 (applying *Lugar*)(citations omitted).

As to the first part of this analysis, plaintiffs claim that defendants, admittedly private entities, should be held subject to the restraints of the federal Constitution because their alleged activities have been countenanced by the federal government through (1) the unique exemption of Baseball from liability under the federal antitrust laws -- an exemption first conferred upon Baseball by the U.S. Supreme Court in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), and later reaffirmed by the Court in Toolson v. New York Yankees, 346 U.S. 356 (1953), **[**16]** and Flood v. Kuhn, 407 U.S. 258 (1972); [6] and (2) congressional desire, expressed by its "positive inaction," Flood, 407 U.S. at 283-84, not to disapprove of these cases legislatively. With respect to the second prong of the *Lugar* analysis, plaintiffs assert in circuitous fashion that it would be "eminently fair" to describe Baseball as a federal actor because Baseball would not have committed the acts alleged were it not for the *Federal Baseball* antitrust exemption. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint at 27.

Baseball does not dispute that plaintiffs plead adequately that its alleged actions resulted, in part, from the perceived comfort afforded by the *Federal Baseball* antitrust exemption. But Baseball contends that there must be more than a mere allegation that a private entity acted pursuant to **[**17]** federal law or a federal judicial decision before the entity's actions can be attributed to the federal government. I agree.

The Supreme Court decisions in this area have held uniformly that **HN12**[] "a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice [of the defendant] must in law be deemed to be that of the [government].'" San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987)(quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). Baseball's alleged efforts to defame plaintiffs and otherwise prevent them from acquiring and relocating the Giants simply cannot be attributed to the federal government **[*426]** under this standard. Plaintiffs do not plead that the federal government coerced Baseball into behaving in this manner; nor do they plead that either *Federal Baseball* and its progeny or "positive inaction" by Congress has in any way provided significant encouragement to Baseball to do so.

The closest plaintiffs come to pleading significant governmental **[**18]** encouragement appears in the following paragraph of their complaint: "The federal antitrust exemption has permitted Major League Baseball to operate free

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[6] The scope and nature of this exemption are discussed at Section D.3., *infra*.

of the legal restraints applicable to other interstate businesses and has thus enabled, *encouraged* and created the framework for the conduct of defendants complained of herein." Complaint at P 74 (emphasis added). Simply uttering the word "encouraged," however, is not enough to equate Baseball's actions with those of the federal government. The so-called encouragement alluded to in this paragraph is explained by plaintiffs themselves in the preceding clause as flowing solely from a judicially-created antitrust exemption, "which has *permitted* Baseball to operate free of the legal restraints applicable to other interstate businesses." *Id*. (emphasis added). Thus the governmental involvement alleged here can, at best, be viewed as mere acquiescence, as opposed to the "significant," active encouragement required to adequately link defendants' actions to the federal government. *See* *United States Olympic Comm., 483 U.S. at 547* (mere governmental approval of or acquiescence in conduct of private **[**19]** entity insufficient to equate private entity's actions with those of the federal government).

In essence, plaintiffs claim that Baseball's actions should be attributed to the federal government solely because the federal government allegedly has exempted Baseball from the antitrust laws. But such reasoning was flatly rejected by the Supreme Court in *Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)*. There, the Court affirmed dismissal of a civil rights complaint proceeding under *42 U.S.C.A. § 1983* because the defendant private utility could not be viewed as a state actor. In so doing, the Court expressly rejected the plaintiff's contention that the private utility was a state actor because it enjoyed state-created monopoly status under the antitrust laws. *Jackson, 419 U.S. at 351-52*. The Court's analysis in *Jackson* is equally applicable here, where plaintiffs charge Baseball as a federal actor solely because it enjoys an alleged exemption from federal antitrust laws. *Cf*. *United States Olympic Comm., 483 U.S. at 547* (Congress's conferral upon **[**20]** private entity of exclusive right under trademark laws to use of term "Olympic" not enough to make private entity's choice of how to enforce that right a governmental decision). *Compare* *Leesville Concrete, 111 S. Ct. at 2085* (private party using preemptory challenges to exclude jurors on basis of race found to be a governmental actor because of, *inter alia*, "*direct and indispensable participation of the judge*" (emphasis added)). I will therefore dismiss plaintiffs' direct constitutional claims under *Fed. R. Civ. P. 12(b)(6)* for failure to state a cause of action.

C. *42 U.S.C.A. § 1983*

To state a civil rights claim under *42 U.S.C.A. § 1983*, plaintiffs must plead that Baseball (1) deprived them of a right secured by the Constitution or laws of the United States while (2) acting under color of state law. *See*, *e.g.*, *Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978)*; *Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)*. With regard to the first element, plaintiffs plead that Baseball deprived **[**21]** them of rights secured by Article IV, Section 2 [7] of the U.S. Constitution and the *First*, *Fifth*, and *Fourteenth Amendments*. In particular, plaintiffs claim that Baseball (a) denied them the right to participate in the purchase of a Major League Baseball team from an owner who contracted to sell the team to plaintiffs; (b) impaired their liberty interest in their reputations by **[*427]** impugning their good names, honor, and integrity and foreclosing their personal, business, and occupational opportunities; and (c) discriminated against them on the basis of their state residence and ethnic heritage and denied them equal protection of the laws.

As to the second element of *§ 1983*, plaintiffs aver that Baseball acted under color of state law because (a) Baseball is exempt from liability under state antitrust laws; (b) there is a symbiotic relationship and close nexus between Baseball **[**22]** and state and local governments; and (c) Baseball acted in concert with the City of San Francisco to prevent the Giants from being relocated.

Baseball focuses its motion to dismiss solely upon the second element of *§ 1983*, arguing that plaintiffs have not sufficiently pled that Baseball acted under color of state law. Because I conclude that plaintiffs have sufficiently pled that Baseball acted in concert with the City of San Francisco to deprive them of their constitutionally protected rights, I will address at length only that portion of plaintiffs' complaint, and deny Baseball's motion as to plaintiffs' *§ 1983* claims.

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[7] ***HN13***[] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.

HN14[] A private defendant's joint participation with a state official in a conspiracy to deprive another of constitutionally protected rights constitutes both state action essential to show a direct violation of a plaintiff's rights and action "under color of state law" for purposes of *§ 1983*. *See* *Lugar v. Edmonson Oil Co., 457 U.S. 922, 931 (1982)*(explaining *Adickes, 398 U.S. 144*). In their complaint, plaintiffs plead the following facts:

> On information and belief, the City of San Francisco through its officials **[**23]** and Major League Baseball have colluded to keep the Giants in San Francisco by, *inter alia*:
>
> . . .
>
> (c) The City of San Francisco has sought to induce the Giants not to relocate by agreeing to indemnify both (i) the team's present owner in connection with any actions filed against him relating to the sale of the team and (ii) potential investors competing with the Partnership to purchase the Giants. In turn, potential investors have agreed to indemnify Major League Baseball against legal liability relating to purchase of the Giants. San Francisco, therefore, in effect agreed to indemnify Major League Baseball in connection with the sale of the Giants.

Complaint at P 97.

In addition to these averments, plaintiffs direct the Court to the following public testimony of San Francisco Mayor Frank M. Jordan before a December 10, 1992 hearing of the United States Senate Subcommittee on Antitrust, Monopolies and Business Rights:

> In early September [1992], I [Mayor Jordan] went to New York to meet with Bill White, the President of the National League. I told Mr. White that the City [of San Francisco] had *a vital economic interest* in the Giants franchise and had **[**24]** important contractual rights under the Stadium Lease. *Without giving us any assurance of success, Mr. White told me that the League would consider a competing offer from San Francisco*. Under the agreement to sell the Giants to Florida interests, the Giants owner allegedly promised to refuse to deal with all other [sic] who wanted to buy the team, even with those from San Francisco. *Without the League's intervention, we would not have been permitted to submit a competing offer* and the voices of Giants fans in San Francisco would not have been heard or considered.
>
> I cannot begin to tell you the amount of time and work that my staff and other officials of our city government devoted to this effort. I can tell you, however, that it was and continues to be worth every minute. . . . [8]

[25]** **[*428]** *Hearings on "Baseball's Antitrust Immunity" Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. (Dec. 10, 1992)(prepared statement of Hon. Frank M. Jordan, Mayor, City and County of San Francisco)(emphasis added).

Baseball argues that the above allegations and testimony are insufficient to allege a conspiracy between Baseball and the City of San Francisco for purposes of *§ 1983*'s "under color of state law" element because plaintiffs do not plead with "sufficient particularity" that an agreement between Baseball and the City of San Francisco had been reached. I disagree.

Federal Rule of Civil Procedure 8(a)(2) *HN16*[] requires that pleadings contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Under this Rule, the complaint must

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[8] Although this testimony is not included with plaintiffs' complaint, the parties agreed at oral argument that it may be treated by the Court as being part of the complaint for purposes of this motion, thus avoiding the need to convert Baseball's motion under *Fed. R. Civ. P. 12(b)* into a motion for summary judgment. I note, however, that even without such an agreement, *HN15*[] the Court may take judicial notice of matters of public record, such as Mayor Jordan's testimony, without converting a motion to dismiss into a motion for summary judgment. *See*, *e.g.*, *Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986)*; 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1364 (1990).

provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson, 355 U.S. 41, 47 (1957)*. Despite Baseball's citation of lower court decisions to the contrary, the Supreme Court has reiterated recently that ***HN17***[] a federal court may **[**26]** not apply a pleading requirement more stringent than that provided for in the Federal Rules of Civil Procedure, even in § 1983 litigation. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, U.S. , 113 S. Ct. 1160, 1163 (1993)*. The Court explained in *Leatherman* that unless the Federal Rules provide for heightened specificity, [9] "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id*.

Plaintiffs in this case have gone far beyond merely providing Baseball with fair notice of their claim and the grounds upon which it rests. Not only do they allege that the City of San Francisco colluded with Baseball in deprivation of their rights, but they also plead specifically that the City went so far as to indemnify Baseball from liability for **[**27]** its actions in connection with the sale of the Giants. And plaintiffs offer testimony from San Francisco's Mayor of that city's direct pleas to Baseball to interfere with the sale and transfer, as well as testimony that Baseball ultimately did interfere. I find such allegations, which must be accepted as true on a motion to dismiss, more than adequate to create at least a reasonable inference that Baseball and the City of San Francisco "reached an understanding," *Adickes, 398 U.S. at 152*, to interfere with plaintiffs' constitutionally protected rights. [10] **[**28]** Plaintiffs plead sufficient facts from which to conclude that Baseball may have acted "under color of state law," [11] **[**29]** and I will therefore **[*429]** deny Baseball's motion to dismiss plaintiffs' § 1983 claim. [12]

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[9] *Rule 9(b)*, for example, requires that averments of fraud or mistake be pled with particularity. *Fed. R. Civ. P. 9(b)*.

[10] As stated above, Baseball's motion to dismiss focuses solely upon the second element of § 1983 -- whether plaintiffs adequately plead that Baseball acted under color of state law by conspiring with the City of San Francisco. It challenges neither plaintiffs' averments that the alleged object of the conspiracy was in deprivation of plaintiffs' constitutionally protected rights, nor whether plaintiffs have adequately stated a cause of action for deprivation of such rights. Accordingly, I have no occasion to address the substantive constitutional allegations of plaintiffs' complaint.

[11] I also conclude that plaintiffs adequately plead that Baseball acted "under color of state law" under the so-called "close nexus" test, which examines a government's link to the challenged action and asks whether the actions of a private entity may be attributed to the state. *See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)*. Discussed above with respect to plaintiffs' direct constitutional claims, ***HN18***[] the "close nexus" test requires a determination of whether the government -- the state in § 1983 litigation -- "'has exercised coercive power or has provided such *significant encouragement*, either overt or covert, that the choice [of a private entity] must in law be deemed to be that of the [government].'" *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 546 (1987)*(quoting *Blum v. Yaretsky, 457 U.S. 991, 1004 (1982))*(emphasis added).

Plaintiffs allege that the City of San Francisco sought to induce the Giants not to relocate by agreeing to, in effect, indemnify Baseball against legal liability relating to the purchase of the Giants. Additionally, the Mayor of San Francisco has testified in public that he pleaded with Baseball to intervene in the sale and transfer. It certainly would be reasonable to infer from these allegations, which I must accept as true on a motion to dismiss, that the City of San Francisco sought to actively encourage at least some of the allegedly unlawful actions taken by Baseball in this case. I find such encouragement, particularly the alleged financial indemnification of legal liability for these actions, to be just the sort of "significant encouragement" necessary to deem the actions of Baseball to be those of the City of San Francisco. And where the challenged conduct constitutes "state action," as it may here, that conduct is deemed to be conduct "under color of state law and will support a suit under § 1983." *Lugar, 457 U.S. at 934*.

Having based my decision to deny Baseball's motions on two alternative grounds, I do not address whether Baseball and the various political subdivisions where the game is played are so intertwined as to create a "symbiotic relationship" sufficient to deem Baseball's actions to have been taken under color of state law. Nor do I address whether Baseball's alleged exemption from *state* antitrust laws, in itself, makes Baseball's actions similarly attributable to the state.

[12] I reject Baseball's eleventh hour assertion that plaintiffs have no standing to sue under § 1983 because plaintiffs were "merely potential investors" in an allegedly injured partnership, giving only the Partnership entity standing to maintain such an action. As sole support for this argument Baseball cites *Erlich v. Glasner, 418 F.2d 226 (9th Cir. 1969)*, which held that a shareholder lacks

[30]** D. *Antitrust*

Baseball next moves to dismiss plaintiffs' claims under *sections 1* and *2* of the Sherman Anti-Trust Act ("Sherman Act"), *15 U.S.C.A. §§ 1* and *2* (West 1973 & Supp. 1993), [13] and offers the following three reasons why these claims should be dismissed: (1) plaintiffs have failed to allege that Baseball's actions restrained competition in a relevant market; (2) plaintiffs have no standing to assert a Sherman Act claim; and (3) Baseball is exempt from liability under the Sherman Act. I will address each argument in turn.

[31]** 1. *Relevant Market*

HN20[] Absent a *per se* violation, which neither party argues has been alleged here, a cause of action under the Sherman Act requires, *inter alia*, an allegation of injury to competition in relevant product and geographic markets. *See Mid-South Grizzlies v. National Football League, 720 F.2d 772, 785-88 (3d Cir. 1983)*, *cert. denied*, *467 U.S. 1215 (1984)*; *Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 147 (3d Cir. 1981)*. [14] Baseball argues **[*430]** that plaintiffs have not alleged an injury to competition in a relevant product market because plaintiffs were seeking to *join* Baseball, rather than *compete* with it.

[32]** In support of this proposition, Baseball relies heavily upon the Third Circuit's holding in *Mid-South Grizzlies*. Plaintiffs in that case, the Mid-South Grizzlies (the "Grizzlies"), were a joint venture located in Memphis, Tennessee that owned a team in the World Football League ("WFL"). *Mid-South Grizzlies, 720 F.2d at 775-76*. After the WFL's demise, the Grizzlies applied for admission to the National Football League ("NFL"). *Id*. The NFL rejected the Grizzlies' application, and the Grizzlies subsequently brought suit against the NFL under *sections 1* and *2* of the Sherman Act. *Id*. The Third Circuit affirmed the district court's entry of summary judgment in favor of the NFL because, *inter alia*, "the Grizzlies [had] shown no actual or potential injury to competition resulting from the rejection of their application for an NFL franchise." *Id. at 787*.

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standing to bring a *§ 1983* action on behalf of a corporation in which he holds shares. There are two difficulties with Baseball's argument. First, plaintiffs here are partners in a partnership, not shareholders of a corporation. Second, and perhaps more important, the Ninth Circuit after *Glasner* held that ***HN19***[] "a shareholder does have standing when he or she has been injured directly and independently of the corporation." *Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1318 (9th Cir. 1989)*. Plaintiffs Piazza, Tirendi, and PTB plead repeatedly throughout their complaint that *their* own constitutional rights have been infringed and that they seek redress under *§ 1983* only for those infringements.

[13] In particular, plaintiffs allege the following: (1) Baseball's actions "have placed direct and indirect restraints on the purchase, sale, transfer and relocation of Major League Baseball teams and on competition in the purchase, sale, transfer and relocation of such teams, all of which directly and indirectly affect interstate commerce," Complaint at P 104; (2) "Major League Baseball is an unreasonable and unlawful monopoly created, intended and maintained by defendants for the purpose of permitting defendant team owners, an intentionally select and limited group, to reap enormous profits," *id. at P 110*; and (3) Baseball has achieved these restraints on trade and its monopoly status by engaging in "an unlawful combination and conspiracy . . . the substantial terms of which have been to eliminate all competition in the relevant market [defined as the market for American League and National League baseball teams], to exclude plaintiffs from participating in the relevant market, to establish monopoly control of the relevant market and to unreasonably restrain trade by denying the sale, transfer and relocation of the Giants to the Tampa Bay area," *id. at P 111*.

The effect of Baseball's actions, plaintiffs allege, has been, among other things, to restrain their right to engage in the business of Major League Baseball, restrain their right to competitively bid on Major League Baseball teams, and cause plaintiffs to lose contract rights and profits. *Id. at P 112*.

[14] For a concise discussion of the distinction between a *per se* violation of the Sherman Act and the so-called rule of reason analysis applicable to resolution of most Sherman Act cases, see *Business Electric Corp. v. Sharp Electric Corp., 485 U.S. 717, 723-24 (1988)*. Aside from determining whether plaintiffs must allege a loss of competition in relevant markets, which plaintiffs readily concede they must do, the distinction is not relevant to Baseball's motion to dismiss.

The Grizzlies had identified the relevant product market for Sherman Act purposes as "major-league professional football." *Id. at 783*. The NFL argued that denial of the Grizzlies' franchise application could not have injured competition **[**33]** in this product market because there was no economic competition among league members capable of injury. *Id. at 786*. The Third Circuit agreed in part, finding on the record before it no evidence of economic competition between a potential NFL franchise located in Memphis, Tennessee and the nearest team geographically (280 miles away in St. Louis, Missouri). The court expressly declined, however, to hold that there could never be intra-league competition, noting that it was conceivable that "within certain geographic submarkets two league members [could] compete with one another for ticket buyers, for local broadcast revenue, and for sale of the concession items like food and beverages and team paraphernalia." *Id. at 787* (footnote omitted). Baseball argues on the basis of this decision that it could not have injured competition in a relevant product market. I disagree.

There are two important distinctions between *Mid-South Grizzlies* and the instant case. First, unlike the Grizzlies, plaintiffs here were not seeking to join Major League Baseball through *creation* of a franchise but were attempting to purchase an **[**34]** *existing* team. The import of this distinction turns upon the second distinction, which is that also unlike the Grizzlies, who identified the relevant product market as major-league professional football generally, plaintiffs here have identified the relevant product market as the market for existing American League and National League baseball *teams*. In other words, plaintiffs allege injury to competition in the team franchise market (the market for ownership of professional baseball teams, and the market for ownership of the Giants in particular). They do not seek to redress injury to an intra-league market comprised of Major League Baseball generally, which plaintiffs sought to join through the purchase of a franchise, and which may or may not include competition among present franchise owners. Plaintiffs aver that they were competing in the team franchise market with other potential investors located primarily *outside* of Major League Baseball for ownership of the Giants, and that Baseball interfered directly and substantially with competition in that market. I therefore reject Baseball's contention that plaintiffs have failed to allege a restraint on competition in a **[**35]** relevant product market. *See Fishman v. Estate of Wirtz, 807 F.2d 520, 532 n.9 (7th Cir. 1986)* (stating in antitrust action brought by jilted suitors of the Chicago Bulls basketball team that the "national sports franchise market could be a relevant market" for Sherman Act purposes) (dictum)). [15] **[**36]** *Mid-South* **[*431]** *Grizzlies* is therefore entirely distinguishable from the instant case. [16]

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[15] *Wirtz* also stands for the proposition that ***HN21***[] a relevant product market may be defined as a market *for* which the parties compete, as opposed to one *in* which they compete. *Wirtz, 870 F.2d at 531* (citing *Otter Tail Power Co. v. United States, 410 U.S. 366, 369 (1973))*. Thus a party may prevail under the Sherman Act if it was unlawfully excluded *from* a market, such as the market identified in *Wirtz* as the market for presentation of live basketball in Chicago, even if that party never met, nor intended to meet, the defendants in direct competition within that market. Plaintiffs argue here that they were competing with others outside Major League Baseball to join Major League Baseball and that *Wirtz* requires recognition that Baseball's alleged interference with that competition could be actionable under the Sherman Act. I agree.

Plaintiffs also argue that this case may fall into the exception noted by the Third Circuit in *Mid-South Grizzlies* (that intra-league competition between certain teams for ticket-purchasers, concessions, etc. conceivably may exist). Plaintiffs assert that if their antitrust claim survives Baseball's motion to dismiss, they will elicit evidence during discovery that defendant Florida Marlins, Inc. (the "Marlins") -- owner of a National League expansion team located in Miami, Florida -- colluded unlawfully with unnamed others to keep the Giants out of Florida in an effort to preserve the Marlins' alleged monopoly in that state over Major League Baseball television rights, fans, and concessions. To buttress this assertion, which does not appear in their complaint, plaintiffs have submitted several copies of newspaper articles that speculate or charge that the owner of the Marlins, Wayne Huizenga, engaged in such collusion. Although I am persuaded conceptually by plaintiffs' theory, I cannot base my holding upon it because their complaint does not even allude to such a scheme, nor do plaintiffs define as a relevant product market the market for baseball fans, television rights and concessions in the State of Florida. I note in this regard that plaintiffs have not filed for leave to amend their complaint to pursue such a theory.

[16] Similarly distinguishable are *Seattle Totems Hockey Club, Inc. v. National Hockey League, 783 F.2d 1347* (9th Cir.), *cert. denied*, *479 U.S. 932 (1986)*, and *Levin v. National Basketball Ass'n, 385 F. Supp. 149 (S.D.N.Y. 1974)*. Unlike the instant case but similar to *Mid-South Grizzlies*, *Seattle Totems* was an antitrust action arising from an unsuccessful attempt by the plaintiff in that case to join the National Hockey League ("NHL") through the *creation* of a franchise. The Ninth Circuit affirmed the district

[37]** 2. *Standing*

The principles of standing applicable to alleged violations of *sections 1* and *2* of the Sherman Act are the same as those applicable to questions of standing under section 4 of the Clayton Act, *15 U.S.C.A. § 15 (West Supp. 1993)*. *See Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 288 n.13 (3d Cir. 1978)*. "In addressing the 'standing' of parties to bring a claim under § 4 of the Clayton Act, the Supreme Court has focused on the nexus between the antitrust violation and the plaintiff's harm and on whether the harm alleged is of the type for which Congress provides a remedy." *In re: Lower Lake Erie Iron Ore Antitrust Litig.*, Nos. 91-1526/1586-1595/1627-1634, slip op. at 37, F.2d , 1993 WL 209530 (3d Cir. May 27, 1993, as corrected June 15, 1993). In *Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545 (1983)*("*AGC*"), the Supreme Court outlined a multi-factor inquiry to analyze nexus questions for purposes of standing under § 4 of the Clayton Act. As characterized recently by the Third Circuit, the *AGC* **[**38]** standing factors are as follows:

> ***HN22***[] (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

[*432] *Lower Lake Erie*, slip op. at 41-42. These factors must be considered and balanced in light of the unique circumstances of each case. *See Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 965 (3d Cir. 1983)*, *cert. denied*, *465 U.S. 1024 (1984)*.

Without directly addressing the *AGC* factors, Baseball posits two reasons why plaintiffs lack Sherman Act standing. First, Baseball contends that plaintiffs' antitrust claim can be boiled down to Baseball's rejection of the Partnership's **[**39]** application to acquire and transfer the Giants. Thus, Baseball argues, any claim arising out of an alleged restraint on competition belongs only to the Partnership entity, not plaintiffs individually. Second, Baseball asserts that the only direct harm allegedly suffered by plaintiffs independent of their interest in the Partnership was the alleged injury to their reputation, a harm not actionable under the Sherman Act. I view the first of Baseball's arguments as focusing upon the first, third and fourth *AGC* factors, and the second of Baseball's arguments as focusing upon the second *AGC* factor.

a. *Directness of injury, causation and other victims*

HN23[] The directness of injury and causation for antitrust standing purposes depends upon whether the plaintiff has alleged a direct causal connection between the defendant's purported antitrust activity and the plaintiff's alleged harm. *See AGC, 459 U.S. at 540-42*; *Lower Lake Erie*, slip op. at 45-46. Plaintiffs identify the antitrust activity here as Baseball's alleged conspiracy to intentionally monopolize and restrain competition in the market for ownership of Major League Baseball teams, the Giants **[**40]** in particular. Plaintiffs allege that these unlawful activities have resulted in (1) the elimination of plaintiffs and organizations in which plaintiffs owned majority interests from

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court's dismissal of the plaintiff's Sherman Act claim in part because the plaintiffs sought to join the NHL rather than compete with it. *Seattle Totems* is thus distinguishable because competition in the markets for ownership of existing franchises or participation in the NHL was not at issue.

Closer to the facts in this case, *Levin* involved an antitrust action filed by plaintiffs who sought to purchase an existing professional sports franchise -- the Boston Celtics basketball team. The district court granted summary judgment in favor of the defendants in that case because, *inter alia*, the plaintiffs wanted to join the National Basketball Association rather than compete with it. The district court's opinion, however, gives no indication that either the plaintiffs asserted or that the court considered a claim that competition had been restrained in the markets for professional basketball teams or for participation in professional basketball. (I also note in passing that the Third Circuit in *Mid-South Grizzlies* called into question the suggestion in *Levin* that there could never be competition among league members. *See Mid-South Grizzlies, 720 F.2d at 787 n.9*.)

competition in this market; (2) the exclusion of plaintiffs and their organizations from engaging in the business of Major League Baseball; and (3) loss of plaintiffs' contractual and property rights.

Baseball argues that plaintiffs' alleged injury is, at best, indirect because only the Partnership, not plaintiffs, could have been affected. Although this contention may prove factually correct after the case has developed, I cannot find sufficient support in plaintiffs' complaint to agree. Plaintiffs plead that they were *individually* excluded by Baseball from the relevant product market and suffered damages as a result. For example, plaintiffs Piazza and Tirendi allege that Baseball schemed to prevent the transfer of the Giants to Florida by unlawfully excluding them first individually, as the financial backbone of the Partnership, from the market for the Giants (and other Major League Baseball teams), only later to target the financially weakened Partnership and the remaining Investors. Thus the plaintiffs, **[**41]** not just the Partnership, sustained the injuries for which they seek redress.

In support of its position that the Partnership is a more direct victim, Baseball relies upon several decisions that stand for the familiar proposition that

> [a] stockholder of a corporation does not acquire standing to maintain an [antitrust] action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is the indirect harm which consists in the diminution in value of his corporate shares resulting from the impairment of corporate assets.

Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, *401 U.S. 974 (1971)*. *See also*, *e.g.*, *Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849* (2d Cir.), *cert. denied*, *479 U.S. 987 (1986)*. But such decisions, even if they apply with equal force to partners and partnership entities, [17] are inapposite. It is true that **[*433]** plaintiffs cite injury to the Partnership as a consequence of Baseball's antitrust behavior; but they also identify **[**42]** unique, particularized injury to themselves. As I read their complaint, plaintiffs do not seek to redress a diminution in the value of their interest in the Partnership or any other wrong that befell the Partnership *per se*. They seek to redress Baseball's allegedly unlawful exclusion of Vincent Piazza, Vincent Tirendi, and PTB from competing in a relevant market. I therefore find that the first, third, and fourth *AGC* factors weigh strongly in plaintiffs' favor.

[43]** b. *Goal of antitrust laws*

Baseball next contends that the only harm plaintiffs allege independent of the Partnership is harm to their reputations. Again, I must disagree. As discussed above, plaintiffs seek to redress damages sustained as a result of Baseball's alleged exclusion of them from a relevant market. Such injuries are clearly of the type that Congress sought to redress through the antitrust laws. The Supreme Court has repeatedly stated that a central purpose of the Sherman Act is to protect "the economic freedom of participants in the relevant market." *AGC, 459 U.S. at 538*. Thus, the second *AGC* factor favors plaintiffs.

c. *Duplicative Recovery and Complex Apportionment*

Although the parties do not address the fifth *AGC* factor -- the potential for duplicative recovery or complex apportionment of damages -- I conclude that this factor, too, weighs in favor of plaintiffs. Were plaintiffs suing on behalf of the Partnership, I can conceive of a situation where multiple recoveries would be possible to the extent that the other Investors are not parties to this litigation. As noted above, however, that is not the case. Plaintiffs **[**44]** seek to redress their own particular injuries; thus there appears no risk of duplicative recoveries or complex apportionment of damages. Finding that each of the *AGC* factors weighs in favor of plaintiffs, I therefore reject Baseball's contention that plaintiffs lack standing to press a Sherman Act claim.

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[17] *Compare* *Klebanow v. New York Produce Exchange, 344 F.2d 294 (2d Cir. 1965)*("When business is conducted by a partnership, the [Clayton Act] views the partnership rather than a partner as the person injured.") *with* *Kauffman, 434 F.2d at 733* ("Nowhere . . . do we find authority for the proposition that [a shareholder is vested in a share of his corporation's right to sue]. To accept this would be to convert an orthodox corporate structure to a general partnership or joint venture with each participant a principal and agent for the others.")

3. *Exemption from Antitrust Liability*

I now turn to the heart of Baseball's motion to dismiss plaintiffs' Sherman Act claim -- that in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, Inc., 259 U.S. 200 (1922)*; *Toolson v. New York Yankees, 346 U.S. 356 (1953)*; and *Flood v. Kuhn, 407 U.S. 258 (1972)*, the United States Supreme Court exempted Baseball from liability under the federal antitrust laws. Plaintiffs do not deny that these cases recognize some form of exemption from antitrust liability related to the game of baseball, but argue alternatively that the exemption either does not apply in this case, cannot be applied as a matter of law to the facts of this case, or should no longer be recognized at all.

a. *Evolution of the exemption*

[45]** Writing for a unanimous Supreme Court over seventy years ago, Justice Holmes affirmed a judgment of the Court of Appeals of the District of Columbia and held that the business of giving exhibitions of baseball games for profit does not constitute trade or commerce within the meaning of the Sherman Act, and thus the Act does not apply to that business. *See* *Federal Baseball, 259 U.S. at 208-09*, and the underlying decision of the Court of Appeals, *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 269 F. 681 (C.C.D.C. 1920)*("*D.C. Opinion*"). The plaintiff in that case, Federal Baseball of Baltimore, Inc. ("Federal Baseball"), owned a franchise in the Federal League of Professional Baseball Clubs until dissolution of that league in 1915 pursuant to an agreement with the National League and American League of Professional Baseball Clubs. *D.C. Opinion, 269 F. at 682*. With the demise of the Federal League, Federal Baseball was left without an organization within which to compete, and subsequently brought suit against the National and American Leagues, **[**46]** among others, for violation of the Sherman Act. *Id*. A jury found in favor of Federal Baseball, awarding it $ 240,000 in treble damages, costs, and attorneys fees.

[*434] The gravamen of Federal Baseball's case was the alleged anticompetitive impact of what is known as the "reserve clause" in the yearly contracts of players in the National and American Leagues. *Id. at 687-88*. The reserve clause bound a player to either enter a new contract with the same team in the succeeding year of the player's contract or be considered ineligible by the National and American Leagues to serve any baseball club. *Id. at 687*. Because of this restrictive provision, the Federal League and its constituent clubs were unable to obtain players who had contracts with the National and American Leagues, the effect of which, as found by the jury, was to damage Federal Baseball. *Id. at 682, 687*.

The Court of Appeals reversed the jury's verdict and remanded, making four significant findings. First, and quite simply, the court found that the business in which the defendants were engaged was the business of giving exhibitions **[**47]** of the game of baseball. *Id. at 684*.

Second, the court found that "[a] game of baseball is not susceptible of being transferred, . . . [and] the transportation in interstate commerce of the players and the paraphernalia used . . . was but an incident to the main purpose of the [defendants], namely, the production of the game." *Id. at 684-85*. Thus, the court reasoned, a baseball exhibition could not be considered interstate commerce, and the business of giving such an exhibition could not be subject to the Sherman Act. *Id*.

The third finding of the Court of Appeals was that, despite the fact that the giving of an exhibition was not interstate commerce, there were interstate components of Federal Baseball's business, the direct interference with which was redressable under the Sherman Act. *Id. at 686*. These interstate features included such things as the movement of players and their paraphernalia from place to place across state lines. *Id*. The court found that if unlawful anticompetitive activity directly interfered with the business of moving the players or their equipment, as opposed **[**48]** to the exhibition of the game itself, the Sherman Act would apply. *Id*.

Finally, the Court of Appeals found that the reserve clause only indirectly, if at all, affected the interstate aspects of Federal Baseball's business (the business of moving players and their equipment), which was not sufficient to give rise to a Sherman act violation. *Id. at 687-88*.

These four findings can be condensed into two reasons why the Court of Appeals found that the reserve clause did not offend the Sherman Act. First, the anticompetitive impact of the reserve clause on the business of giving a baseball exhibition was not redressable as a matter of law under the Sherman Act, such business found not to be interstate commerce. Second, the reserve clause had, at best, only an incidental impact on the portion of Federal Baseball's business that was considered interstate commerce.

The Supreme Court affirmed. The Court agreed that the defendants' exhibitions of baseball games "are purely state affairs," lacking the character of interstate commerce. *Federal Baseball, 259 U.S. at 208*. From this, the Court reasoned, "if we are right the plaintiff's **[**49]** business is to be described the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains [the reserve clause] and the other conduct charged against the defendants [buying up Federal League clubs] were not an interference with commerce among the States." *Id. at 209*.

The Supreme Court next addressed the exemption in *Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953)*, a *per curiam* opinion affirming decisions of the Sixth and Ninth Circuits. [18] The plaintiffs in the underlying cases were professional baseball players who brought suit under the federal antitrust laws alleging harm by virtue, again, of the reserve clause. *Id. at 362* (Burton, J. dissenting). Seeking to avoid *Federal Baseball*, the plaintiffs stressed, among other things, the **[*435]** obsolescence of that decision in light of the increased revenue generated by baseball due to interstate radio and television broadcasts. *See Toolson v. New York Yankees, 101 F. Supp. 93*. Unpersuaded by this position, the district courts dismissed the claims **[**50]** and the Courts of Appeals affirmed. The plaintiffs then petitioned the Supreme Court to overturn *Federal Baseball*. In a terse opinion, the Court refused, upholding *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Toolson, 347 U.S. at 357* (*per curiam*).

Following *Toolson*, several attempts were made to extend its reasoning and that of *Federal Baseball* beyond the context of baseball. *See*, *e.g.*, *United States v. Shubert, 348 U.S. 222 (1955)*(theater); *United States v. International Boxing Club, 348 U.S. 236 (1955)* **[**51]** (boxing); *Radovich v. National Football League, 352 U.S. 445 (1957)*(football). In each of these cases, however, the Court declined the invitation. Moreover, to head off any further attempted extensions of those decisions, the Court stated in *Radovich* with crystal clarity that "we now specifically limit the rule . . . established [in *Federal Baseball* and *Toolson*] to the facts there involved, *i.e.*, the business of organized professional baseball." *Radovich, 352 U.S. at 451*.

The next and most recent time the Supreme Court directly considered the exemption was in *Flood v. Kuhn, 407 U.S. 258 (1972)*. Like *Toolson*, the plaintiff in *Flood* was a professional baseball player dissatisfied with the reserve clause in his contract and the "reserve system" generally. [19] After an extensive analysis of the history of the exemption, Justice Blackmun, who delivered the opinion of the Court, produced a list of statements that can be made regarding the exemption and its circumstances:

[52]**

1. Professional baseball is a business and it is engaged in interstate commerce.

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[18] *See Toolson v. New York Yankees, Inc., 101 F. Supp. 93 (S.D. Cal. 1951)*, *aff'd without opinion*, ***200 F.2d 198 (9th Cir. 1952)***; *Kowalski v. Chandler, 202 F.2d 413 (6th Cir. 1953)*; *Corbett v. Chandler, 202 F.2d 428 (6th Cir. 1953)*.

[19] The "reserve system" includes the reserve clause and Major League Baseball rules designed to complement the clause in confining the player to the club that has him under contract and otherwise providing contract uniformity. *See Flood, 407 U.S. at 259 n.1*.

> 2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.
>
> 3. Even though others might regard this as "unrealistic, inconsistent, or illogical," the aberration is an established one . . ., heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. . . .
> 4. Other professional sports operating interstate -- football, boxing, basketball, and, presumably, hockey and golf -- are not so exempt.
> 5. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. . . . The Court accordingly has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. . . .

Id. at 282-84 (footnotes and citations **[**53]** omitted).

b. *Discussion*

(i) *Scope of the exemption*

In each of the three cases in which the Supreme Court directly addressed the exemption, the factual context involved the reserve clause. Plaintiffs argue that the exemption is confined to that circumstance, which is not presented here. Baseball, on the other hand, argues that the exemption applies to the "business of baseball" generally, not to one particular facet of the game.

Between 1922 and 1972, Baseball's expansive view may have been correct. Although *Federal Baseball* involved the reserve clause, that decision was based upon the proposition that the business of exhibiting baseball games, as opposed to the business of moving **[*436]** players and their equipment, was not interstate commerce and thus not subject to the Sherman Act. *Toolson*, also a reserve clause case, spoke in terms of the "business of baseball" enjoying the exemption. *Toolson, 346 U.S. at 357*. Likewise, *Radovich*, a 1957 decision concerning football, recognized the exemption as extending to the "business of organized professional baseball." *Radovich*, 352 U.S. 450-53.

In 1972, however, **[**54]** the Court in *Flood v. Kuhn* stripped from *Federal Baseball* and *Toolson* any precedential value those cases may have had beyond the particular facts there involved, *i.e.*, the reserve clause. The *Flood* Court employed a two-prong approach in doing so. First, the Court examined the analytical underpinnings of *Federal Baseball* -- that the business of exhibiting baseball games is not interstate commerce. In the clearest possible terms, the Court rejected this reasoning, removing any doubt that "professional baseball is a business . . . engaged in interstate commerce." *Flood, 407 U.S. at 282*.

Having entirely undercut the precedential value of the *reasoning* of *Federal Baseball*, the Court next set out to justify the continued precedential value of the *result* of that decision. To do this, the Court first looked back to *Toolson* and uncovered the following four reasons why the Court there had followed *Federal Baseball*:

> (a) Congressional awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional inaction. (b) *The fact that baseball was left alone to develop for that period* **[**55]** *upon the understanding that the reserve system was not subject to existing antitrust laws*. (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation rather than court decree.

Id. at 273-74 (emphasis added). The emphasized text indicates that the *Flood* Court viewed the *disposition* in *Federal Baseball* and *Toolson* as being limited to the reserve system, for baseball developed between 1922 and 1953 with the understanding that its *reserve system*, not the game generally, was exempt from the antitrust laws. This reading of *Flood* is buttressed by (1) the reaffirmation in *Flood* of a prior statement of the Court that "'*Toolson* was a narrow application of the doctrine of *stare decisis*,'" *id. at 276* (quoting *Shubert, 348 U.S. at 228-30*); and (2) the *Flood* Court's own characterization, in the *first sentence* of its opinion, of the *Federal Baseball*, *Toolson*, and *Flood* decisions: "For the third time in 50 years the Court is asked *specifically* **[**56]** to rule that professional baseball's *reserve system* is within the reach of the antitrust laws." *Id. at 259* (emphasis added) (footnote omitted).

Viewing the dispositions in *Federal Baseball* and *Toolson* as limited to the reserve clause, the *Flood* Court then turned to the reasons why, even though analytically vitiated, the precise results in *Federal Baseball* and *Toolson* were to be accorded the continuing benefit of *stare decisis*. Like *Toolson*, the *Flood* Court laid its emphasis on continued positive congressional inaction and concerns over retroactivity. *Id. at 283-84*. In particular, the *Flood* Court "concluded that Congress as yet has had no intention to subject baseball's *reserve system* to the reach of the antitrust statutes." *Id. at 283* (emphasis added). Finally, the Court acknowledged that "with its *reserve system* enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball." *Id. at 282* **[**57]** (emphasis added). Thus in 1972, the Supreme Court made clear that the *Federal Baseball* exemption is limited to the reserve clause.

Relying primarily upon *Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978)*, *cert. denied*, *439 U.S. 876 (1978)*, defendant Baseball offers a different reading of *Flood*. The plaintiff in that case, Charles O. Finley & Co. ("Finley"), owned the Oakland Athletics ("Oakland") baseball club. *Finley, 569 F.2d at 530*. In June of 1976, Oakland negotiated tentative agreements to sell Oakland's contract rights **[*437]** in three players to other teams. *Id. at 531*. Defendant Commissioner of Baseball Bowie Kuhn disapproved of the sale, and Finley subsequently brought suit, claiming, among other things, that the Commissioner conspired with others in violation of the antitrust laws. *Id*. Finding the Commissioner exempt from the antitrust laws under *Federal Baseball*, the district court granted summary judgment in favor of the Commissioner, and Finley appealed.

Like plaintiffs here, Finley argued on appeal that the exemption applies **[**58]** only to the reserve system. The Seventh Circuit disagreed, finding that "despite the *two* references in the *Flood* case to the reserve system, it appears clear from the entire opinions in the three baseball cases, as well as from *Radovich*, that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws." *Id. at 541* (emphasis added) (footnotes omitted).

In reaching this conclusion, the Seventh Circuit looked back to *Federal Baseball*, *Toolson*, and *Radovich*, as I have done here, and concluded that the Court had focused in those cases upon the business of baseball, not just the reserve clause. Then the court discussed *Flood*:

> In *Flood v. Kuhn*, the Court said that "Professional baseball is engaged in interstate commerce" and "we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball."

Id. (citation omitted). This single paragraph represents the Seventh Circuit's entire substantive discussion of *Flood* -- the Supreme Court's most recent and most thorough explanation of the *Federal* **[**59]** *Baseball* exemption. The court discounted two references in *Flood* to the reserve clause [20] and made no mention of the fact that *Flood* refers to the reserve clause at least *four* times, the two not discussed by the court indicating that (1) the Supreme Court reads *Federal Baseball* and *Toolson* as reserve clause cases, *Flood, 407 U.S. at 273-74*; and (2) the Court

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[20] The *Finley* court identified the following two references to the reserve clause in *Flood*:

> For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.

Finley, 569 F.2d at 540 n.48 (quoting *Flood, 407 U.S. at 259*).

> With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly.

Id. (quoting *Flood, 407 U.S. at 282*).

continues to follow the precise disposition of those decisions because Congress continues to express no intention of subjecting the *reserve clause* to the antitrust laws, *id. at 283*.

[60]** But there is an even more significant flaw in the Seventh Circuit's analysis of *Flood* than in failing to note the extent to which that decision turned upon the reserve clause: Application of the doctrine of *stare decisis* simply permits no other way to read *Flood* than as confining the precedential value of *Federal Baseball* and *Toolson* to the precise facts there involved. To understand why this is so, one must fully understand the doctrine of *stare decisis* and its application by lower courts to Supreme Court decisions. The Third Circuit recently offered the following explanation:

> [Supreme Court] . . . opinions usually include two major aspects. First, the Court provides the legal standard or test that is applicable to laws implicating a particular . . . provision. This is part of the reasoning of the decision, the *ratio decidendi*. Second, the Court applies that standard or test to the particular facts of the case that the Court is confronting -- in other words, it reaches a specific result using the standard or test.
>
> As a lower court, we are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under the **[**61]** standard or test. As Justice Kennedy has stated, courts are bound to adhere not only to results of cases, but also "to their explications of the governing rules of law." Our system of precedent or *stare decisis* is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone. This **[*438]** distinguishes the American system of precedent, sometimes called "rule stare decisis," from the English system, which historically has been limited to following the results or disposition based on the facts of a case and thus referred to as "result stare decisis."
>
> Like lower courts, the Supreme Court applies principles of *stare decisis* and recognizes an obligation to respect both the standard announced and the result reached in its prior cases. Unlike lower courts, the Supreme Court is free to change the standard or result from one of its earlier cases when it finds it to be "unsound in principle [or] unworkable in practice."

Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 691-92 (3d Cir. 1991)(citations omitted), *aff'd in part and rev'd in part on other grounds*, *__ U.S. __, 112 S. Ct. 2791 (1992)*. **[**62]**

Applying these principles of *stare decisis* here, it becomes clear that, before *Flood*, lower courts were bound by both the *rule* of *Federal Baseball* and *Toolson* (that the business of baseball is not interstate commerce and thus not within the Sherman Act) [21] and the *result* of those decisions (that baseball's reserve system is exempt from the antitrust laws). The Court's decision in *Flood*, however, effectively created the circumstance referred to by the Third Circuit as "result stare decisis," from the English system. In *Flood*, the Supreme Court exercised its discretion to invalidate the *rule* of *Federal Baseball* and *Toolson*. Thus no rule from those cases binds the lower courts as a matter of *stare decisis*. The only aspect of *Federal Baseball* and *Toolson* that remains to be followed is the result or disposition based upon the facts there involved, which the Court in *Flood* determined to be the exemption of the reserve system from the antitrust laws.

[63]** Neither *Finley* nor any other case cited by Baseball in support of its view of the exemption has undertaken such an analysis of the Supreme Court's baseball trilogy. [22] **[**64]** And as none of these decisions is binding upon this Court, I will not follow them. [23] It is well settled that ***HN24***[] exemptions from the antitrust laws are to be

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[21] *Radovich* later made clear that this rule applied only to the business of organized baseball, prohibiting its application to other professional sports. *See* *Radovich, 352 U.S. at 450*.

[22] Baseball cites the following decisions, among others, in support of its view: *Professional Baseball Schools & Clubs, Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982)*; *Triple-A Baseball Club Associates v. Northeastern Baseball, Inc., 832 F.2d 214 (1st Cir. 1987)*, *cert. denied*, ***485 U.S. 935 (1988)***; *Portland Baseball Club, Inc. v. Kuhn, 491 F.2d 1101 (9th Cir. 1974)*; *Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970)*, *cert. denied*, ***400 U.S. 1007 (1971)***.

narrowly construed. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979). Application of this principle is particularly appropriate, if not absolutely critical, in this case because the exemption at issue has been characterized by its own creator as an "anomaly" and an "aberration." Flood, 407 U.S. at 282; *see also* id. at 286 (*Federal Baseball* is a "derelict in the stream of the law." (Douglas, J. dissenting)). For these reasons, I conclude that the antitrust exemption created by *Federal Baseball* is limited to baseball's reserve system, and because the parties agree that the reserve system is not at issue in this case, I reject Baseball's argument that it is exempt from antitrust liability in this case.

(ii) *Nature of the exemption*

Although it would be appropriate to end here my discussion of the *Federal Baseball* exemption, for the purpose of providing a complete record of decision in the event of certification for immediate appeal under 28 U.S.C.A. § 1292(b) (West Supp. 1993), I will press on to consider the implications of applying "rule stare decisis" to *Federal Baseball* and plaintiffs' complaint.

[*439] Assuming, as Baseball would have it, that *Finley* is correct and the exemption extends beyond the reserve system, I must determine exactly how far the exemption reaches. I find that stating, as did the *Finley* court, that the exemption covers the "business of baseball" does little to delineate the contours of the exemption.

As mentioned above, to state a claim under the Sherman Act, plaintiffs **[**65]** must allege injury to competition in a relevant product market. *See* Mid-South Grizzlies, 720 F.2d at 785. Although the Supreme Court has not couched its explanation of the exemption in these terms, I believe that the only arguably surviving rule to be gleaned from the Court's baseball trilogy is that if the relevant product market involved is the market defined as the "business of baseball," injury to competition in that market may not be redressed under the Sherman Act.

[24] *Cf.* Henderson Broadcasting Corp. v. Houston Sports Ass'n, 541 F. Supp. 263 (S.D. Tx. 1982)(exemption does not apply to market for broadcast of baseball games). *Federal Baseball* itself made this clear. The focus in that case was upon competition in two different businesses or markets. The first was defined as the business of "giving exhibitions of base ball [sic]." Federal Baseball, 259 U.S. at 208. The second was defined as the business of "moving players and their paraphernalia from place to place." *D.C. Opinion, 269 F. at 686*. The Sherman Act was held not to apply to restraints **[**66]** in the first market because that market did not implicate interstate commerce. Federal Baseball, 259 U.S. at 208-09. Restraints in the second market, however, were redressable under the Sherman Act because that market did implicate interstate commerce. *D.C. Opinion, 269 F. at 687-88*. Thus, assuming the validity of *Finley*, the *Federal Baseball* exemption is one related to a particular market -- the market comprised of the exhibition of baseball games -- not a particular type of restraint (such as the reserve clause) or a particular entity (such as Major League Baseball).

It follows from having expressed the exemption as relating to a particular market that the next question is whether the plaintiffs in this case seek relief for restraints in that market or some other market. If Baseball's allegedly **[**67]** unlawful conduct merely restrained competition in the market comprised of baseball exhibitions, Baseball is immune from liability under the Act. If some other market was involved, however, even the expansive version of the *Federal Baseball* exemption would not apply.

HN25[] A "market" may be defined as "any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level." Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 518.1b (Supp. 1991)(footnote omitted). As stated above, plaintiffs allege that the relevant product market in this case is the market for ownership of existing major league professional baseball teams. Reduced to its essentials, one can infer at this stage of the proceedings that this market has the following components: (1) the

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[23] I note that the Third Circuit has neither analyzed *Flood* nor construed the contours of the *Federal Baseball* exemption. I am bound, however, to follow the approach to *stare decisis* set forth by the Third Circuit in *Planned Parenthood*.

[24] In light of *Flood*, I do not believe, nor do I understand Baseball to argue, that *Federal Baseball*'s interstate commerce reasoning remains vital.

product being sold is an ownership interest in professional baseball teams; (2) the sellers are team owners; and (3) the buyers are those who would like to become team owners. Viewing the complaint in the light most favorable to plaintiffs, it would not be unreasonable also to infer that if the team owners combined, they could increase the price of teams considerably **[**68]** and control the conditions of sale. [25]

The market to which the expansive version of the *Federal Baseball* exemption applies, on the other hand, has the following components: (1) the product is the exhibition of baseball games; (2) the sellers, as with the market defined by plaintiffs, are team owners; and (3) the buyers are fans and, perhaps, **[*440]** the broadcast industry. Thus the two markets have different products -- baseball teams versus baseball games -- and different consumers.

Although not expressed in market terms, the Court of Appeals in *Federal Baseball* attributed great weight to such differences. **[**69]** The court distinguished for Sherman Act purposes between the business that encompassed the exhibition of baseball games (the "game exhibition market") and the business that involved the movement of players and their paraphernalia (the "player transportation market"). *D.C. Opinion, 269 F. at 686*. The focus of the exemption was on the exhibition of games only, which Justice Holmes characterized in affirming the Court of Appeals as "purely state affairs." *Federal Baseball, 259 U.S. at 208*. Other aspects of a baseball team's business -- interstate aspects distinguishable from but nonetheless related to the games such as the movement of players and equipment -- were not part of the exemption. Thus the anticompetitive nature of the reserve clause in the game exhibition market was found not to violate the Sherman Act, but could have given rise to a claim under the Act had it directly affected other markets. A similar distinction may be made here. The plaintiffs in this case target not anticompetitive activity in the market for the exhibition of baseball *games*; but anticompetitive activity in market for the sale of ownership **[**70]** interests in baseball *teams* -- a market seemingly as distinguishable from the game exhibition market as the player transportation market.

Recent courts construing the expansive version of the exemption, although not focusing upon the distinction made by the Court of Appeals in *Federal Baseball*, have defined the exempted market (characterized as the "business of baseball") as that which is central to the "'unique characteristics and needs'" of baseball. *Postema v. National League of Professional Baseball Clubs, 799 F. Supp. 1475, 1488 (S.D.N.Y. 1992)*(quoting *Flood, 407 U.S. at 282*), *rev'd on other grounds*, F.2d , 1993 WL 240824 (2d Cir. July 6, 1993); [26] *Henderson, 541 F. Supp. at 268-69, 271* (*Federal Baseball* exemption not applicable to market for broadcast of baseball games). There seems to be agreement among these courts and others that, defined in this way, ***HN26***[] the exempted market includes (1) the reserve system and (2) matters of league structure. *See*, *e.g.*, *Professional Baseball Schools and Clubs, Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982)*; **[**71]** *Postema, 799 F. Supp. at 1489*; *Henderson, 541 F. Supp. at 269*; *State v. Milwaukee Braves, Inc., 31 Wis.2d 699, 144 N.W.2d 1, 15 (1966)*, *cert. denied*, *385 U.S. 990 (1966)*.

[72]** I do not view these decisions as conflicting with the analysis of the Court of Appeals in *Federal Baseball*. Applying their logic, the Court of Appeals can be understood as essentially viewing the movement of players and their equipment from game to game as a market activity not central to the unique characteristics and needs of exhibiting baseball games. Thus, when these decisions are considered together, the following list of activities or markets that are *not* within the exempted market can be generated: (1) the movement of players and their equipment from game to game; (2) the broadcast of baseball games; and, perhaps, (3) employment relations between organized professional baseball and non-players.

[25] One might also view the relevant market more narrowly as the market for the purchase and transfer of the Giants only, where there was but one seller, Robert Lurie, constituting a monopoly, with the buyer group including only those interested in the Giants, as opposed to other professional baseball teams. On a motion to dismiss, I must view the relevant market in the manner most favorable to plaintiffs.

[26] *Postema* held that the *Federal Baseball* exemption does not apply to baseball's employment relationships with non-players such as umpires because such relationships "are not a unique characteristic or need of the game." *Id. at 1489*. *But see Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970)*(holding that employment relations with umpires are within the exemption), *cert. denied*, ***400 U.S. 1001 (1971)***. *Postema* chose not to follow *Salerno* because it was decided before "*Flood's* apparent endorsement of a limited view of the exemption." *Postema, 799 F. Supp. at 1475*.

No court, however, has analyzed or applied the expansive view of the *Federal Baseball* exemption to the market for ownership interests in existing baseball teams. Thus I must determine whether this market is central to the unique characteristics and needs of baseball exhibitions. I conclude that such a determination is not possible without a factual record, and that, viewing plaintiffs' complaint in their favor, plaintiffs may be able to demonstrate **[*441]** that team ownership **[**73]** is not central to baseball's unique characteristics.

Plaintiffs plead that they were attempting to acquire an interest in a business owned by Robert Lurie engaged in the exhibition of baseball games -- the San Francisco Giants. As stated above, the products being sold in this market (teams) are different from those being sold in the exempted market (games). And acquiring an ownership interest in a team may very well be no more unique to the exhibition of baseball games than is moving players and their equipment from game to game. Although players and their equipment are, beyond doubt, uniquely necessary to a baseball game, the Court of Appeals in *Federal Baseball* found, on a trial record, that their movement -- which essentially involves the transportation of men and equipment -- was not. Likewise, although teams, as business entities engaged in exhibiting baseball games, are undoubtedly a unique necessity to the game, the transfer of ownership interests in such entities may not be so unique. Moreover, anticompetitive conduct toward those who seek to purchase existing teams has never been considered by any court to be an essential part of the exhibition of baseball games.

On **[**74]** the other hand, it is conceivable that, although the precise products in plaintiffs' market and the exempted market are different, these markets nonetheless overlap to such an extent that they should be treated identically for purposes of the expansive view of *Federal Baseball*. In other words, the acquisition of a business that is engaged in baseball exhibitions may be central in some way not apparent on the face of the complaint to the unique characteristics of baseball exhibitions. Without a factual record, I would be engaged in mere speculation in deciding now whether it is or is not.

Accordingly, I conclude that if "rule stare decisis" and the *Finley* expansive view were applied, this case would not be ripe for determination of whether the *Federal Baseball* exemption applies. Thus, even under this analysis, Baseball's motion would be denied. One additional observation bears mentioning. I have considered plaintiffs' complaint in the light most favorable to plaintiffs and have accepted their definition of the relevant market as the market for team *ownership*. But the gravamen of plaintiffs' case may be Baseball's interference with plaintiffs' efforts to acquire and **[**75]** *relocate* the Giants to Florida. As stated earlier, matters of league structure have been viewed by other courts as being unique to baseball. The physical relocation of a team and Baseball's decisions regarding such a relocation could implicate matters of league structure, and thus be covered by the exemption. If, therefore, the expansive view of *Federal Baseball* were applied and a factual record were developed showing that this case concerns only restraints on the market for ownership *and* relocation of the Giants as inseparable activities, "rule stare decisis" could require application of the exemption.

III. *CONCLUSION*

Baseball's motion to dismiss is granted in part and denied in part. Plaintiffs' direct claims under the U.S. Constitution are dismissed. In all other respects the motion is denied. Because I have not dismissed all of plaintiffs' claims over which this Court has original jurisdiction, I will continue to exercise supplemental jurisdiction over plaintiffs' state law claims. See *28 U.S.C.A. § 1367 (West Supp. 1993)*.

An appropriate order follows.

ORDER - August 4, 1993, Filed

AND NOW, this 4th day of August, 1993, **[**76]** upon consideration of Defendants' Motion to Dismiss the Complaint (Docket Entry No. 3) and all papers filed in support thereof and in response thereto, and after oral argument, IT IS HEREBY ORDERED that said motion is GRANTED IN PART AND DENIED IN PART for the reasons stated in the accompanying Opinion, as follows:

1. Plaintiffs' direct claims under the U.S. Constitution (Count I) are DISMISSED.

2. In all other respects, defendants' motion is DENIED.

John R. Padova, J.

Tacker v. Wilson

United States District Court for the Western District of Tennessee, Western Division

August 4, 1993, Decided ; August 4, 1993, Filed; August 5, 1993, Entered

No. 92-2586-4/BRE

Reporter

830 F. Supp. 422 *; 1993 U.S. Dist. LEXIS 11410 **; 27 Fed. R. Serv. 3d (Callaghan) 106; 1993-2 Trade Cas. (CCH) P70,356

ALFRED T. TACKER, d/b/a FAMILY HERITAGE CASKET GALLERY, INC., Plaintiff, v. ELMER WILSON, individually, and WILSON METAL CASKET COMPANY, INC.; BATESVILLE CASKET COMPANY, INC.; DELTA CASKET COMPANY, INC.; MEMPHIS CASKET COMPANY, INC; WILBERT BURIAL VAULT COMPANY, INC.; DORIC OF MEMPHIS, INC.; MEMORIAL PARK, INC.; MEMORIAL GUARDIAN PLANS, INC.; WESTPOINT CASKET COMPANY, INC.; HENRY SPIKES, individually, and as a Director of THE TENNESSEE BOARD OF FUNERAL DIRECTORS & EMBALMERS; LEON RIDGEWAY, individually, and as a Director of THE TENNESSEE BOARD OF FUNERAL DIRECTORS AND EMBALMERS; THOMAS STRICKLAND, individually, and as a Director of THE TENNESSEE BOARD OF FUNERAL DIRECTORS AND EMBALMERS; ROBERT P. SHACKELFORD, JR., individually, and as a Director of THE TENNESSEE BOARD OF FUNERAL DIRECTORS AND EMBALMERS; ARTHUR PICKLE, individually, and as a Director of THE TENNESSEE BOARD OF FUNERAL DIRECTORS AND EMBALMERS; SERVICE CORPORATION INTERNATIONAL; MEMORIAL PARK, INC.; and MEMORIAL GUARDIAN PLANS, INC., d/b/a MEMPHIS FUNERAL HOME, Defendants.

Core Terms

Casket, alleges, motion to dismiss, Sherman Act, conspiracy, second amended complaint, antitrust, supplemental jurisdiction, distributors, regulations, license, official capacity, district court, legally-cognizable, defendants', concerted refusal, service provider, fail to state, Embalmers, argues, immune, member of the board, funeral director, tort claim, conspired, licensure, concert, grounds

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN1[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

In order to state a claim under 15 U.S.C.S. § 1, the plaintiff must usually indicate (1) that the defendants contracted, combined, or conspired, (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets, (3) that the objects of and the conduct pursuant to the conspiracy were illegal, and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the individual against whom the concerted action is directed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Per Se Rule & Rule of Reason, Per Se Violations**

In determining the sufficiency of a claim under 15 U.S.C.S. § 1 of the Sherman Act, a court must look to the nature of the alleged behavior to decide between how to analyze the allegations--either under a per se analysis or by the rule of reason. A naked restraint of trade with no purpose other than to stifle competition is a violation per se of § 1 of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Per Se Rule & Rule of Reason, Per Se Violations

The apparent rule now is that concerted refusals to deal are violations per se of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, where there is no plausible argument that the refusal to deal accentuates efficiency and where it is impossible to prove that the conspirators possess market power. Otherwise, the concerted refusal to deal resulted in no anti-competitive effect.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN6[] Complaints, Requirements for Complaint

See *Fed. R. Civ. P. 8(a)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN7[] Motions to Dismiss, Failure to State Claim

A complaint need not be overly fact-specific. The function of the complaint is to give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved; however, pleadings filled with nothing but conclusory allegations that do not afford notice to the court or to the opposing parties violate *Fed. R. Civ. P. 8*. Such a violation calls for dismissal of the complaint under *Fed. R. Civ. P. 12(b)(6)* for failure to state a legally-cognizable claim. The claim should not be dismissed, however, unless it appears that beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, and the proof is largely in the hands of the alleged conspirators.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] Antitrust & Trade Law, Sherman Act

The framers of the Sherman Act did not intend for antitrust laws to interfere with the market-regulation activities of the states.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > State & Territorial Governments > Claims By & Against

Real Property Law > Subdivisions > State Regulations

HN10[] Exemptions & Immunities, Parker State Action Doctrine

The state action doctrine exempts only anticompetitive conduct engaged in as an act of government by the state as sovereign, or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN11[] US Federal Trade Commission Actions, Remedial Powers

The Federal Trade Commission Act, *15 U.S.C.S. § 41 et seq.*, was created for the purpose of creating and lodging administrative functions in a body specially competent to deal with threats and dangers to trade and competition. *15 U.S.C.S. § 45* is the enforcement statute declaring unlawful unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. *15 U.S.C.S. § 45(a)(1)*. Courts have traditionally held that the basic purpose of the statute is to protect the public, and that remedial power rests exclusively in the FTC.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN12[] Antitrust & Trade Law, Federal Trade Commission Act

The Federal Trade Commission Act, *15 U.S.C.S. § 41 et seq.*, may be enforced only by the Federal Trade Commission. Nowhere does the Act bestow upon either competitors or consumers standing to enforce its provisions.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[] Public Enforcement, State Civil Actions

See *Tenn. Code Ann. § 47-25-101* (1988).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN14[] Public Enforcement, State Civil Actions

See *Tenn. Code Ann. § 47-25-106* (1988).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

HN15[] Subject Matter Jurisdiction, Jurisdiction Over Actions

See *28 U.S.C.S. § 1367*.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Same Case & Controversy

Constitutional Law > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Jurisdiction

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN16[] Supplemental Jurisdiction, Same Case & Controversy

The court formulated a two-step analysis to determine whether the exercise of pendent jurisdiction was proper: (1) Did the state claim and the federal claim share a common nucleus of operative fact? and, if so, (2) With respect to doctrines of judicial economy, convenience, and fairness, should the power to hear the claim be exercised? *28 U.S.C.S. § 1367* envelops the common nucleus of operative fact test in the requirement that the two claims be so related that they form part of the same case or controversy under the U.S. Const. art. III.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

HN17[] **Jurisdiction, Exclusive Jurisdiction**

Exercise of supplemental jurisdiction is appropriate when both claims arise out of the same alleged conspiracy, the district court has exclusive jurisdiction over the federal claim, and the supplemental claim would not predominate over the federal claim.

Counsel: **[**1]** Mr. Robert G. Gilder, Esq., Southhaven, MS, Attorney for Alfred T. Tacker.

Mr. James R. Garts, Jr., Harris, Shelton, Dunlap & Cobb, Memphis, TN, Attorney for Elmer Wilson, Individually and Wilson Metal Casket Company, Inc.

Paul B. Plant, Harwell & Plant, Lawrenceberg, TN, Attorney for Elmer Wilson, Individually and Wilson Metal Casket Company, Inc.

Mr. Donald E. Knebel, Barnes & Thornburg, Indianapolis, IN, Attorney for Batesville Casket Company, Inc., and Doris of Memphis, Inc.

Mr. William W. Dunlap, Jr., Harris, Shelton, Dunlap & Cobb, Memphis, TN, Attorney for Batesville Casket Company, Inc.

Mr. Alan R. Wolfe, Mr. Joseph M. Crout, Williams, McDaniel & Wolfe, P.C., Memphis, TN, Attorneys for Memphis Casket Company, Inc.

Mr. Michael Richards, Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, Memphis, TN, Attorney for Memphis Wilbert Vault Company, Inc., Memorial Guardian Plans, Inc., Henry Spikes, Leon Ridgeway, Thomas Strickland, Robert P. Shackelford, Jr., and Arthur Pickle.

Mr. Frank Carney and Mr. Alan E. Glenn, Evans & Petree, Memphis, TN, Attorneys for Memorial Park, Inc.

Mr. B. Storey, Edwards, Storey, Marshall & Helveston, West Point, Mississippi, Attorney **[**2]** for Westpoint Casket Company, Inc.

Mr. Myron L. Dale, Friest & Jacobs, Cincinnati, OH, Attorney for Aurora Casket Company, Inc.

Mr. William W. Grubbs, Jr., Memphis, TN, Statutory Agent for Delta Casket Company, Inc.

Mr. Hulon O. Warlick, Warlick, Myhr, and Brown, Memphis, TN.

Mr. Steven E. Winn, Office of the State Attorney General, Nashville, TN.

Judges: McRAE

Opinion by: ROBERT M. McRAE

Opinion

[*425] ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS FILED BY WILSON METAL CASKET COMPANY, INC.; DORIC OF MEMPHIS, INC.; BATESVILLE CASKET COMPANY, INC.; MEMPHIS CASKET COMPANY, INC.; WESTPOINT CASKET COMPANY, INC.

and

DISMISSING FROM THE ACTION HENRY SPIKES, LEON RIDGEWAY, THOMAS STRICKLAND, ROBERT P. SHACKELFORD, JR., and ARTHUR PICKLE, INDIVIDUALLY AND AS DIRECTORS OF THE TENNESSEE BOARD OF FUNERAL DIRECTORS AND EMBALMERS.

and

DENYING ELMER WILSON'S MOTION TO DISMISS THE STATE LAW TORT CLAIM

This is a federal antitrust action which plaintiff seeks to supplement with a state antitrust claim and a state tort claim. Now before the Court are several motions to dismiss on various grounds, filed by various defendants.

As to plaintiff's allegations under *§ 1* of the Sherman Act, this Court (1) DENIES the **[**3]** motions to dismiss filed by Wilson Metal Casket Company; Batesville Casket Company; Memphis Casket Company; Doric of Memphis; and Westpoint Casket Company and (2) GRANTS the motion to dismiss filed by Henry Spikes, Leon Ridgeway, Thomas Strickland, Robert P. Shackelford, Jr., and Arthur Pickle in those defendants' official capacities as directors of the Tennessee Board of Funeral Directors and Embalmers.

As to plaintiff's allegations under *15 U.S.C. § 45* and FTC regulations promulgated thereunder, this Court DISMISSES the action as to all named defendants for failure to state a legally-cognizable claim.

As to plaintiff's allegations under Tennessee ***antitrust law***, this Court DISMISSES the action as to all named defendants for failure to state a legally-cognizable claim.

As to plaintiff's common-law intentional tort allegations against defendant Elmer Wilson, this Court DENIES Elmer Wilson's motion to dismiss for lack of supplemental jurisdiction.

DISCUSSION

I. THE ANTITRUST CLAIMS

Plaintiff ("Tacker") owns and operates the Family Heritage Casket Gallery in Memphis, Tennessee. Tacker alleges that in order to continue the practice of fixing artificially **[**4]** high prices for funeral goods and services, the defendants conspired to prevent Tacker from engaging in the business of selling caskets directly to the public at a relatively reduced price. The list of defendants can be broken down into two groups: (1) Casket distributors and (2) Corporations providing funeral services ("service providers"), many of whose officers belong to a governing board of funeral directors and embalmers. That board and its directors are also named defendants.

Tacker alleges that defendants were participants in a sort of oligopoly/cartel that engaged in price-fixing and tie-ins to preserve their market power. When Tacker threatened this practice by independently offering caskets to the public at a relative discount, defendants conspired to refuse to deal with Tacker.

In the second amended complaint, Tacker alleges that the refusals to deal were apparently dictated by the defendant corporate service providers and their officers, some of whom served on the Tennessee Board of Funeral Directors and Embalmers ("the Board"). The second amended complaint states that in 1990 and 1991, when plaintiff applied for his license to sell caskets, the Board arbitrarily delayed **[**5]** plaintiff's receipt of a license. After plaintiff finally received the license, a director of the Board indicated that since the Board had failed to prevent Tacker from getting a license, they would make sure that Tacker's business failed.

A pattern emerged. Tacker and a distributor would communicate as to Tacker's purchasing **[*426]** inventory from the distributor. Initially, the distributor would agree to supply Tacker with caskets, but would ultimately withdraw from the arrangement, ostensibly after having been pressured by other distributors and service providers to become part of the conspiracy.

The second amended complaint asserts that all defendants committed wrongs under § 1 of the Sherman Act, under FTC regulations, and under the Tennessee antitrust statutes. There is an additional allegation of common-law assault and battery against one of the individual defendants, Elmer Wilson.

According to defendants, Tacker's complaint, amended complaint, and second amended complaint must be dismissed because of their failures to indicate specifically how the refusals to deal were anything other than a series of unilateral decisions and for the complaint's failure to state claims for which relief **[**6]** can be granted under FTC regulations and Tennessee anti-trust law. In addition, Elmer Wilson argues that the tort allegations against him should not be subject to this Court's supplemental jurisdiction.

(1) The Sherman Act Claim (as it affects Wilson Metal Casket Company, Batesville Casket Company, Memphis Casket Company, Doric of Memphis, and Westpoint Casket Company)

§ 1 of the Sherman Act states, ***HN1***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several states . . . is declared to be illegal." *15 U.S.C. § 1 (Supp. 1993)*. Defendants advocate dismissal of Tacker's claim under § 1 of the Sherman Act because of faulty pleading. ***HN2***[] In order to state a claim under § 1, the plaintiff must usually indicate (1) that the defendants contracted, combined, or conspired, (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets, (3) that the objects of and the conduct pursuant to the conspiracy were illegal, and (4) that the plaintiff was injured as a proximate result of that conspiracy. *Greene County Memorial Park v. Behm Funeral Homes, Inc., 797 F. Supp. 1276, 1284 (W.D. Pa. 1992)*, **[**7]** *aff'd without op., 993 F.2d 876 (1993)*.

Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 (1914) involved a group of lumber dealers engaged in price fixing. As the lumber cartel's prices increased, lumber wholesalers suffered decreased sales and began dealing directly with the public. In response, the retail cartel agreed among themselves not to deal with lumber wholesalers who dealt directly with the public. *Eastern States* was one of the Supreme Court's earlier acknowledgments of a concerted refusal to deal's inherent economic harm. According to the Court, one dealer has the unquestioned right to refuse to deal with another "for reasons sufficient to himself," but:

> ***HN3***[] An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful . . . to the individual against whom the concerted action is directed.

Eastern States, 234 U.S. at 614.

HN4[] In determining the sufficiency of a claim under § 1 of the Sherman Act, a Court must look **[**8]** to the nature of the alleged behavior to decide between how to analyze the allegations--either under a *per se* analysis or by the rule of reason. A naked restraint of trade with no purpose other than to stifle competition is a violation *per se* of § 1 of the Sherman Act. *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805-806 (6th Cir. 1988)*.

For many years, the U.S. Supreme Court consistently held that concerted refusals to deal were violations *per se* of § 1. Business and economic justifications for such conduct were thus deemed irrelevant, and a showing of adverse effect on competition was considered unnecessary.See also, *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-19, 84 L. Ed. 1421, 60 S. Ct. 703 (1940)*; *Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)*; *Northern P. R. Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct.* ***[*427]*** *514 (1958)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; **[**9]** *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)*.

Later, however, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*, the Supreme Court carved out an exception to the long-standing *per se* rule for concerted refusals to deal, deciding that such conspiracies or combinations can potentially increase efficiency in a given market and thus have a purpose other than to be blatant and unreasonable restraints of trade, especially if those acting in concert do not have effective market power. ***HN5***[] The apparent rule now is that concerted refusals to deal are violations *per se* of *§ 1* where there is no plausible argument that the refusal to deal accentuates efficiency and where it is impossible to prove that the conspirators possess market power. Otherwise, the concerted refusal to deal resulted in no anti-competitive effect. *Northwest Wholesale, 472 U.S. at 289-98*.

Defendants **[**10]** in the current action argue that the *§ 1* claim cannot withstand a *Rule 12(b)(6)* motion to dismiss for failure to state a legally-cognizable claim, because plaintiff offers nothing more than conclusory allegations to support the claim. In addition, defendants argue that the claim must fail because it does not allege each essential element of a *§ 1* violation.

Rule 8(a) of the Federal Rule of Civil Procedure states that a complaint is adequate when it contains:

> ***HN6***[] (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . .
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and
> (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8.

HN7[] A complaint need not be overly fact-specific. The function of the complaint is to give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved; however, pleadings filled with nothing but conclusory allegations that do not afford notice to the court or to the opposing parties violate *Rule 8*. *Ames v. North American Reinsurance Corp., 815 F.2d 75 (6th Cir. 1987)*. **[**11]** Such a violation of Rule calls for dismissal of the complaint under *Rule 12(b)(6)* for failure to state a legally-cognizable claim. The claim should not be dismissed, however, unless it appears that beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Windsor v. The Tennessean, 719 F.2d 155 (1983)*, *reh'g denied, 726 F.2d 277* (6th Cir.), *cert. denied, 494 U.S. 826, 83 L. Ed. 2d 50, 105 S. Ct. 105 (1984)*.

Defendants argue that the claim under the Sherman Act is replete with conclusory allegations and should be dismissed for that reason. However, a conspiracy is, by its very nature, cloaked in secrecy. A complaint ought not to be dismissed for plaintiff's failure to state facts that defendants might meticulously have hidden from plaintiff and that only a discovery process might reveal. As the Supreme Court stated in a factually-similar case, ***HN8***[] "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, [and] the proof is largely in the hands of the **[**12]** alleged conspirators. . . ." *Norfolk Monument Co. v. Woodlawn Memorial Gardens, 394 U.S. 700, 704, 22 L. Ed. 2d 658, 89 S. Ct. 1391 (1969)*. Additionally, because Tacker alleges a concerted refusal to deal, he is relieved from pleading with as much specificity as might be necessary under a rule of reason analysis.

In the second amended complaint, Tacker alleges numerous incidents in which casket distributors refused to sell caskets to him, either refusing at the outset or ultimately withdrawing from prior agreements. In paragraph 44 of the amended complaint, Tacker alleges that the manager of one of the distributors informed Tacker outright that one of the service providers "would not allow" that distributor to sell to Tacker. Tacker alleges that all of these distributors supplied caskets to the service providers. In **[*428]** paragraph 47, there is a description of how one salesperson informed plaintiff that he had been told "not to come near" plaintiff's company. Elsewhere in the second amended complaint, Tacker describes incidents of coercion and intimidation among the parties allegedly in concert, threats against plaintiff's livelihood, **[**13]** and habits of price-fixing and tying-in.

This Court agrees with defendants that the complaints contain many pages of surplusage and that the useful allegations in plaintiff's complaints are relatively few. Defendants are also correct that plaintiff's allegations do not employ antitrust terminology or theory that might make for more specific descriptions of the wrongs alleged.

Tacker does allege facts that indicate more than a series of coincidences. Further, he has alleged facts that, if proven, could indicate defendants' market power in concert and their conspiracy's anti-competitive results of artificially increased prices and squeezing out independent competition. The nature of any effective conspiracy is an important reason that the § 1 claim survives these motions to dismiss. Tacker cannot be expected, pre-discovery, to allege facts that have allegedly been painstakingly and systematically withheld from him.

Tacker's complaint is not so conclusory as to deprive defendants of notice of the nature and basis of the claim under the Sherman Act. The Court will not dispose of that claim before discovery is had. Wilson Metal Casket Company's, Bastesville Casket Company's, Memphis Casket **[**14]** Company's Doric of Memphis's, and Westpoint Casket Company's Rule 12(b)(6) motions to dismiss plaintiff's claim under 15 U.S.C. § 1 are DENIED.

(2) THE SHERMAN ACT CLAIM (as it affects Henry Spikes, Leon Ridgeway, Thomas Strickland, Robert P. Shackelford, Jr., and Arthur Pickle ("the Board") in their individual capacities and official capacities as directors of the Tennessee Board of Funeral Directors and Embalmers ("the TBFD&E")

Plaintiff alleges in the second amended complaint that the Board, in their individual and official capacities, violated § 1 of the Sherman Act by intentionally delaying plaintiff's licensure to engage in selling caskets retail. In addition, plaintiff alleges that the Board comprises an oligopoly "controlling the entire funeral industry in the Memphis a monopoly (sic), against the interest of the consuming public as well as that of anyone attempting to compete in the area of casket and/or vault sales." Para. 54, Second Amended Complaint.

As a state body, the TBFD&E is immune from antitrust scrutiny for actions that would be unlawful restraints if carried out by private parties. *See* *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. **[**15]** In *Parker,* the Supreme Court decided that ***HN9***[] the framers of the Sherman Act did not intend for antitrust laws to interfere with the market-regulation activities of the states, such as the creation of regulating bodies like the TBFD&E.

This is not to say that the Board is immune from liability for all actions. ***HN10***[] The "state action" doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly. To invoke immunity, which the Board does in its motion to dismiss, the conduct complained of must have occurred pursuant to state compulsion.

Plaintiff alleges that the Board intentionally delayed plaintiff's licensure. One Board member, Leon Ridgeway, is alleged to have threatened to put plaintiff out of business. Plaintiff also cites, as further misconduct by the Board, correspondence to plaintiff from the Board threatening to revoke plaintiff's license if plaintiff did not provide embalming services.

The Board argues that all of the alleged conduct either is shielded by state action immunity or is not legally actionable. This Court agrees. Licensure **[**16]** certainly falls squarely within state action, as does the warning that plaintiff's license would be revoked if plaintiff did not follow licensing policy. Any delay in plaintiff's licensure still falls under the Board's immunity, especially **[*429]** since plaintiff did get the license he sought. Plaintiff alleges no facts in relation to the licensure or in relation to the threat of revocation that, if proven, would divest the Board of its immunity from liability for those acts.

As to the alleged threat made by Leon Ridgeway, plaintiff states no legally-cognizable claim. Even assuming the truth of the allegation for purpose of the motion to dismiss, a unilateral threat cannot stand as the sole basis for a claim under the Sherman Act's requirement that plaintiff prove a conspiracy.

Plaintiff argues that even if the Board members are immune in their official capacities, they could still be individually liable for the conduct alleged. However, that argument works only if plaintiff has stated facts amounting to a legally-cognizable claim. At a minimum, a legally-cognizable claim gives an opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type **[**17]** of litigation involved. *Ames v. North American Reinsurance Corp., 815 F.2d 75 (6th Cir. 1987)*.

Plaintiff argues that each member of the Board is also personally affiliated with various corporate service providers. Because of these affiliations, argues plaintiff, the members of the Board had personal reasons to wield their administrative powers in ways that would coerce other members of the industry into not doing business with plaintiff. Although plaintiff constructs perfectly plausible motives, plaintiff alleges no facts that, if proven, would impose liability individually upon members of the Board. The motion to dismiss filed by the Board in their individual and official capacities is GRANTED.

(3) THE CLAIM UNDER *15 U.S.C. § 45* and FTC REGULATIONS

Plaintiff alleges that defendants' behavior violated *15 U.S.C. § 45* and regulations promulgated pursuant to that statute. Defendants assert that plaintiff fails to state a claim under *15 U.S.C. § 45* because the statute does not provide for private claims. Plaintiff argues that (1) defendants cite nothing **[**18]** but non-binding authority for their argument, and (2) even if this Court agrees that there currently exists no private right to a claim under the statute, this Court should take the opportunity to make a change in the law.

HN11[] The Federal Trade Commission Act ("the FTC Act"), *15 U.S.C. §§ 41, et seq.*, was created for the purpose of creating and lodging administrative functions in a body specially competent to deal with threats and dangers to trade and competition. *See, Hastings Mfg. Co. v. FTC, 153 F.2d 253* (6th Cir.), *cert. denied, 328 U.S. 853, 90 L. Ed. 1626, 66 S. Ct. 1344 (1946)*; *New Jersey Wood Finishing Co. v. Minnesota Mining and Mfg. Co., 332 F.2d 346 (3d Cir. 1964)*, *aff'd, 381 U.S. 311, 14 L. Ed. 2d 405, 85 S. Ct. 1473 (1965)*. *15 U.S.C. § 45* is the enforcement statute declaring unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." *15 U.S.C. § 45(a)(1)*. Courts have traditionally held that the basic purpose of the statute is to protect the public, and that remedial **[**19]** power rests exclusively in the FTC.

Plaintiff is correct that defendants cite other Circuits' law [1] to argue that there exists no private right of action under *15 U.S.C. § 45*; however, the Sixth Circuit has also addressed the issue. *FTC v. Owens-Corning Fiberglas Corp., 853 F.2d 458 (6th Cir. 1988)*, *cert. denied, 489 U.S. 1015, 103 L. Ed. 2d 190, 109 S. Ct. 1128 (1989)*, involved the rights of an intervenor under the FTC Act. In *Owens-Corning,* the intervenor, whose rights of intervention were sharply circumscribed, sought to appeal certain findings of fact made by the District Court. *Id. at 463*. In addressing that situation, the Sixth Circuit stated:

> [The intervenor] may not, as a private party invoke the jurisdiction of the federal courts to enforce the Federal Trade Commission Act. Congress has clearly limited **[*430]** the invocation of jurisdiction under the FTC Act to the Commission itself.

Id. at 464. The *Owens-Corning* Court then adopted language set forth in *Alfred Dunhill, Ltd. v. Interstate Cigar Co., 499 F.2d 232 (2d Cir. 1974)*: **[**20]**

> ***HN12***[] The Federal Trade Commission Act may be enforced only by the Federal Trade Commission. Nowhere does the Act bestow upon either competitors or consumers standing to enforce its provisions.

499 F.2d at 237.

This Court is persuaded by the *Owens-Corning* language and also by several decisions in other circuits. Defendants' motions to dismiss plaintiff's allegations under *§ 45* and regulations **[**21]** promulgated thereunder are hereby GRANTED. Those allegations are hereby DISMISSED.

(4) THE TENNESSEE ANTITRUST ALLEGATIONS

Plaintiff alleges that defendants conduct, described in earlier portions of this order, violated *Tennessee Code Annotated § 47-25-101* which states, in pertinent part:

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[1] *See, Baum v. Great Western Cities, Inc., 703 F.2d 1197 (10th Cir. 1983)*; *Dreisbach v. Murphy, 658 F.2d 720 (9th Cir. 1981)*; *Fulton v. Hecht, 580 F.2d 1243*, *reh'g denied,* ***585 F.2d 520 (5th Cir. 1978)***, *cert. denied,* ***440 U.S. 981, 60 L. Ed. 2d 241, 99 S. Ct. 1789 (1979)***. *Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232 (2d Cir. 1974)*; *Holloway v. Bristol-Myers Corp., 158 U.S. App. D.C. 207, 485 F.2d 986 (D.C. Cir. 1973)*.

> HN13[] All arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any . . . product or article, are declared to be against public policy, unlawful, and void.

TENN. CODE ANN. § 47-25-101 (1988).

§§ 47-25-103 - 106 outline the remedies available for violation of *§ 47-25-101*. Such remedies include criminal penalties, enforcement of which would be the Attorney General's duty, and charter forfeiture, enforcement of which also rests exclusively with the Attorney General. The only provision which vests standing to enforce in private parties is *§ 47-25-106*, which states:

> HN14[] Any person who may be injured or damaged by any such arrangement, contract, agreement, trust, or combination described in this part may sue for and recover, in any court of competent jurisdiction, **[**22]** of any person operating such trust or combination, the full consideration or sum paid by him for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.

TENN. CODE ANN. § 47-25-106 (1988). [2]

Plaintiff has alleged no facts that would indicate that plaintiff transacted business with any of the defendants. As a private party, plaintiff's remedy for a violation of *§ 47-25-101* would be found in *§ 47-25-106*, but plaintiff has stated no claim for which such relief could be granted.

Plaintiff's allegations under *Tennessee Code Annotated § 47-25-101* are hereby DISMISSED for failure to state a claim for which relief can be granted.

II. THE INTENTIONAL TORT CLAIM: WHETHER SUPPLEMENTAL JURISDICTION IS PROPER OVER THE CLAIM AGAINST ELMER WILSON

In the second **[**23]** amended complaint, plaintiff alleges that plaintiff and his wife, on Elmer Wilson's invitation, went to St. Joseph, Tennessee to visit the Wilson Metal Casket Company. Plaintiff and Wilson agreed that plaintiff would buy some caskets from Wilson, and Wilson left the room momentarily. When Wilson came back, he told plaintiff that he had changed his mind and would not be selling any caskets to plaintiff. When plaintiff pressed Wilson for an explanation, Wilson,

> without provocation and without warning . . . struck plaintiff in the right eye and face with his fist knocking plaintiff to the ground. Mr. Wilson then called out for his son by name and said "come get him." At this moment a young man came from a side door and tackled plaintiff knocking him to the ground. The young man and Mr. Wilson then hit plaintiff several times. . . . Mr. Wilson and the young man then took plaintiff and literally threw him out of the door and onto the gravel parking lot. Mr. Wilson then instructed the young man to "get my gun, I'm going to kill them." Mrs. Tacker, by this time, had gotten the car and pulled the automobile **[*431]** up to plaintiff; as he got in the car Mr. Wilson charged the car threatening to **[**24]** bash in the window. Mrs. Tacker accelerated the car and escaped.

Second Amended Complaint, Paragraph 66. Plaintiff seeks to invoke this court's supplemental jurisdiction, conferred by *28 U.S.C. § 1367*, over state-law claims arising from the altercation with Wilson.

28 U.S.C. § 1367 states:

> HN15[] (a) Except as otherwise provided . . . in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to

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[2] "Person", as used in *§ 47-25-106*, refers to both natural and non-natural persons. *Metropolitan Government of Nashville & Davidson County v. Ashland Oil, 535 F. Supp. 328 (M.D. Tenn. 1982)*.

> claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . .
> . . . .
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
> (1) the claim raises a novel or complex issue of state law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there **[**25]** are other compelling reasons for declining jurisdiction.

The policy underlying supplemental jurisdiction is that conduct which forms the basis of a federal claim may also form the basis of a state claim:

> They may be separate claims, or they may merely be different "counts" or "grounds" or "theories"' in support of what is essentially a single claim. Each can be sued on in its own court system, of course, but that creates duplication and waste. . . . The doctrine of pendent permits the plaintiff to bring both claims in the federal court.

28 U.S.C.A. § 1367 *(Practice Commentary,* Supp. 1993).

Almost twenty-five years before the enactment of § 1367, the Supreme Court addressed supplemental or "pendent" jurisdiction in *United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*. ***HN16***[] The Court formulated a two-step analysis to determine whether the exercise of pendent jurisdiction was proper: (1) Did the state claim and the federal claim share a "common nucleus of operative fact"? and, if so, (2) With respect to doctrines of judicial economy, convenience, **[**26]** and fairness, should the power to hear the claim be exercised? *383 U.S. at 725-27*. *§ 1367*'s boundaries are at least coextensive with *Gibb's* broad conferral of jurisdiction. *§ 1367* envelops the "common nucleus of operative fact" test in the requirement that the two claims be "so related . . . that they form part of the same case or controversy under Article III of the United States Constitution."

HN17[] Exercise of supplemental jurisdiction is appropriate when, as is true in the current case, both claims arise out of the same alleged conspiracy, the District Court has exclusive jurisdiction over the federal claim, and the supplemental claim would not predominate over the federal claim. *See United States v. Tazzioli Constr. Co., 796 F. Supp. 1130 (N.D. Ill. 1992)*. It also stands to reason that where a federal court has jurisdiction over plaintiff's Sherman Act claim, it should exercise supplemental jurisdiction over plaintiff's tort claim, when the tort claim is an outgrowth of the alleged conspiracy, and the alleged conspiracy forms the basis of the Sherman Act claim. *See Bazal v. Belford Trucking Co., Inc., 442 F. Supp. 1089 (S.D. Fla. 1977)*. **[**27]** Plaintiff alleges in the Second Amended Complaint that Wilson's tortious behavior was carried out "in furtherance of the plan to prevent plaintiff or scare plaintiff from the business of retail casket sales." Taking as true the allegations of the Second Amended Complaint, plaintiff's tort claim against Wilson is an outgrowth of the Sherman Act conspiracy and is thus sufficiently related to the antitrust claim as to form part of the same case or controversy as the Sherman Act claim, over which this Court has exclusive jurisdiction. *General Invest. Co. v. Lake Shore & M.S.R. Co., 260 U.S. 261, 286-88, 67 L. Ed. 244, 43 S. Ct. 106 (1922)*.

Defendant Elmer Wilson's motion to dismiss the intentional tort claim is DENIED.

[*432] SUMMARY

(1) The motions of Wilson Metal Casket Company, Batesville Casket Company, Memphis Casket Company, Doric of Memphis, and Westpoint Casket Company to dismiss the Sherman Act claim are DENIED.

(2) Defendants Henry Spikes, Leon Ridgeway, Thomas Strickland, Robert P. Shackelford, Jr., and Arthur Pickle are hereby DISMISSED in their individual and official capacities, and the Clerk of Court is directed to restyle **[**28]** the case to reflect the dismissal of Henry Spikes, Leon Ridgeway, Thomas Strickland, Robert P. Shackelford, Jr., and Arthur Pickle, in those defendants' individual and official capacities.

(3) Defendants' motions to dismiss the claim under the FTC Act and regulations promulgated thereunder are GRANTED and the claim is DISMISSED.

(4) Defendants' motions to dismiss the claim under *Tenn. Code Ann. § 47-25-101* is GRANTED and the claim is DISMISSED.

(5) Defendant Elmer Wilson's motion to dismiss the tort claim is DENIED.

IT IS SO ORDERED.

ENTER: This 4th day of August, 1993.

ROBERT M. McRAE

SENIOR UNITED STATES DISTRICT JUDGE

Alvord-Polk, Inc. v. F. Schumacher & Co.

United States Court of Appeals for the Third Circuit

March 17, 1993, Argued ; August 5, 1993, Filed

No. 92-1762

Reporter
1993 U.S. App. LEXIS 20329 *; 1993-2 Trade Cas. (CCH) P70,322

ALVORD-POLK, INC.; AMERICAN BLIND FACTORY, INC.; DELTA PAINT AND WALLPAPER SUPPLY CO., INC.; FAIRMAN WALLPAPER AND PAINT COMPANY; FRANK R. YOCUM, t/a FRANK R. YOCUM & SONS WALLPAPER CO.; HARRY'S WALLPAPER, INC.; LANCASTER CARPET MARKET, INC.; MARVIN KOLSKY, t/a HEADQUARTERS WINDOWS & WALLS; SILVER WALLPAPER & PAINT CO., INC.; YANKEE WALLCOVERINGS, INC., Appellants, v. F. SCHUMACHER & CO.; THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC. Appellees.

Subsequent History: Vacated by Order of the Court September 15, 1993. Certiorari Denied April 17, 1995, Reported at: *1995 U.S. LEXIS 2628*.

Prior History: [*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. (D.C. Civil No. 90-03617).

Core Terms

dealers, retailers, manufacturers, conspiracy, wallcovering, concerted action, apparent authority, complaints, surcharge, conventional, anticompetitive, plaintiffs', antitrust, trade association, summary judgment, competitors, Sherman Act, anti trust law, Decorating, Counts, tends, horizontal, vertical, piracy, drop shipment, consumers, executive committee, cloaked, letters, costs

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Standards of Review, De Novo Review**

The court's review of a grant of summary judgment is plenary; the court evaluates the evidence using the same standard the district court applies in reaching its decision.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

The very essence of a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, is the existence of an agreement. Indeed, *§ 1* liability is predicated upon some form of concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN4[] Antitrust & Trade Law, Sherman Act

The term "concerted action" is often used as shorthand for any form of activity meeting the contract, combination, or conspiracy requirement of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] Per Se Rule & Rule of Reason, Sherman Act

Activity which is alleged to have been in violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, may be subject to a per se standard and engender liability without inquiry into the harm it has actually caused. Alternatively, *§ 1* liability may- be imposed for concerted action which violates the rule of reason standard without proof that it threatened monopolization.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Neither internally coordinated conduct of a corporation and its unincorporated division, nor activity undertaken jointly by a parent corporation and its wholly owned subsidiary, can form the bases of violations under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

An agreement need not be explicit to result in liability under § 1 of the Sherman Act, 15 U.S.C.S. §1, and may instead be inferred from circumstantial evidence. Therefore, direct evidence of concerted action is not required.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN8[] Discovery, Methods of Discovery

A district court may enter summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law determines which facts are material.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN9[] Summary Judgment, Evidentiary Considerations

A party moving for summary judgment need not produce evidence to disprove its opponent's claim, but it does bear the burden of demonstrating the absence of any genuine issues of material fact. When the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by showing that the nonmoving party has failed to produce evidence sufficient to establish the existence of an element essential to its case.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN10[] Summary Judgment, Entitlement as Matter of Law

In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the party opposing summary judgment.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN11[] **Summary Judgment, Burdens of Proof**

When the moving party has pointed to material facts tending to show there is no genuine issue for trial, however, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN12[] **Summary Judgment, Entitlement as Matter of Law**

The traditional summary judgment standard applies with equal force in antitrust cases; however, the meaning ascribed to circumstantial evidence varies depending upon the challenged conduct.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Evidence of conduct that is as consistent with permissible competition as with illegal conspiracy, without more, does not support an inference of conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

HN14[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Plaintiffs in antitrust cases are required to submit evidence tending to exclude the possibility of independent action, i.e., direct or circumstantial evidence that reasonably tends to prove that the alleged conspirators had a conscious commitment to a common scheme designed to achieve an unlawful objective. Conversely, if the alleged conduct is facially anticompetitive and exactly the harm the antitrust laws aim to prevent, no special care need be taken in assigning inferences to circumstantial evidence.

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

HN15[] **Exemptions, Statements by Party Opponents**

Fed. R. Evid. 801(d)(2) provides that statements are not hearsay if they are offered against a party and are statements of which the party has manifested his adoption or belief in its truth.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Dismissal of Appeals > General Overview

HN16[] Appellate Jurisdiction, Final Judgment Rule

If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN17[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form. The actions of a group of competitors taken in one name present the same potential evils as do the actions of a group of competitors who have not created a formal organization within which to operate.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN18[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Where individual actors take actions as a group, they are a combination for the purposes of those actions. Where no group action is taken, no such combination can exist.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN19[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Concerted action does not exist every time a trade association member speaks or acts. Instead, in assessing whether a trade association, or any other group of competitors, has taken concerted action, a court must examine all the facts and circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, among members of the association.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN20[] **Intentional Interference, Elements**

To establish a claim of tortious interference with existing contracts, plaintiffs must prove that the defendants intentionally and improperly interfered with their performance of contracts with third persons. To prove their claims of tortious interference with prospective contractual relations, plaintiffs likewise must prove, inter alia, the existence of prospective contracts. A prospective contract is something less than a contractual right, something more than a mere hope; it exists if there is a reasonable probability that a contract will arise from the parties' current dealings.

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Richard D. Lageson, Esquire (ARGUED), Gino F. Battisti, Esquire, Suelthaus & Kaplan, P.C. 7733 Forsyth Boulevard, 12th Floor, St. Louis, MO 63105, Attorneys for Appellee The National Decorating Products Association, Inc..

Judges: BEFORE: STAPLETON, ROTH and LEWIS, Circuit Judges.

Opinion by: LEWIS

Opinion

OPINION OF THE COURT

LEWIS, *Circuit Judge*.

[*2] For over a decade, retailers who market wallpaper by providing sample books and showroom displays have feuded with dealers who sell at a discount through toll-free "1-800" telephone numbers. In this case, ten 800-number dealers have accused the retailers' trade association and one of the leading wallpaper manufacturers of violating antitrust laws in an attempt to force them out of business. The district court granted summary judgment to the defendants on these and certain state-law claims. We will affirm.

I.

HN1[] Our review of a grant of summary judgment is plenary; we evaluate the evidence using the same standard the district court was to have applied in reaching its decision. *Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992)*; *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1530 (3d Cir. 1990)*; *Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1093 (3d Cir. 1988)*. Plaintiffs have alleged three theories of antitrust liability under the Sherman Act, *15 U.S.C. § 1* (the "Act"). A brief review of the Act and **[*3]** its purposes informs our determination of the standard to be applied on summary judgment.

A.

HN2[] *Section 1* of the Sherman Act provides:

> 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[.]

15 U.S.C. § 1. **HN3**[] The very essence of a section 1 claim, of course, is the existence of an agreement. Indeed, section 1 liability is predicated upon some form of concerted action. [1] Fisher v. Berkeley, 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-69, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984); United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919); Big Apple BMW, 974 F.2d at 1364. *See also* Weiss v. York Hospital, 745 F.2d 786, 812 (3d Cir. 1984) (section 1 claim requires proof of three elements, the first of which is "a contract, combination or conspiracy"); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 110 (3d Cir. 1980) **[*4]** ("unilateral action, no matter what its motivation, cannot violate [section] 1"). A "'unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement[,]'" must exist to trigger section 1 liability. Copperweld, 467 U.S. at 771, *quoting* American Tobacco Co. v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946). *See also* Fisher, 475 U.S. at 267; Sweeney, 637 F.2d at 111.

The requirement is an important one, for it emphasizes the distinction between section 1 liability, which is imposed for concerted action in restraint of trade, and liability imposed under section 2 of the Sherman Act for monopolization. *See* Copperweld, 467 U.S. at 767. **[*5]** **HN5**[] Activity which is alleged to have been in violation of section 1 may be subject to a *per se* standard and engender liability without inquiry into the harm it has actually caused. *See* Copperweld, 467 U.S. at 768. *See generally* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988). Alternatively, section 1 liability might be imposed for concerted action which violates the "rule of reason" standard without proof that it threatened monopolization. Copperweld, 467 U.S. at 768.

Congress treated concerted action more strictly than unilateral behavior because,

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources **[*6]** may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Id. at 768-69. For this reason, when we examine an alleged violation of section 1 of the Sherman Act, we look for an agreement that "brings together economic power that was previously pursuing divergent goals." Id. at 769. A lack of such divergent goals precludes officers of a single company from conspiring. **HN6**[] Neither internally coordinated conduct of a corporation and its unincorporated division, nor activity undertaken jointly by a parent corporation and its wholly owned subsidiary, can form the bases of section 1 violations. Id. at 769-71.

HN7[] An agreement need not be explicit to result in section 1 liability, Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59-60, 55 L. Ed. 619, 31 S. Ct. 502 (1911), *quoted in* Copperweld, 467 U.S. at 785 (Stevens, J., dissenting), and may instead be inferred from circumstantial evidence. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41, 98 L. Ed. 273, 74 S. Ct. 257 (1954); **[*7]** *Sweeney*, 673 F.2d at 111; Milgram v. Loew's, Inc., 192 F.2d 579, 583 (3d Cir. 1951). Therefore, direct evidence of concerted action is not required.

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HN4[] The term "concerted action" is often used as shorthand for any form of activity meeting the section 1 "contract, combination or conspiracy" requirement. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 445-46 (3d Cir. 1977).

In this case, the parties contest the propriety of summary judgment on the issue of concerted action in each of three different alleged fact patterns. Before addressing each fact pattern, we turn to a review of the summary judgment standard applicable to antitrust cases.

B.

HN8[] A district court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

HN9[] A party moving for summary judgment need not produce evidence to disprove its opponent's claim, *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*, but it does bear the burden of demonstrating the absence of any genuine **[*8]** issues of material fact. *Big Apple BMW, 974 F.2d at 1362*. As in this case, when the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by showing that the nonmoving party has failed to produce evidence sufficient to establish the existence of an element essential to its case. *Celotex, 477 U.S. at 322*.

HN10[] In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the party opposing summary judgment. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. ***HN11***[] When the moving party has pointed to material facts tending to show there is no genuine issue for trial, however, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita, 475 U.S. at 586-87*.

HN12[] This traditional summary judgment standard applies with equal force in antitrust cases, *Eastman Kodak Co. v. Image Technical Services, Inc., 119 L. Ed. 2d 265, 285, 112 S. Ct. 2072 (1992)*; **[*9]** *Big Apple BMW, 974 F.2d at 1362-63*; however, the meaning we ascribe to circumstantial evidence will vary depending upon the challenged conduct.

For example, ***HN13***[] evidence of conduct which is "as consistent with permissible competition as with illegal conspiracy," without more, does not support an inference of conspiracy. *Matsushita, 475 U.S. at 597 n.21*, *citing* *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763-64, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *Big Apple BMW, 974 F.2d at 1363*. *See generally Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 186-87 (3d Cir. 1992)*. This is because mistaken inferences in such a context "are especially costly[;] they chill the very conduct the antitrust laws are designed to protect." *Matsushita, 475 U.S. at 594*; *Monsanto, 465 U.S. at 763-64*. In such cases, the Supreme Court has ***HN14***[] required plaintiffs to submit "evidence tending to exclude the possibility" of independent action, i.e., "direct or circumstantial evidence that reasonably tends to prove that **[*10]** [the alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto, 465 U.S. at 764*, *quoting* *Sweeney, 637 F.2d at 111*.

Conversely, if the alleged conduct is "facially anticompetitive and exactly the harm the antitrust laws aim to prevent," no special care need be taken in assigning inferences to circumstantial evidence. *Eastman Kodak, 119 L. Ed. 2d at 291*; *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335, 1339 (3d Cir. 1987)* (*Monsanto* and *Matsushita* do not apply when challenged action is overtly anticompetitive); *Tunis Brothers Co., Inc. v. Ford Motor Co., Inc., 823 F.2d 49, 50 (3d Cir. 1987)* (implying that *Matsushita* requires evidence tending to exclude the possibility of independent action only when the challenged conduct is as consistent with permissible competition as with illegal conspiracy). *See also In re Coordinated Pretrial Proceedings in* *Petroleum Products Antitrust Litigation,* 906 F.2d 432, 438-39 (9th Cir. 1990) **[*11]** ("the key to proper interpretation of *Matsushita* lies in the danger of permitting inferences from certain types of ambiguous evidence"). [2]

II.

With these standards in mind, we will review the evidence, granting reasonable inferences to the plaintiffs. [3]

[*12] Persons interested in decorating or redecorating their homes or offices typically view samples of wallpaper before purchasing. Recognizing this, retailers traditionally have made available to consumers the wallpaper sample books they purchase from manufacturers. They have also provided consumers with information through the use of promotional materials and showroom displays. The purchase of sample books, establishment of a showroom and hiring of knowledgeable sales personnel are costly endeavors and, as one might expect, these costs are reflected in higher prices to consumers. Manufacturers have encouraged retailers to incur these costs, however, because of a prevailing notion that their products sell better when marketed thus.

In recent years, a new breed of retailer has emerged. Some companies now accept orders from consumers all over the United States who call toll-free telephone numbers to order wallpaper after having availed themselves of the sample books, displays and assistance offered by conventional retailers. Today, purchasers may visit a conventional retailer's showroom, peruse the sample books, note the brands and product numbers of the patterns they like, and then go **[*13]** home and order wallpaper at a discount from an 800-number dealer. This informed decision has, of course, been funded in part by retailers who will realize no return on their investment. The 800-number dealer will arrange a "drop shipment" directly from the manufacturer to the purchasers' homes. [4]

Both conventional retailers and 800-number dealers are members of the National Decorating Products Association (the "NDPA"), a trade association comprised of independent retailers who sell a **[*14]** variety of decorating products. The NDPA has about 3,300 members who operate approximately 8,500 retail locations. Its policy is established and its business conducted by an 18-member board of directors. It sponsors a number of trade shows and educational programs for its members each year. It also publishes a monthly industry news journal titled *Decorating Retailer*, and it formerly published a similar newsletter called *Wallcovering Industry News*.

A.

In the late 1970's and early 1980's, conventional retailers in the NDPA threatened to cease purchasing products from manufacturers who continued to do business with the 800-number dealers, whom they referred to as "pirates." The NDPA itself actively campaigned against 800-number dealers by lobbying manufacturers to recognize the advantages of conventional retailing and by encouraging them to "level the playing field" between 800-number dealers and conventional retailers.

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Similarly, the analyses set forth in *Monsanto* and *Matsushita* do not apply when a plaintiff has offered direct evidence of concerted action. Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335, 1338 (3d Cir. 1987). *See also In re Coordinated Pretrial Proceedings in* Petroleum Products Antitrust Litigation, 906 F.2d 432, 441 (9th Cir. 1990).

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Our review does not include consideration of evidence which was the subject of the three pending motions to supplement the record. Nor will we consider citations to evidence in F. Schumacher & Co.'s brief which was not of record before the district court.

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In the nomenclature of the marketplace, these 800-number dealers are "free-riders," who reduce or eliminate service to create price competition but who benefit from services such as wallpaper sample books, salesperson advice and showroom displays paid for and provided by other, full-service retailers. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977); Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1376-77 (3d Cir. 1992).

For example, Robert Petit, NDPA's executive vice president and chief executive officer, spoke to manufacturers, including Michael Landau, president of F. Schumacher & Co. ("FSC") on this subject. Appendix ("App.") at 190-97, 202. In February, 1983, Petit sent **[*15]** a letter on NDPA letterhead urging retailers to request from manufacturers sample books that did not reveal retail prices. Depriving consumers of this information, Petit argued, would make it more difficult for them to avail themselves of an 800-number dealer's discount. App. at 523. The NDPA also marketed a "sales piracy kit" for conventional retailers to use in disguising or concealing pattern numbers and price information on sample books so that consumers could not so easily acquire the information and then order elsewhere. App. at 271-73, 407.

In 1985, the Federal Trade Commission ("FTC") issued a complaint against NDPA because of these activities. In 1986, the parties entered into a consent decree which provided in part:

> NDPA . . . shall cease and desist from:
>
> A. Conduct having the purpose or effect of:

* * *

> Expressly or impliedly advocating, suggesting, advising, or recommending that any of NDPA's . . . members refuse to deal with any seller of wallcoverings on account of, or that any of NDPA's . . . members engage in any other act to affect, or to attempt to affect, the prices, terms or conditions of sale, or distribution methods or choice of customers of any **[*16]** seller of wallcoverings.

App. at 412. The consent decree also provided:

> IT IS FURTHER ORDERED that this Order shall not be construed to prevent NDPA . . . from publishing written materials or sponsoring seminars, or otherwise providing information or its members' views on topics including but not limited to cost accounting principles, and suggested prices and product identification numbers in wallcovering sample books to other sellers of wallcoverings, provided, however, that the information or views are not presented in a manner constituting a violation of any provision contained in Part II of this Order.

Id. [5]

[*17] In the aftermath of this settlement, as required by the consent decree, NDPA circulated a summary of the consent order in which it informed members that NDPA, as a group of competitors, was "already considered to be an 'agreement.'" App. at 430. The NDPA guidelines for conducting meetings, drafted shortly before entry of the consent decree, also acknowledge that "a trade association is, by definition, a combination of competitors." App. at 740. The guidelines further provide that before a chapter officer delivers a speech or makes a presentation at a meeting, he or she should state that the views expressed are his or her own and not those of the NDPA or any chapter. App. at 743.

Since the entry of the consent decree, NDPA has informed its members that it may no longer assist them in urging manufacturers to act against 800-number dealers. One poll showed that some members have resigned because the NDPA is "not doing anything in regard to the sales piracy issue." App. at 200. Petit, however, has continued to impart to manufacturers, including Landau, his view of the advantages of conventional retailing over other methods of marketing wallcovering, such as 800-number sales. App. at 198.

[*18] B.

The sentiment against 800-number dealers continued to escalate even after the consent decree was entered. *Decorating Retailer* published several letters from NDPA members, including some retailers who were former or current NDPA officers, urging action against the 800-number dealers. Its editor, John Rogers, often solicited

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> We may, of course, consider evidence of activity necessitating the entry of the consent decree, as well as the terms of the consent decree itself, as part of the overall picture, or potential evidence of a pattern of conduct. *See* Big Apple BMW, 974 F.2d at 1361; *cf.* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962).

comment for the letters column by sending a variety of articles from a forthcoming issue to a number of people in the industry. In each issue of *Decorating Retailer*, a standard statement appeared in the letters column apprising the reader that: "The editor reserves the right to edit to fit space limitations or publishing policies. Opinions expressed are those of the writer and not necessarily those of the editor." *E.g.*, app. at 496.

Decorating Retailer and *Wallcovering Industry News* also printed several news articles about 800-number dealers, most of which used the term "pirates" among other characterizations to describe them. In May, 1988, one editorial -- a *Perspective* column in *Decorating Retailer* -- stated that "there are increasing signs that the retailer's voice crying in the wallcovering wilderness is being heard," and cited **[*19]** many developments in the industry, such as "a sudden advent of bar coding kits for retailer protection of sample book pattern numbers," as signs that wallpaper suppliers were responding to retailers' needs. App. at 758.

C.

Undoubtedly, FSC, a leading manufacturer which had always promoted the traditional method of marketing wallcoverings, heard the complaints. In July, 1988, it announced a drop shipment surcharge on wallcovering deliveries directly to consumers, to take effect in September, 1988. App. at 298-99. Under this new policy, FSC would impose a 7 percent surcharge on every order requesting drop shipment. Obviously, this would have the effect of increasing the 800-number dealers' costs while decreasing their ability to compete on the basis of price with conventional retailers.

The minutes from FSC's management committee meeting in April, 1988, state that it considered the policy to be a signal to conventional retailers that FSC was trying to help them. App. at 290. A draft press release, later revised, identified the protection of dealers from piracy as one reason for the surcharge. *Compare* app. at 298-99 *with* app. at 1364-65. Minutes from September, 1989, reveal that **[*20]** the management committee viewed the drop shipment surcharge as "a good first step" against 800-number dealers. App. at 304.

Beyond merely responding to dealer complaints, FSC also claimed that the surcharge was, in part, intended to recoup increased costs of drop shipments. It did not, however, employ any particular formula or calculations to arrive at its surcharge figure or to determine its basis for recoupment. Nor did it consult any source regarding or otherwise study such costs, although the record contains statements by another manufacturer indicating that his costs for drop shipments were no higher than for shipments to stores. App. at 148-49, 622.

Predictably, retailers responded favorably to the imposition of the surcharge. For example, in September, 1988, a *Decorating Retailer* editor's note responding to a letter about 800-number dealers' advertisements stated that "there are signs that telling your troubles to suppliers eventually will be heard and some remedy may result." App. at 485.

Yet the retailers were not entirely satisfied. In January, 1989, at a convention in Halifax, Nova Scotia, Petit revisited the issue of 800-number dealers and the problems they posed for **[*21]** the industry. An August, 1989 memo shows that Petit spoke to at least one manufacturer about "the anger felt by the retailers in lack of support from the wallcovering industry." App. at 185-86. During this period, NDPA officer Clyde Morgan also expressed "concern about the 800-number and the effect it was having on me" at a meeting of industry leaders. App. at 183.

The fall 1989 planning session at FSC also reflected continuing concerns about 800-number dealers. In September, 1989, soon after an NDPA meeting, Landau stated at a management committee meeting that the surcharge was a good first step but that other measures were necessary. App. at 304. An October, 1989 memo asked whether "we [should] make another anti-pirate move? If so, what?" App. at 793. In November, 1989, Landau reported to the management committee what he had learned at an NDPA trade show: "retailers squeezed by mass market & 800 #'s." App. at 307. The minutes from that committee's meeting also include the following entry: "800 #s: Meeting with attorneys next week to formulate new strategy." App. at 309.

D.

In January, 1990, FSC announced a local trading policy to be implemented in March, 1990. App. at 694-97. FSC **[*22]** dealers would be prohibited from selling FSC products outside of their "local trading area," thus effectively prohibiting 800-number dealers from selling FSC's products nationwide through their toll-free telephone numbers. Immediately after this policy was announced, Petit circulated a copy of it to the NDPA board of directors, saying, "This is a major step forward in our battle against the 800-number operators." App. at 693. He also sent a letter to Landau on NDPA letterhead stating, "On behalf of the members of our decorating products associations, I want to express our appreciation of your actions." App. at 700.

Five FSC executives testified that the purpose of the local trading area policy was to ensure that FSC dealers would realize a return on their investments in sample books and other FSC overhead. App. at 1215, 1218-19, 1222-23, 1238-40, 1249-50, 1340-43, 1520-22, 1550-52. FSC's vice president of sales testified that if FSC had not taken action against the 800-number dealers, it "would continue to have resistance to purchasing sample books with the piracy issue." App. at 691. Indeed, there were several references in planning meetings to safeguarding against free riders and **[*23]** supporting conventional retailers.

Shortly thereafter, according to *Decorating Retailer* and *Wallcovering Industry News* articles, NDPA president John Wells spoke at a trade show in Anaheim, California. The articles describe Wells as urging that "insisting on supplier support rather than coding books is the answer to piracy problems besetting wallcovering retailers." App. at 440. At the same show Petit, according to one of the articles, applauded manufacturers' efforts to fight 800-number dealers. *Id*. In accordance with NDPA guidelines, Wells specifically stated that his views were his own as an independent retailer, but the articles refer both to him and to Petit in their NDPA capacities. [6]

[*24] In May, 1990, Rogers wrote a *Perspective* column in which he discussed the retailers' opposition to 800-number dealers, reviewed some of the methods retailers had adopted to guard against 800-number dealers' taking their business, and stated, "ultimately, the answer for the individual dealer is that given by Wells: 'I will support those who support me.'" App. at 167. Rogers testified that while the *Perspective* column does not represent the policy of the NDPA, to his knowledge there has not been an occasion when a comment published in it has contravened NDPA's policies.

Both before and after it instituted the policies in question, FSC received letters from retailers urging it to take action against the 800-number dealers. Meanwhile, during this period the FTC repeatedly responded to inquiries from plaintiffs with the assurance that, in its view, NDPA was in compliance with the consent decree entered into in 1986.

E.

Anti-800 number dealer sentiment was not confined to retailers' ranks; manufacturers were also discussing 800-number dealers among themselves. Between 1988 and 1990, wallpaper manufacturers discussed 800-number dealers at meetings of the Wallcovering Manufacturers **[*25]** Association ("WMA"), an organization in which Landau served as a member of the board of directors.

In April, 1988, for example, Landau reported to the FSC management committee that there had been "extensive discussion pirate situation" at the WMA meeting in Hilton Head. App. at 292. Manufacturers also discussed bar-coding, in the context of either "pirate-proofing" sample books or standardizing labels and shipping containers. FSC discussed with other manufacturers steps they were taking to combat 800-number dealers, such as engaging in cooperative advertising, imposing state sales taxes and imposing local trading policies.

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FSC and NDPA argue that these articles constitute inadmissible hearsay. Plaintiffs respond that the articles are admissible as statements of NDPA, having been published in its own publications. *See* ***HN15***[] *Fed. R. Evid. 801(d)(2)* (statements are not hearsay if they are offered against a party and are statements of which the party has "manifested his adoption or belief in its truth"). We agree: an employee of NDPA had to have written these articles, which were adopted by NDPA when it published them in *Decorating Retailer* and *Wallcovering Industry News*. Wells' statements as reflected in the articles are, therefore, admissible.

800-number dealers were also discussed at conventions sponsored by a chain of wallcovering stores called Wallpaper-To-Go. App. at 313, 315. FSC officials and other wallcovering manufacturers deny that they agreed with other manufacturers to take action against the 800-number dealers, however. *See* FSC's brief at 42.

Other manufacturers reacted against the 800-number dealers in much the same fashion as FSC did. In April 1988, the owner of one company wrote an open letter to manufacturers about 800-number dealers. In it, he suggested that a task force be formed **[*26]** to establish an "effective, standard and universal method of 'pirate-proofing' sample books." App. at 884. At least one manufacturer took a step in that direction and coded its sample books so that style and price information could not easily be discerned. App. at 139-41. Another imposed a local trading policy, app. at 130-38, 151, and another tried, but discontinued, a cooperative advertising program with conventional retailers. App. at 127-28. By August, 1989, two more manufacturers had imposed a drop shipment surcharge. App. at 160, 789.

III.

In May, 1990, plaintiffs filed suit against NDPA and FSC. Their amended complaint, filed in January, 1991, contained twelve counts, the first four of which provide the central focus for this appeal. In Count I, they alleged that "the individual retail wallcovering dealers, acting through the NDPA" violated *section 1* of the Sherman Act by entering into a horizontal conspiracy to eliminate the competition posed by 800-number dealers. In Count II, the plaintiffs alleged that in response to the pressure exerted by the NDPA, FSC joined NDPA in a vertical conspiracy similarly designed to thwart competition. In Counts III and IV, the plaintiffs alleged **[*27]** that FSC entered into a conspiracy with other, unnamed, wallcovering manufacturers aimed at eliminating 800-number dealers. Specifically, plaintiffs challenged FSC's imposition of the drop shipment surcharge and its adoption of a local trading policy as being directed at them. [7]

Plaintiffs also alleged a claim under section 2(d) of the Clayton Act, *15 U.S.C. § 13(d)*; state-law antitrust and restraint of trade violations; tortious interference with contracts and prospective contractual relations; fraud and misrepresentation; defamation and commercial disparagement and breach of contract. In turn, FSC asserted various counterclaims **[*28]** against the 800-number dealers.

The district court granted defendants' motions for summary judgment on Counts I through IV and granted both plaintiffs and defendants summary judgment on various other claims and counterclaims. Thereafter, the parties settled those claims which had not been disposed of, and plaintiffs filed this appeal challenging the district court's decision on Counts I through IV, the state-law antitrust claims, the tortious interference claim and the defamation claim against NDPA.

The district court had jurisdiction over this case pursuant to *28 U.S.C. § 1331*, and we exercise jurisdiction pursuant to *28 U.S.C. § 1291*. [8] In our analysis of each of the plaintiffs' Sherman Act claims, which allege three distinct

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Their amended complaint indicates that plaintiffs originally were concerned about two additional FSC policies: FSC's failure to discuss cooperative advertising possibilities with 800-number dealers though it did so with conventional retailers, and FSC's charging state sales tax on drop shipments. These policies, however, are not subjects of this appeal.

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NDPA and FSC argue that we lack jurisdiction over this appeal because the district court failed to enter a judgment on a separate document in accordance with *Rule 58 of the Federal Rules of Civil Procedure* and had not yet awarded costs in accordance with *Rule 54(d) of the Federal Rules of Civil Procedure*.

antitrust theories of liability, we proceed from the premise that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962).

[*29] IV.

At Count I, in which plaintiffs named only NDPA as a defendant, they alleged that conventional retailers, acting through the NDPA, conspired to pressure manufacturers to eliminate them from the marketplace. The district court examined the record for evidence of "officially sanctioned NDPA activity," found none, and ruled that plaintiffs could not meet the "concerted action" requirement because "the NDPA can only act pursuant to a resolution from its board and no such resolution has been identified." App. at 37. We will affirm, although on different grounds. Erie Telecommunications, 853 F.2d at 1089 n.10; Johnson v. Orr, 776 F.2d 75, 83 n.7 (3d Cir. 1985) (an appellate court may affirm a result reached by the district court for any reason in the record supporting the judgment).

It is both uncontested and uncontestable that NDPA is an association of competing wallpaper dealers. As such, when NDPA takes action it has engaged in concerted action so as to trigger potential section 1 liability. Weiss, 745 F.2d at 816 (hospital executive committee's actions are concerted action within the meaning **[*30]** on section 1). "***HN17***[] Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form." Weiss, 745 F.2d at 815. The actions of a group of competitors taken in one name present the same potential evils as do the actions of a group of competitors who have not created a formal organization within which to operate. *See* id. at 816 ("where such associations exist, their actions are subject to scrutiny under section 1 . . . in order to insure that their members do not abuse otherwise legitimate organizations to secure an unfair advantage over their competitors"). *See also* Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963); Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945).

We agree with NDPA's contention, however, that NDPA can only be held liable for concerted action if it acted as an entity. *See* Nanavati v. Burdette Tomlin Memorial Hospital, 857 F.2d 96, 117-18 (3d Cir. 1988) (*Weiss* holds that when a group of competitors "acts as a body, it constitutes a 'combination'"). In *Nanavati* **[*31]** , we held that although the actions of a hospital executive committee might constitute concerted action, the committee does not engage in concerted action when it does not "act[] as an entity in furtherance of the conspiracy." Id. at 119. As we explained there:

> Our conclusion in *Weiss* was premised on the concept that ***HN18***[] where individual actors take actions as a group, they are a combination for the purposes of those actions. Where no group action is taken, no such combination can exist. In short, we did not hold in *Weiss* that because the actions of the medical staff constitute the actions of a combination, even where there is no allegation that the staff acted as a group, the 'contract, combination or conspiracy' requirement has been met. Such a group is a combination as a matter of law only for the actions it takes as a group.

In Bankers Trust Co. v. Mallis, 435 U.S. 381, 55 L. Ed. 2d 357, 98 S. Ct. 1117 (1978) (per curiam), however, the Supreme Court recognized that the rules of civil procedure requiring entry of judgment on a separate document should be interpreted in a common-sense fashion. "***HN16***[] If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal." Mallis, 435 U.S. at 385-86. *See also* International Brotherhood of Teamsters v. Western Pennsylvania Motor Carriers Assoc., 660 F.2d 76, 80 (3d Cir. 1981). The district court's failure to enter judgment in accordance with the dictates of Rule 58 appears to stem from oversight. No other plausible suggestion has been advanced. Thus, we reject this jurisdictional argument.

As to costs, we note that the parties' stipulation of settlement, which disposed of those counts as to which the district court had not granted summary judgment and which was entered as an order by the district court, provided that each party was to bear its own costs, thus implicitly if not actually resolving any Rule 54(d) issue.

Id.

In *Nanavati*, the plaintiff did not maintain that the executive committee took any action as a group. *Id*. Instead, he pointed to the actions of medical staff members who were not on the executive committee as the basis for his claim. He argued that the record contained evidence of a boycott against him **[*32]** by members of the medical staff, so the jury had not erred in finding that the executive committee had participated in the boycott. Our search for evidence that members of the executive committee had acted in furtherance of the boycott yielded none; thus, we affirmed the district court's grant of judgment n.o.v. to the executive committee.

Nanavati teaches that ***HN19***[] concerted action does not exist every time a trade association member speaks or acts. Instead, in assessing whether a trade association (or any other group of competitors) has taken concerted action, a court must examine all the facts and circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, [9] among members of the association. *See generally* *Nanavati, 857 F.2d at 119-20*.

[*33] Judicial scrutiny of alleged concerted action, undertaken to determine whether it was the result of an agreement, is an intricate endeavor. In the straightforward case, such as when a stock exchange requires disconnection of a nonmember's private telephone wire, or a hospital executive committee votes to deny staff privileges to a member, the action is obviously a result of an agreement which is stamped with the imprimatur of the association by a vote or passage of a resolution. *See*, *e.g.*, *Silver, 373 U.S. at 347*; *Weiss, 745 F.2d at 816*. We can hardly say, however, that this case falls within that genre.

Here, plaintiffs rely on *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*, to argue that NDPA took concerted action when its officers spoke out in protest against the 800-number dealers' business methods and when NDPA publications included letters complaining about 800-number dealers. In *Hydrolevel*, the Supreme Court, relying on general principles of agency law, determined that the American Society of Mechanical Engineers ("ASME") could be **[*34]** held liable for the actions of its officers and agents taken with apparent authority. Writing for the majority, Justice Blackmun held that imposing liability based upon apparent authority comported with the intent of the antitrust laws because ASME possessed great power and the codes and standards it issued influenced policies and affected entities' abilities to do business. *Hydrolevel, 456 U.S. at 570*. "When it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id. at 570-71*. Imposing antitrust liability on the association for the actions of its agents would encourage ASME to police its ranks and prevent the use of associations by one or more competitors to injure another. *See generally* *id. at 571-73*. *See also* M. Boudin, *Antitrust Doctrine and the Sway of Metaphor*, *75 Geo. L. J. 395, 417-18 (1986)*. [10]

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It would be incorrect to require an official board resolution, or other officially sanctioned activity, to impose liability on NDPA. Recognizing that perpetrators of antitrust violations are often sophisticated businessmen, courts regularly permit agreements to be shown by circumstantial evidence. *See* *Big Apple BMW, 974 F.2d at 1364*; *Theatre Enterprises, Inc. v. Paramount Distributing Corp., 346 U.S. 537, 540-41, 98 L. Ed. 273, 74 S. Ct. 257 (1954)*.

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Judge Boudin notes that the Supreme Court in *Hydrolevel* viewed ASME as an "extra-governmental agency" regulating its own industry. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*. *See* M. Boudin, *Antitrust Doctrine and the Sway of Metaphor*, *75 Geo. L. J. 395, 417 (1986)*. Indeed, *Hydrolevel* and many other trade association cases have focused on this role and on associations' standard-setting or industry-regulating activities. *See e.g.* *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*; *Moore v. Boating Industry Assoc., 819 F.2d 693 (7th Cir. 1987)*. *See generally* ABA Antitrust Section, ***Antitrust Law*** *Developments* 86-91 (3d ed. 1992). Notably, the case before us does not involve standard-setting or industry-regulating activity on NDPA's part.

[*35] In deciding *Hydrolevel*, the Court rejected ASME's argument that it should not be held liable unless its agents had acted with an intent to benefit it. This argument was irrelevant, the Court held, in part because "whether they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them." *Hydrolevel, 456 U.S. at 574*. The Court viewed the imposition of liability regardless of the agents' intent as more consistent with the purposes of ***antitrust law***, since this would encourage ASME to police its agents so as to prevent the anticompetitive effects of their using its name and power even in individual efforts at restraining trade. *Id*.

The issue presented here, however, is markedly different. In *Hydrolevel*, the plaintiff had named three defendants in its conspiracy claim. Although it is difficult to discern the exact contours of the alleged conspiracy from the *Hydrolevel* opinion, it is quite clear that the plaintiff there was not seeking to hold ASME liable for concerted action solely on the basis of actions taken by one official with apparent authority. The conspiracy **[*36]** alleged apparently was between the chairman of an ASME standards committee and the plaintiff's primary competitor; the question before the Court was whether ASME could be held liable for its agent's anticompetitive activity in participating in the conspiracy even though no one else at ASME had authorized the violation. Because a conspiracy was alleged to have taken place between the ASME official and another conspirator, the Court did not address the question of whether two or more members of ASME were utilizing that organization as a vehicle for concerted anticompetitive activity.

We believe that the *Hydrolevel* rule that an association's economic power may justify its being held liable for the actions of its agents cannot be extended to defeat the "concerted action" requirement of *section 1*. Imposing liability on an association, as we did in *Weiss*, does not abolish or diminish the first element of *section 1* liability; it merely recognizes that a group of competitors with a unity of purpose are engaged in concerted action, whether or not they act under one name. As we explained in *Nanavati*, in the absence of a co-conspirator, an association's actions satisfy the concerted **[*37]** action requirement only when taken in a group capacity. For this reason, even actions taken by a person with apparent authority to act on behalf of an association should not result in *section 1* liability in the absence of a co-conspirator, unless the actions in question represent an attempt by the association, rather than the actor, to restrain trade. Thus, we cannot agree that *Hydrolevel* requires imposition of *section 1* liability upon NDPA, in the absence of a co-conspirator, without some indication that two or more members of NDPA were utilizing it as a vehicle for concerted anticompetitive action.

Having narrowed our inquiry to whether the actions taken and statements made by NDPA officials were proscribed by *Weiss* and *Nanavati*, we agree with the district court's determination that the evidence was insufficient to proceed beyond summary judgment. On the record before us, to adopt the suggestion that NDPA's members either agreed that it should threaten manufacturers with a boycott unless they took steps to injure the 800-number dealers, or believed that NDPA was doing so on their behalf and acquiesced in its effort, would require an exercise in conjecture. *Cf*. *Moore v. Boating Industry Assoc., 754 F.2d 698, 711 (7th Cir. 1985)*, **[*38]** *vacated on other grounds 474 U.S. 895 (1985)*, *on remand* *819 F.2d 693 (7th Cir. 1987)* (combination of threat of denial of certification to members using a certain product, made by association officer acting with apparent authority, plus "subsequent action on the part of the Association members in refusing to purchase" the product constituted concerted action).

For example, plaintiffs point to evidence of conversations about 800-number dealers which Petit had with a number of wallcovering manufacturers as indicating that NDPA acted to injure them. *See* app. at 185, 190-98, 201-07, 212-29, 407, 416-19, 693-99, 700. Neither complaints by dealers nor complaints on behalf of many dealers communicated by the president of their trade association constitute antitrust violations, however. Absent indications that Petit, while representing the NDPA, coerced (or attempted to coerce) manufacturers into cooperating in eliminating 800-number dealers, Petit's conversations, even if undertaken while representing the NDPA, show nothing more than the legitimate voicing of complaints to manufacturers. Nothing in either the antitrust laws **[*39]** or the FTC consent decree prohibits the NDPA from voicing complaints.

Plaintiffs also point to the statements regarding 800-number dealers which Wells, Petit and Morgan made at NDPA conventions as evidencing NDPA's campaign against them. *See* app. at 167, 182-84, 440. It is undisputed, however, that NDPA officials were instructed, and their general practice was, to preface their remarks with the explicit disclaimer that they were speaking in their individual rather than official capacities. Indeed, Wells and Morgan specifically testified that they had done so. *See* app. at 183-84, 2245-46. In the face of such uncontradicted evidence, it would be unreasonable for a jury to infer that these officials were speaking as representatives of NDPA. Moreover, even if it were reasonable to infer that they were speaking in their official capacities, the statements constituted nothing more than further complaints about 800-number dealers and a suggestion that retailers should support the manufacturers who supported them in their sales efforts. Nothing in the record before us indicates that dealers cooperated in this effort by doing so, or that they refused to support those manufacturers **[*40]** who did not support them.

Finally, plaintiffs refer to letters from NDPA members and editorials and articles about 800-number dealers which were published in *Decorating Retailer* and *Wallcovering Industry News*. *See* app. at 468, 479, 485, 490-92, 495, 756-59, 784, 837-38. Letters revealing members' views, and articles and editorials expressing frustration and anger with the 800-number dealers, however, do not evidence an agreement among the members of NDPA who read these publications to pressure manufacturers into treating 800-number dealers less favorably than traditional retailers.

In sum, while an occasional letter or article may imply a call for action from fellow retailers, and while NDPA officers were hardly reticent in voicing members' complaints about 800-numbers dealers, even considering all of the evidence in context, there is insufficient evidence to support a reasonable inference that NDPA members agreed to act through the NDPA to pressure manufacturers to take steps against 800-number dealers.

For these reasons, we will affirm the district court's grant of summary judgment at Count I.

V.

At Count II, plaintiffs alleged that FSC responded to pressure from the **[*41]** NDPA by conspiring with it to eliminate 800-number wallpaper dealers from the marketplace. Their allegations flow directly from evidence of conventional retailers complaining to FSC and other manufacturers about plaintiffs' "free-riding." This type of evidence is as consistent with procompetitive activity as with allegedly illegal activity. *Monsanto, 465 U.S. at 763*. In *Monsanto*, a case which also involved an alleged conspiracy to terminate a dealership relationship because of other dealers' complaints, the Supreme Court noted:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct. Complaints about price cutters 'are natural -- and from the manufacturer's perspective, unavoidable -- reactions by distributors to the activities of their rivals.' Such complaints . . . 'arise in the normal course of business and do not indicate illegal concerted action.' . . . Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, **[*42]** manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.

Monsanto, 465 U.S. at 763-64. Thus, we exercise a measure of caution when drawing inferences from such facts; "a fine line demarcates concerted action that violates ***antitrust law*** from legitimate business practices." *Big Apple BMW, 974 F.2d at 1363*, *citing* *Monsanto, 465 U.S. at 762-64*. [11]

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> Citing *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*, the dissent contends that the teachings of *Monsanto* do not apply to a so-called "hybrid case," in which joint coercive action by dealers allegedly results in a manufacturer's acting to injure other dealers. *See* *Business Electronics, 485 U.S. at 730 n.4*. Such a case (of which the one before us is an example) combines elements of horizontal and vertical conspiracies; this may affect the decision of whether a *per se* or a rule of reason standard will apply when judging liability, *cf.* *Pennsylvania Dental Assoc. v. Medical Service Assoc. of Pennsylvania, 745 F.2d 248, 259 (3d Cir. 1984)*, but it does not necessarily

[*43] In *Big Apple BMW*, plaintiffs alleged that BMW of North America, Inc. ("BMW") had refused to grant automobile dealerships to them because other dealers had complained about plaintiffs' high-volume, deep-discount business methods. BMW asserted a variety of legitimate business reasons for its actions, including a concern about plaintiffs being "free-rider" dealers. Plaintiffs, however, presented evidence that they would not have posed the "free-rider" problem BMW feared, *see* *Big Apple BMW, 974 F.2d at 1377*, and that a person with the same advertising tactics as theirs (high-volume, deep-discount "sellathons") had been granted a BMW franchise. *Id. at 1378*. They also presented evidence tending to discredit the other reasons BMW proffered to support its refusal to grant them a franchise. *Id. at 1377-80*.

We reversed the district court's grant of summary judgment because plaintiffs had advanced evidence tending to exclude the possibility of BMW's having acted independently from the complaining dealers. They had "countered each alleged reason with evidence that both discredits BMW NA's witnesses **[*44]** and provides independent support for the [plaintiffs'] claim that BMW NA and its dealers acted in concert to repel" plaintiffs' competition. *Id. at 1380*.

Similarly, in *Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564 (3d Cir. 1986)*, we reversed a grant of summary judgment because defendant General Motors Corporation ("GMC") first favorably viewed plaintiff's franchise application, then heard its dealers' disapproval and threatened non-cooperation, and then denied the application. GMC had not expressed concern about the plaintiff's franchise application until it heard its dealers' complaints. We held that "we must infer that [the dealers'] conduct contributed to GMC's decision not to award [the plaintiff] the Buick franchise." *Arnold Pontiac, 786 F.2d at 573*.

In marked contrast to *Big Apple BMW* and *Arnold Pontiac*, here it is conceded that the 800-number dealers are free riders. It is also undisputed that FSC has for years sold sample books and promotional materials and has encouraged its dealers to invest in these and other overhead costs in order to provide better service **[*45]** to their customers. Plaintiffs cannot, and do not, argue that FSC imposed the two policies at issue for any reason other than it simply believed its products were best sold through conventional retailers rather than 800-number dealers. Thus, unlike the scenarios in *Big Apple BMW* and *Arnold Pontiac*, there was no abrupt turnaround in this case. FSC had for years recognized the importance of selling service; indeed, part of its business is selling sample books and promotional materials to provide that service. When it became convinced that the conventional retailers who provided such services were being adversely affected by the 800-number dealers, its actions were entirely consistent with its previously held view of its own self-interest.

Big Apple BMW, in fact, bears little resemblance to this case. In that case, plaintiffs applied for a dealership at three locations. They produced evidence that BMW had encouraged them to apply; that as to each location, competing dealers complained to BMW about anticipated price-cutting, and that BMW abruptly reversed its position on the plaintiffs' applications. Plaintiffs' evidence further revealed that a BMW vice president informed **[*46]** the holder of one of the franchises plaintiffs sought that the plaintiffs' application would fail because they were price cutters. An agent of BMW admitted that "it was the dealers who did not want [plaintiffs] to get the [Philadelphia] franchise, it wasn't BMW who rejected them." *Big Apple BMW, 974 F.2d at 1372*.

Plaintiffs also presented evidence that the reasons given by BMW for denying the franchises, while purporting to be justifications from BMW's point of view, were pretexts, thus permitting an inference that self-interest did not motivate its actions. In 1981, for example, BMW said the plaintiffs were not accepted as franchisees because they had tried to bribe a BMW employee. We took note of and were impressed with the fact that, despite this alleged bribery, in 1982 BMW urged the plaintiffs to reapply. *Id. at 1368*. The concern expressed about the alleged bribe apparently did not surface until BMW needed a reason to refuse plaintiffs' application. *Id. at 1369*.

Despite any indication to the contrary which might result from a broad reading of these decisions, Supreme Court authority makes **[*47]** clear that antitrust liability cannot result from the fact that termination came about in

follow that the *Monsanto* teachings do not apply. We believe that the Court's footnote in *Business Electronics* merely states that a restraint is termed horizontal or vertical based upon the type of agreement reached, rather than its effects.

response to dealer complaints. *Monsanto, 465 U.S. at 763*. *Monsanto* teaches that the ultimate inquiry is not whether retailers' complaints caused FSC to respond with its drop shipment surcharge and local trading area policy, but whether FSC agreed, tacitly or otherwise, with retailers to try to injure 800-number dealers as a result of NDPA's coercion.

Plaintiffs emphasize a number of items in attempting to support their claim at Count II. Each of these, however, tends to demonstrate no more than that FSC adopted and implemented its drop shipment surcharge and local trading policy in response to its retailers' complaints. Such activity does not violate *section 1*. *See Monsanto, 465 U.S. at 763* ("permitting an agreement to be inferred . . . from the fact that termination came about 'in response to' complaints could deter or penalize perfectly legitimate conduct"); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801, 805 (4th Cir. 1989)*.

For example, plaintiffs place **[*48]** great stock in FSC's management committee minutes, which indicate that FSC was attempting through its new policies to tell retailers that it was trying to help them. The minutes also reveal that Landau learned at an NDPA meeting that FSC's drop shipment surcharge was a "good first step," but it had to take further steps to help its traditional retailers. *See* app. at 290, 304. These statements reflect no more than a recognition by FSC that its retailers were being injured by the 800-number dealers and an attempt to respond to their concerns in that regard, actions which are entirely legitimate in the aftermath of *Monsanto*.

Plaintiffs also focus on letters which many retailers sent to manufacturers, including FSC, urging that they "do something" about 800-number dealers. *See* app. at 517, 519, 521-22, 526, 545, 550-75. These letters similarly reveal nothing more than that retailers complained to FSC. They do not tend to show that FSC went beyond responding to the complaints and actually agreed with retailers to attempt to eliminate the competition posed by the 800-number dealers.

To support an inference that FSC crossed the line between proper and improper action, plaintiffs **[*49]** highlight two examples of what they claim to be FSC's assertion of pretextual reasons for its actions. (If FSC had, in fact, advanced reasons for its actions which were pretextual, this would tend to support an inference that it had indeed acted as part of a conspiracy with conventional retailers. *See Big Apple BMW, 974 F.2d at 1374-80*.)

First, plaintiffs point to evidence in FSC's management committee minutes which contrast the "objective" of its drop shipment surcharge ("To make statement to industry that we are trying to help them") with the "rationale" for this surcharge ("To protect legitimate customers, to increase margins in this area"). App. at 290. They also point to a parallel distinction between FSC's original and published press releases announcing the surcharge. The original press release stated:

> In direct response to retailer requests, we at F. Schumacher & Company are proud to announce that we will assertively support our dealers in their local trading areas and protect them from sales piracy by adding a seven percent surcharge onto all drop shipments . . . While bar coding is a breakthrough for the industry in terms of product identification **[*50]** we feel that it alone is not an entirely effective deterrent against sales piracy . . . . Our approach attacks the problem at its root and makes the accounts who drop ship feel the effects, rather than leaving the responsibility of policing to the retailers.

App. at 298-99. The final press release stated that the policy was not designed to combat "piracy" but rather to

> help insure that our consumers receive the best possible service and that our wallcovering brands are supported in the most effective and appropriate manner at retail . . . This policy seeks to encourage all dealers to concentrate their selling efforts exclusively within their own trading areas where they can provide service directly to the consumers to whom they sell the product.

App. at 486.

Plaintiffs argue that these inconsistencies in and contrasts between the internal and the public explanations of the drop shipment policy reveal that FSC was attempting to disguise the true reason for its actions. We disagree; even granting plaintiffs reasonable inferences, the two statements and the two press releases instead seem in harmony with FSC's explanation, which it has consistently maintained, that it took **[*51]** the action it did to protect the investments made by traditional retailers. That FSC felt a need to use more genteel language when explaining to the public what it could internally refer to as efforts to combat "piracy" does not imply a sinister motive. FSC is permitted to respond to dealer complaints, and it did just that.

Second, plaintiffs argue that although FSC acknowledges that dealer complaints were part of the reason for its surcharge, at one time it also stated that the surcharge was intended in part to recoup increased costs associated with drop shipments. FSC did not, however, use mathematical calculations to arrive at its surcharge figure; it neither consulted anyone regarding nor studied such costs, and the record contains statements by another manufacturer indicating that his costs for drop shipments were no higher than for shipments to stores. This, plaintiffs argue, underscores the arbitrariness of the surcharge and evinces FSC's true, sinister motive.

A lack of market research, while perhaps adding luster to plaintiffs' contention that the surcharge was arbitrarily determined, does not necessarily invite an inference that FSC's statement was an attempt to conceal **[*52]** a conspiracy. It is true that the seven percent figure did not reflect an analysis of FSC's costs; however, this does not indicate that FSC was not pursuing its self interests in imposing it. The record affirmatively indicates that the seven percent figure was arrived at as one which would provide sufficient incentive for traditional retailers to continue to invest in service -- a reason entirely consistent with FSC's explanation for its actions and rendering unreasonable any inference of sinister motive. *See* app. at 149-50; *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1014 (2d Cir. 1989)* (mere fact that a business reason advanced to explain actions is undermined does not alone justify inferring that the actions resulted from a conspiracy). Plaintiffs' attempt to portray as disingenuous FSC's assertion of an economic basis in support of its decision to implement the surcharge is unavailing.

Plaintiffs note a further piece of evidence which they claim tends to support their theory of liability at Count II: the memorandum Petit circulated among the NDPA board of directors after FSC imposed its local trading area **[*53]** policy in January, 1990. In it, Petit stated: "Enclosed is a copy of FSC's new marketing and advertising policy. This is a major step forward in our battle against the 800 number operators. Enumerated point 12 in effect means that FSC will no longer be selling [to] the 'sales pirate.'" App. at 693.

Subsequent ratification of a manufacturer's actions may sometimes tend to indicate that an agreement existed between the ratifier and the manufacturer, but nothing in this memorandum does so. Instead, at most, the memorandum reveals that Petit recognized that FSC's new policy would be beneficial to traditional retailers and wanted to share both the policy and that information with the board.

While separate enumeration and discussion of the evidence upon which plaintiffs rely in support of Count II has been necessary to make clear what we believe its significance to be, we have also considered the evidence as a whole in accordance with *Continental Ore*. We nonetheless conclude, however, that the plaintiffs have simply failed to present evidence tending to exclude the possibility of independent action, as they must to survive summary judgment under *Monsanto*. They have not countered **[*54]** FSC's alleged reasons for its actions with evidence that both discredits the reasons and provides independent support for their conspiracy claim. *See* *Big Apple BMW, 974 F.2d at 1380*. Accordingly, we will affirm the district court's grant of summary judgment at Count II.

VI.

At Counts III and IV, plaintiffs allege that FSC conspired with other wallcovering manufacturers to injure the 800-number dealers. We will affirm the district court's grant of summary judgment as to these counts because plaintiffs' evidence tends to show only an opportunity to conspire, not an agreement to do so.

Certainly, direct evidence (or a direct inference) of an agreement between FSC and other manufacturers regarding 800-number dealers could enable plaintiffs to show concerted action. The evidence of an agreement, however, amounts to nothing more than communications on the 800-number subject. Communications alone, although more suspicious among competitors than between a manufacturer and its distributors, do not necessarily result in liability. *Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 894 (3d Cir. 1981)*. As we have observed, it is **[*55]** only when those communications rise to the level of an agreement, tacit or otherwise, that they become an antitrust violation.

Thus, plaintiffs are left to argue that FSC and other manufacturers conspired based upon their parallel conduct. "Proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but . . . such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian v. United States, 561 F.2d 434, 446 (3d Cir. 1977)*. The circumstances necessary to support such an inference are: (a) a showing that the defendants acted contrary to their own economic interests; and (b) satisfactory demonstration of a motivation to enter an agreement. *Id*., *citing* *Venzie Corp. v. United States Mineral Products Co., Inc., 521 F.2d 1309, 1314 (3d Cir. 1975)*. *See also* *Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co., Inc., 1993 U.S. App. LEXIS 17424* (3d Cir. July 13, 1993); *Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 208 (3d Cir. 1980)*. **[*56]**

In particular, when evidence shows communications which provided an opportunity for agreement, a plaintiff must still produce evidence permitting an inference that an agreement in fact existed. *Venzie, 521 F.2d at 1313*. The evidence must give rise to more than speculation. *Id*.

In *Venzie*, for example, plaintiffs contended that two defendant corporations had agreed to refuse to sell fireproofing material to them. The record contained evidence that defendants had made numerous telephone calls, at least one of which concerned the plaintiffs, to each other and had met for lunch. We held that it was for the jury to assess the credibility of the defendants' assertions that they had not discussed or agreed upon the alleged refusal to deal, but, even disregarding statements to that effect, all that plaintiff's evidence proved was an opportunity for an agreement, which would not suffice to support a verdict. Plaintiff had failed to highlight evidence supporting an inference that an agreement in fact existed and thus could not support a verdict. *Venzie, 521 F.2d at 1312*. *See also* *Tose, 648 F.2d at 895*. **[*57]**

In contrast, a particularly detailed memorandum of a telephone call can give rise to a reasonable inference of agreement. In *Apex Oil Co. v. DiMauro, 822 F.2d 246, 254 (2d Cir 1987)*, for example, the plaintiff survived a summary judgment motion by advancing evidence in the form of detailed memoranda indicating the existence of an agreement.

In this case, it is conceded that manufacturers discussed 800-number dealers, and actions they were taking concerning them, at conventions. The evidence of communications thus falls somewhere between *Venzie*, in which there were no notations of the subject matter of the conversations, and *Apex Oil*, in which the notations implied an agreement. Plaintiffs, however, seek to infer an agreement from those communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place. Without more, they cannot do so. *Cf*. *Tose, 648 F.2d at 894* (mere disbelief of contrary testimony does not prove agreement).

We emphasize that unlike actions such as price-cutting, which provide the classic **[*58]** example of conscious parallelism, FSC's action was in its economic interests. It is simple syllogistic reasoning that if FSC was aware that most of its dealers were conventional retailers, and believed that its products sold better in the conventional setting, it would conclude that it was in its economic interests to keep the conventional retailers satisfied. That FSC may have foregone some short-term opportunity for sales to 800-number dealers does not suffice to show it acted contrary to its self-interests when it indisputably believed it was acting to benefit itself economically in the long term. *Tose, 648 F.2d at 895*; *see* P. Areeda, ***Antitrust Law*** § 1415e (1986). FSC's listening to retailers' complaints in no way implies that there was an agreement among manufacturers to do the same. *See* *Venzie, 521 F.2d at 1314* ("the absence of action contrary to one's economic interest renders consciously parallel business behavior 'meaningless, and in no way indicates agreement,'" *quoting* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 681 (1962)); **[*59]** *see also* *Houser v. Fox Theatres Management Corp, 845 F.2d 1225, 1232-33 (3d Cir. 1988)* (requiring both actions contrary to economic interests and motive to conspire).

VII.

Remaining for disposition are the plaintiffs' state-law antitrust and tort claims. Although no federal claims remain at this juncture, considerations of judicial economy and fairness militate in favor of our retaining jurisdiction over and deciding the merits of these state-law claims. *Graf v. Elgin, Joliet and Eastern Ry. Co., 790 F.2d 1341, 1347-48 (7th Cir. 1986)*; *Ingram Corp. v. J. Ray McDermott & Co., Inc., 698 F.2d 1295, 1317-20 (5th Cir. 1983)*. *See generally* *Enercomp, Inc. v. McCorhill Publishing, Inc., 873 F.2d 536, 545-46 (2d Cir. 1989)*. We will affirm the district court's disposition of these claims.

A.

In Count VI, plaintiffs alleged that the defendants violated Pennsylvania ***antitrust law*** by engaging in the activity alleged as the basis of Counts I through IV. This allegation rises or falls with plaintiffs' federal antitrust claims. *See* *Collins v. Main Line Board of Realtors, 452 Pa. 342, 304 A.2d 493 (Pa. 1973)*; **[*60]** *Schwartz v. Laundry and Linen Supply Drivers' Union, 339 Pa. 353, 14 A.2d 438 (Pa. Super. 1940)*; plaintiffs' brief at 45; FSC's brief at 47-48. Therefore, our decision with respect to Counts I through IV disposes of Count VI as well.

B.

In Count VII, plaintiffs alleged that FSC and NDPA tortiously interfered with their existing and prospective contracts. Like Count VI, Count VII rises or falls with plaintiffs' antitrust claims. *See* *Big Apple BMW, 974 F.2d at 1381-82* ("factual underpinnings of these tort claims are intertwined with the antitrust claims"; antitrust violations or other actions in restraint of trade are examples of improper conduct). Moreover, plaintiffs have failed to demonstrate that they would be able to present evidence tending to prove each element of their tortious interference claims at trial.

HN20[] To establish a claim of tortious interference with existing contracts, plaintiffs must prove that the defendants intentionally and improperly interfered with their performance of contracts with third persons. *Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1388 (3d Cir. 1991)*; *Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175, 1183 (Pa. 1978)*. **[*61]** To prove their claims of tortious interference with prospective contractual relations, plaintiffs likewise must prove, *inter alia*, the existence of prospective contracts. *Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 471 (Pa. 1979)*. A prospective contract "is something less than a contractual right, something more than a mere hope[]" *id.*; it exists if there is a reasonable probability that a contract will arise from the parties' current dealings. *Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895, 898-99 (Pa. 1971)*.

Plaintiffs have failed to identify with sufficient precision contracts and prospective contracts which were interfered with by the defendants. They have likewise failed to identify an existing contract which was terminated because of the defendants' actions. Nor have they demonstrated a reasonable probability that they would have entered into prospective contracts with third parties but for defendants' alleged interference. *See* *General Sound Telephone Co., Inc. v. AT&T Communications, Inc., 654 F. Supp. 1562, 1565-66 (E.D. Pa. 1987)*. In sum, plaintiffs have failed to advance **[*62]** more than speculation to support their claim of tortious interference; therefore, we will affirm the district court as to this count.

C.

Finally, in Count X, plaintiffs alleged that the NDPA defamed them by publishing articles and editorials referring to 800-number dealers as "pirates." Under Pennsylvania law, a statement is defamatory if it "'tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 923 (3d Cir. 1990)*, *quoting* *Birl v. Philadelphia Electric Co., 402 Pa. 297, 167 A.2d 472, 475 (Pa. 1960)*. To prove their claim, plaintiffs must show: (1) the defamatory character of the statements; (2) publication by NDPA; (3) the statements' application to the plaintiffs; (4) an understanding by readers of the statements' defamatory meaning; and (5) an understanding by readers of an intent on the part of NDPA to refer to the plaintiffs. *42 Pa. Cons. Stat. Ann. § 8343(a)* (1982); *U.S. Healthcare, 898 F.2d at 923*. The law does not require **[*63]** that a plaintiff be specifically named in an allegedly defamatory statement, for a statement might be defamatory if, by description or circumstances, it tends to identify the plaintiff as its object. *Redco Corp. v. CBS, Inc., 758 F.2d 970, 972 (3d Cir. 1985)*.

Plaintiffs base their defamation claim upon statements referring to 800-number dealers in general as "pirates." Individual group members may sue based upon statements about a group when the statements were directed toward a "comparatively small class or group all of whose constituent members may be readily identified and the recipients of the [statements] are likely to identify some, if not all, of them as intended objects of the defamation." *Farrell v. Triangle Publications, Inc., 399 Pa. 102, 159 A.2d 734, 736-37 (Pa. 1960)*. But no claim arises from a defamatory remark directed toward a group whose membership is so numerous that no individual member can reasonably be deemed its intended object. *Id. at 736*. Similarly, no claim exists if, for any other reason, a reader could not reasonably conclude that the statements at issue referred to the particular **[*64]** person or persons alleging defamation. *Id. at 737*.

Relying upon record evidence indicating that in 1990 there were only 20 to 25 800-number dealers in the industry (app. at 1123-24), plaintiffs argue that they may base their claim on statements directed at 800-number dealers in general. *Cf*. *Restatement (Second) of Torts § 564A, comment c*. As noted above, however, a group's size is not the sole consideration in determining whether individual members may assert defamation claims based upon statements about the group. A group may be relatively small, but statements which disparage it may not serve as a basis for an individual defamation claim unless a reader could reasonably connect them to the complaining individual.

In *Farrell*, for example, one of 13 township commissioners asserted a defamation claim against a newspaper which had published a story implicating "a number of township commissioners and others" in corrupt activity. *Farrell, 159 A.2d at 736*. The Pennsylvania Supreme Court held that the plaintiff had stated a claim for defamation. In so holding, however, the court concentrated not on the size of the group **[*65]** discussed but on whether readers "knew that the plaintiff was one of the thirteen commissioners." *Id. at 738*. We similarly do not end our inquiry upon being apprised that there were between 20 and 25 800-number dealers in 1990; we examine whether the plaintiffs were "sufficiently identified as [objects of NDPA's statements] to justifiably warrant a conclusion that [their] individual reputation[s have] been substantially injured." *Id. at 736*.

Here, there is nothing in the record other than the number of 800-dealers which could support a conclusion that any of the plaintiffs' individual reputations were injured by NDPA's statements about 800-number dealers in general. Indeed, the individual identities of this group's members are, by the very nature of their business, less meaningful than the telephone numbers they promote to facilitate discount purchases. This group appears amorphous and ill-defined when compared to the well-defined group of township commissioners at issue in *Farrell*. Plaintiffs have not produced evidence tending to prove that they belong to such an easily identifiable, cohesive group that a reader would **[*66]** ascribe statements referring to 800-number dealers in general as "pirates" to any of them individually. Thus, we will affirm the district court's grant of summary judgment on Count X.

VIII.

For the foregoing reasons, we will affirm the district court's grant of summary judgment as to Counts I through IV, VI, VII and X of the plaintiffs' amended complaint.

Concur by: ROTH (In Part)

Dissent by: ROTH (In Part)

Dissent

ROTH, Circuit Judge, concurring in part and dissenting in part:

Because I believe the majority has misapplied the precedent relevant to the antitrust claims involved in the present case and misanalyzed the evidence present in the record, I respectfully dissent from the conclusion that the majority reaches in Parts IV and V with regard to Counts I and II of the complaint. Because I believe that Counts VI and VII are intimately linked with Counts I and II, I also dissent from the conclusion the majority reaches in Part VII A and B. I concur with the majority's conclusions in Parts VI and VII C with regard to the remaining counts.

Initially, I would like to emphasize that this case was disposed of by summary judgment; no trial by a factfinder has been held. A court may grant summary judgment only when **[*67]** the submissions in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

In antitrust cases, to establish a violation of *Section 1* of the Sherman Act, the plaintiff must prove the existence of a "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." *15 U.S.C. § 1*. To survive a defendant's motion for summary judgment in a *Section 1* antitrust case, a plaintiff "must establish that there is a genuine issue of material fact as to whether [the defendant] entered into an illegal conspiracy [or combination] that caused [the plaintiff] to suffer a cognizable injury." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. **[*68]** The plaintiff must introduce evidence that tends to demonstrate "a unity of purpose or a common design and understanding, or a meeting of the minds." *Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1364 (3d Cir. 1992)* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980))*. "Concerted action may be inferred from circumstantial evidence. That evidence should be analyzed as a whole, rather than compartmentalized, to determine whether it supports an inference of concerted action." *Big Apple BMW, 974 F.2d at 1364* (citing *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962))*.

In evaluating a record for purposes of deciding a summary judgment motion, "it is inappropriate for a court to resolve factual disputes and to make credibility determinations. . . . Inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, 974 F.2d at 1363* **[*69]** (citing *Country Floors, Inc. v. A Partnership Composed of Gepner and Ford, 930 F.2d 1056, 1061 (3d Cir. 1991))*.

> To raise a genuine issue of material fact, . . ., the opponent need not match, item for item, each piece of evidence proffered by the movant. In practical terms, if the opponent has exceeded the 'mere scintilla' threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. It thus remains the province of the factfinder to ascertain the believability and weight of the evidence.

Big Apple BMW, 974 F.2d at 1363.

As the majority at least implicitly recognizes, there is evidence present in the record in this case that supports appellants' claims. *See* majority opinion at [typescript at 10-21]. As I will explain, I believe that this evidence, taken as a whole, exceeds a "mere scintilla" threshold. I fear that the majority has crossed the delicate line between the inference drawing proper for summary judgment analysis and the substantive evaluation **[*70]** of evidence that must be left to a jury.

In reviewing the evidence, we must also keep in mind that the NDPA has been campaigning for years against the 800 number dealers. The NDPA was previously prosecuted by the FTC for exactly the activity complained of here, attempting to drive 800 number dealers out of the wallcovering business. *See* app. at 412; majority opinion at [typescript at 12-14]. I find that this history is significant to an evaluation of the evidence present in the record. It is uncontested that the NDPA is both highly sophisticated and possesses significant market power. It is unrealistic to think that such a sophisticated trade association, wary of the antitrust laws, would produce the same kinds of damaging evidence as would a less artful group.

I.

Turning first to Count I, the claim of a horizontal conspiracy between the individual retail wallcovering dealers, acting through the NDPA, I believe that the majority has misapplied relevant precedent to its consideration of an intellectually challenging issue of first impression in this Court. [12] The threshold legal question that must be answered is: Can the actions and statements of an agent of a trade association, **[*71]** if that agent is cloaked with the apparent authority to act on behalf of the association, serve to hold the trade association liable as a "combination" under *section 1* of the Sherman Act. The majority has answered this question in the negative unless a court finds either that a co-conspirator exists or that "the actions in question represent an attempt by the association, rather than the actor, to restrain trade[]" so that *section 1* liability cannot be imposed on the NDPA "absent some indication that two or more members of NDPA were utilizing it as a vehicle for concerted anticompetitive action." Majority opinion at [typescript at 30]. In arriving at this conclusion, however, the majority misconstrues the concept of apparent authority to arrive at a result which is inconsistent both with relevant Supreme Court precedent and with the dictates of logic.

Let me begin by discussing **[*72]** the basics of "apparent authority." The issue of apparent authority arises when there is a question of the existence or of the scope of the agency. If it is clear that the principal itself is acting or that the principal has expressly authorized the action of the agent, the question of "apparent authority" never surfaces. The issue in the present case is whether the officers of the NDPA were authorized to make certain statements on behalf of the association. If these officers had the express authorization of the association, we would not need to determine whether they were speaking with its "apparent authority." We get to this question only when the situation is more clouded.

As a general rule, apparent authority may be created by any conduct, or acquiescence in conduct, by the principal which causes a third person to believe that the principal consents to the actions or statements of the person who is allegedly acting for the principal. *See* *Restatement (Second) of Agency § 27* (1984) ("apparent authority to do an act may be created by written or spoken words or any conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents **[*73]** to have the act done on his behalf by the person purporting to act for him.") *Cf.* *NLRB v. L & J Equipment Co., Inc., 745 F.2d 224, 232-235 (3d Cir. 1984)* (discussing "apparent agency" in considering whether certain actions and statements of in-house organizing committee members during labor union representation election were done as agents of the union).

This issue of the apparent authority of the NDPA officers to speak on behalf of the association is one which I conclude, on the basis of the facts of record which I will discuss later, should go to the jury.

With apparent authority in mind, I will return to plaintiffs' allegations in Count I, the horizontal conspiracy. "In order to establish a violation of *section 1* of the Sherman Act . . ., a plaintiff must establish three elements: (1) a contract, combination, or conspiracy; (2) restraint of trade; and (3) an effect on interstate commerce." *Weiss v. York Hosp., 745 F.2d 786, 812 (3d Cir. 1984)*, *cert. denied*, *470 U.S. 1060, 84 L. Ed. 2d 836, 105 S. Ct. 1777 (1985)*. The issue here is whether the actions of a trade association's agent can create liability on the part of the **[*74]** trade association as a *section 1* "combination." A proper analysis of the requirements for a *section 1* "combination" focuses not upon concepts such as official authorization of action but upon "the economic substance of . . . [an] arrangement." *Weiss, 745 F.2d at 815*. In *Weiss*, this Court found that a hospital's medical staff was a *section 1* combination because "each staff member . . . has an economic interest separate from and in many cases in competition with the interests of the other medical staff members." *Id.* Additionally, the Court found the medical staff similar to the Associated Press and the New York Stock Exchange, "a combination of otherwise competing entities," which the Supreme Court has previously found to be *section 1* combinations. *Id.* (citing *Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)*; *Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945))*.

The NDPA is similarly a combination of otherwise competing entities. A trade association is a group of competitors who unite for a common purpose and is a unit of joint action sufficient to constitute a *section 1* **[*75]** combination

[12] Neither the parties, the majority, nor my own research has uncovered any case that has dealt with the specific issue involved here.

See G.D. Webster, The Law of Associations § 9a.01[1], 9A3-4 (1991) ("There is no question that an association is a 'combination' within the meaning of *Section 1* of the Sherman Act. Although a conspiracy requires more than one person, an association, by its very nature a group, satisfies the requirement of joint action. Thus, any association activity which restrains interstate commerce can be violative of *Section 1* even if no one acts in concert with the association."); Stephanie W. Kanwit, *FTC Enforcement Efforts Involving Trade and Professional Associations*, 46 Antitrust L.J. 640, 640 (1977) ("Because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of *§ 1* of the Sherman Act."). Indeed, NDPA's summary of the FTC consent order notes that anticompetitive activities will violate the "antitrust laws," and explains that "an agreement between one or more competitors is necessary for the law or the consent order to be violated, but remember that: 1 NDPA is a *group* of competitors and is therefore already considered to be an 'agreement.'" App. at 429-40. This statement **[*76]** indicates both that NDPA believed that it was a *section 1* combination with group status and power and that it conveyed that impression to the wallcovering industry.

I conclude that NDPA's status as a *section 1* combination does not change when it acts through its agents cloaked with apparent authority. I believe that this conclusion is compelled by the Supreme Court's opinion in *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 570-71, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*, where the Court held a trade association liable under *section 1* of the Sherman Act for the statements of a subcommittee chairman. The Court stated that "when it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id.* The response at issue was merely an "'unofficial' response authored by a single ASME subcommittee chairman. Yet the force of ASME's reputation is so great that M & M was able to use that one 'unofficial' response to injure seriously the business of a competitor." *Id. at 971*.

As the majority emphasizes, in *Hydrolevel* **[*77]** ASME was found liable as a co-conspirator rather than as a combination. I find this factual distinction with the present case of little relevance. The Supreme Court's analysis in *Hydrolevel* was neither explicitly nor implicitly limited to situations where a trade association was one of many co-conspirators. Instead, it was grounded upon the economic power that a trade association may possess. *See 456 U.S. at 570-71*. The Court reasoned:

> Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus, a rule that imposes liability on the . . . [trade association]--which is best situated to prevent antitrust violations through abuse of its reputation--is most faithful to the congressional intent that the private right of action deter antitrust violations.

Id. at 572-73. Indeed, the Supreme Court has explained that it is the economic power of concerted action that requires *section 1* antitrust scrutiny. "Concerted activity inherently is fraught with anticompetitive **[*78]** risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*; *see also* Terrence C. Sheehy & William J. Hunter, Jr., *Antitrust Principles Applicable to Trade Association Activities*, 362 PLA/Comm 19 (1985) ("[A] trade association may be found liable for treble damages based upon the activities of its members, when they act with the apparent authority of the association. . . . It is not necessary that co-conspirators be named parties."). [13]

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[13] One commentator has argued that the Court's decision in *Hydrolevel* is properly characterized as a metaphor for protecting due process. When a trade association, a group that functions privately to regulate an industry, has power substantially to affect its market, actions of its agents that tend to exclude and harm competitors essentially deprive those competitors of any rights to fair representation in industry regulation. *See* Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, *75 Geo. L.J. 395, 417-18 (1986)* ("The failure of a powerful trade association or other organization to protect competitors should be remedied, by analogy to representation in government, by giving those excluded a right to participate in the group or, in the alternative, a right fairly to be represented by those in charge of the group."). The application of such a due process metaphor to the present case suggests that the actions of NDPA's officers and officials may be aimed at improperly ostracizing and excluding 800 number dealers from decisions that will control the wallcovering industry. Because of this capacity of a trade association to impose exclusionary standards on engaging in a particular business or industry, it is perhaps more critical, when there has been a

[*79] The majority relies upon *Nanavati v. Burdette-Tomlin Memorial Hosp., 857 F.2d 96 (3d Cir. 1988)*, to support its position that the actions of a trade association's agent cloaked with apparent authority can render the trade association liable only if there has been some group decision by members of the association to pursue anticompetitive activity. Such reliance is misplaced. In *Nanavati* there was no allegation of group or concerted action by the hospital's Executive Committee in connection with the allegations of a boycott of the referral of patients to Dr. Nanavati. *See* *857 F.2d at 119*. We held that the Executive Committee could not be considered a combination because it did not act as a body with regard to the boycott. "Instead of group action by the Executive Committee, Nanavati points to the actions and motivations of medical staff members who were not on the Committee." *See id*.

There is no inconsistency between *Nanavati* and a proper application of *Hydrolevel* to the present case. Here, group action on the part of NDPA has been alleged. The "individuals" whose actions are under scrutiny are officials **[*80]** of NDPA who are allegedly cloaked with apparent authority. Just as the actions of ASME's subcommittee chairman could hold that association liable under *section 1* of the Sherman Act, the statements and actions of NDPA's officers and agents can hold it similarly liable. The appropriate analog to the present case in *Nanavati* would have been an allegation that an Executive Committee officer cloaked with apparent authority had engaged in a boycott against the plaintiff. In such a situation, as in the present case, sufficient allegations of "group action" would exist to find a *section 1* combination.

The majority's conclusion that an association could be liable for the actions of its agents cloaked with apparent authority only if "the actions in question represent an attempt by the association, rather than the actor, to restrain trade" would eviscerate the doctrine of apparent authority delineated in *Hydrolevel*. The point of *Hydrolevel* is that actions of an association's agent, cloaked with apparent authority, *are* actions of the association. Indeed, the majority's interpretation is contradicted by the conclusion in *Hydrolevel* that there need be no ratification of the actions **[*81]** of an association's agents for it to be held liable. "[A] ratification rule would have anticompetitive effects, directly contrary to the proposes of the antitrust laws. ASME could avoid liability by ensuring that it remained ignorant of its agent's conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents." *Hydrolevel, 456 U.S. at 573-574*. As long as the association has clothed the agent with apparent authority to act on its behalf, it is liable for the anticompetitive actions taken by that agent. Moreover, acquiescence by the association in one of its officers acting as its spokesman can be a confirmation of apparent authority. *See* *Restatement (Second) of Agency § 27* (1984).

An examination of the evidence present in the record demonstrates that there is sufficient evidence to submit this case to a jury for a determination whether NDPA's agents were cloaked with the apparent authority to act on behalf of the association and whether they engaged in anticompetitive activity. Particularly relevant is the speech given by NDPA president John Wells at a trade show. According to reports of this speech **[*82]** in *Decorating Retailer* and the *Wallcovering Industry News*, this speech was characterized as "Retailer Spokesman Urges Supplier Support," App. at 440, and included statements to solve the "piracy problem" by "urging retailers to say 'No' to some collections and suppliers." App. at 167, 440. Regardless of Wells' insistence that he had stated that he was speaking in his individual rather than official capacity, *see* app. at 183-84, the fact that those who heard him and who reported on what he said characterized his remarks in NDPA's publications as those of the "retailer spokesman" may persuade a jury to find that he was speaking in his official capacity with the acquiescence of the NDPA.

Furthermore, there is evidence of conversations between NDPA Chief Executive Officer Robert Petit and other NDPA officers and wallcovering manufacturers allegedly to urge that the manufacturers take steps to eliminate the 800 number dealers. *See* app. at 185, 190-98, 201-207, 212-229, 407, 416-419, 693-99, 700. One such conversation occurred between Petit and John Fitzgerald, president of Collins and Aikman, parent corporation of manufacturer Kinney Wallcoverings. In a memorandum recording **[*83]** this meeting, Petit stated that he told Fitzgerald of the "anger felt by the retailers in lack of support from the wallcovering industry" and "that the piracy

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showing that attempted regulation by the association may have this propensity to eliminate non-participating competitors, that the court permit a full consideration of those allegations by the finder of fact.

issue seems to have intensified." App. at 185. In response, "Fitzgerald indicated that he recognized the problems the retailer faces and wanted to know what I felt would be the chances of success if they in effect started a new company and actually franchised dealers to handle two or three lines. These lines would be guaranteed not to be available to 800 number operators or to chains." *Id.* Petit added that "I think it's a very important step forward and told them we would like to cooperate where possible. If [Kinney] does something of this nature, it could break the logjam that now exists in regard to piracy." *Id.* Petit admitted that he made similar statements to other manufacturers including FSC. *See* app. at 204. Again, considering the implications of this conversation, in view of Petit's position as CEO of the NDPA, the question of whether Petit was speaking with the authority or the apparent authority of the NDPA should be considered by the jury, and not dismissed by the judge.

Finally, the evidence of other speeches, **[*84]** numerous letters, and editorials in *Decorating Retailer* add to the reservoir of evidence of anticompetitive activity from which a jury could draw. I conclude that on the whole there is sufficient evidence to survive summary judgment because, viewed in a light favorable to plaintiffs, this evidence creates a material issue of fact whether NDPA officials, cloaked with apparent authority to act on behalf of the association, engaged in anticompetitive activity. [14] I would reverse the district court's disposition of Count I and remand for trial.

II.

Turning now to Count II, I conclude that there is enough evidence of a conspiracy between **[*85]** NDPA and FSC to go to a jury in light of my determination in Part I that there is sufficient evidence to go to a jury regarding NDPA's alleged anticompetitive activities. Generally, in order to survive summary judgment on a vertical conspiracy claim, the non-movant must produce evidence which "tends to exclude the possibility that the manufacturer and [involved] distributors were acting independently." *Monsanto, 465 U.S. at 764*. When dealer complaints are introduced as such evidence, "an antitrust plaintiff must be prepared to demonstrate a causal relationship between alleged dealer complaints *and* a distributor's action in order to show that the concerted action in violation of the Sherman Act is distinguishable from 'perfectly legitimate' independent conduct." *Big Apple BMW, 974 F.2d at 1364*. This causal relationship appears to require evidence that supplements dealer complaints. "Complaints by competitors, standing alone, are not sufficient to show a conspiracy." *Monsanto, 465 U.S. at 764*.

The present case, however, does not represent a garden variety vertical conspiracy case. Rather, **[*86]** it involves allegations of a hybrid horizontal/vertical conspiracy where a manufacturer entered the scheme only as a result of substantial dealer coercion to do so. In *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*, the Court appeared to say that vertical restraints forced by a horizontal conspiracy which involves manufacturers coerced by retailers is really a horizontal antitrust violation and should be treated as a horizontal conspiracy. The Court interpreted Judge Bork's antitrust treatise as follows: "[Bork says] that a facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal cartel' agreement among his distributors is in reality a horizontal restraint. That says precisely what we say: that a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." *485 U.S. at 730 n.4* (interpreting Robert Bork, The Antitrust Paradox 288 (1978)). Judge Bork emphasized that such a scheme includes restraints which are "vertical in form only." Bork at 288.

The implication of treating the conspiracy alleged in this **[*87]** case as such a hybrid is that the assumptions underlying *Monsanto*'s requirements for evidence that excludes the possibility of independent manufacturer action apply with much less force. The case contains allegations that the manufacturer's decision process has been tainted by coercion. Indeed, the principles grounding post-*Monsanto* antitrust theory and jurisprudence demonstrate that it is evidence of dealer coercion of a manufacturer or of the pretextual naature of a manufacturer's purported justification for imposing a vertical restraint which tends to show that the vertical restraint violates the antitrust laws.

[14] I also note that, as will be discussed in my analysis of Count II, there is evidence of a conspiracy between the NDPA and FSC. *See infra* at [typescript at 18-20]. This evidence provides a basis for characterizing FSC as a co-conspirator of the NDPA sufficient to survive summary judgment on Count I, even under the majority's analysis of section I combination liability.

See Jean Wegman Burns, *Rethinking the "Agreement" Element in Vertical Antitrust Restraints*, 51 Ohio St. L.J. 1, 31-32 (1990); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135 (1984).

Normally, vertical restraints may enhance interbrand competition and provide consumers with the optimal level of dealer services. *See* Business Electronics, 485 U.S. at 724-25; Easterbrook, 53 Antitrust L.J. at 135. Indeed, **[*88]** elimination of "free riders" may create long-run efficiencies by protecting the viability of dealers who provide the efficient level of services. *See* Business Electronics, 485 U.S. at 725; Burns, 51 Ohio St. L.J. at 12-14. However, a retailers' scheme to coerce manufacturers into imposing vertical restraints is more likely to eliminate competition from discounters who tend to drive the prices of goods down to an efficient equilibrium. For example, in the personal computer market, computers originally were sold only by showroom retailers. Eventually, 800 number discounters entered the market and drove prices substantially down. At present, the market contains both showroom retailers and 800 number discounters. But the price gap between them is much smaller than when 800 number discounters first entered the market. Previously the gap often exceeded $ 1000 per computer. Now, that gap is often as small as $ 100 per computer. The *Monsanto* theory of efficient service level was validated in the personal computer market; but the price of those services dropped to a long-term efficient equilibrium only because of the presence of **[*89]** "free riders" who drove the price of those services down from an inefficiently high level. *See*, *e.g.*, Stewart Alsop, *Bewitched, Bedraggled: PC Industry Dances to Customers' Beat*, InfoWord, July 5, 1993, at 4; Stratford Sherman, *How to Prosper in the Value Decade*, Fortune, November 30, 1992, at 90; Peter Burrows & Stephanie Anderson Forest, *Dell Computer Goes into the Shop*, Business Week, July 12, 1993, at 138. The wisdom that has undergirded our traditional antitrust jurisprudence also carries forward to the present.

> The protection of price competition from conspirational restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations, to put competitors out of business entirely.

United States v. General Motors, 384 U.S. 127, 148, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966).

In the present case, I believe that there is evidence **[*90]** both of dealer coercion and of pretext sufficient to present Count II to a jury. Plaintiffs allege a hybrid horizontal/vertical conspiracy that involves dealer coercion. Petit's activities regarding Fitzgerald, *see* app. at 185-86, and Landau of FSC, *see* app. at 304, 309 indicate that NDPA was pressuring FSC and other manufacturers to adopt measures to restrain 800 number dealers. The *Decorating Retailer*, through both editorials and letters to the editor, was also used as a mechanism to pressure manufacturers. As members of the wallcovering industry who received this publication, FSC and other manufacturers must have known about the strong anti-800 number dealer sentiments that dominated the industry. Moreover, affirmative requests by the trade association of retailers that included implicit threats to boycott uncooperative manufacturers support plaintiffs' claim.

Furthermore, I find that there is evidence of pretext present in the record. First, the two FSC press releases demonstrate that FSC was concerned about eliminating its references to "sales piracy" and its linkage to its drop shipment surcharge. *See* app. at 289-99, 486. The majority explains away the possibility **[*91]** that this evidence demonstrates FSC's complicity in an anticompetitive conspiracy: "That FSC felt a need to use more genteel language when explaining to the public what it could internally refer to as efforts to combat 'piracy' does not imply a sinister motive." Majority opinion at [typescript at 41]. I believe that the proper body to make such determinations about the implications of FSC's "genteel language" is a jury. I find it difficult to believe that no reasonable jury could find that the changes from the draft to the final press release constitute evidence of pretext.

Second, I find that FSC's failure to engage in any economic or mathematical analysis regarding its surcharge provides additional evidence of pretext. Again the majority explains this away: "A lack of market research, while perhaps adding luster to plaintiff's contention that the surcharge was arbitrarily determined, does not necessarily invite an inference that FSC's statement was an attempt to conceal a conspiracy." Maybe so; but I believe it could invite such an inference. Since we must draw all possible inferences in the non-movant's favor, I find that this issue also is capable of resolution only by **[*92]** a jury. I would reverse the district court's disposition of Count II and remand for trial.

In summation, I conclude that counts I and II are inextricably linked. The anticompetitive activity alleged in the present case properly may be characterized as an effort by the NDPA, acting through its officers, to coerce manufacturers such as FSC into adopting restraints upon 800 number wallcovering dealers. In essence, plaintiffs have alleged a "horizontal" conspiracy involving both the NDPA and FSC. Even under the majority's analysis of *section 1* combination liability, the evidence of FSC's complicity in NDPA's campaign against 800 number dealers should prove sufficient for Count 1 to survive summary judgment. Similarly, the majority's conclusion that FSC's actions are as likely to be the result of independent action as of an illicit conspiracy is undercut when one accounts for the evidence that NDPA's officers actively solicited manufacturer restraints upon 800 number dealers. Both Counts I and II should be resolved by a jury.

Lee v. Life Ins. Co. of N. Am.

United States District Court for the District of Rhode Island

August 5, 1993, Decided ; August 5, 1993, Entered

C.A. No. 92-0058 P

Reporter

829 F. Supp. 529 *; 1993 U.S. Dist. LEXIS 11329 **; 1993-2 Trade Cas. (CCH) P70,366

TONY LEE, RAMACHANDRAN PALISSERY, AND RALPH TALARICO, for themselves and all those similarly situated, Plaintiffs, v. THE LIFE INSURANCE COMPANY OF NORTH AMERICA, THE UNIVERSITY OF RHODE ISLAND, MR. EDWARD EDDY, MR. ROBERT CAROTHERS, MR. BLAISE MORRISSEY, THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS BOARD OF GOVERNORS FOR HIGHER EDUCATION, AND ONE OR MORE JOHN DOES, individually, jointly and severally, in both their corporate capacities, and in their personal and official capacities, Defendants.

Core Terms

amended complaint, Plaintiffs', health clinic, coverage, Sherman Act, monopolize, conspiracy, comparable, antitrust, conspired, clinic, relevant market, plans, health insurance, allegations, mandatory, enroll, costs, rule of reason, tying product, market power, tied product, anticompetitive, equal protection claim, sufficient facts, carriers, commerce, products, restraint of trade, tying arrangement

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Motions to Dismiss, Failure to State Claim**

It is not proper to dismiss a complaint under Fed. R. Civ. P. 12(b)(6) unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. In making this determination, a court should accept the well-pleaded complaint as true and indulge every reasonable inference in favor of the plaintiff. This standard of review does not mean, however, that a court must accept every allegation made by the complainant, no matter how conclusory or generalized.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act states 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 declared to be illegal. 15 U.S.C.S. § 1. Said act prohibits only unreasonable restraints of trade.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Regulated Practices, Price Fixing & Restraints of Trade

To determine unreasonable restraint of trade, courts generally evaluate the alleged anticompetitive actions through case-by-case application of the so-called rule of reason test -that is, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

The "rule of reason" limits the Sherman Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications. In this special context, the term "anticompetitive" refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. And, the law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN5[] Per Se Rule & Rule of Reason, Per Se Violations

In limited circumstances, courts will apply a per se standard to antitrust allegations under § 1 of the Sherman Act. The per se approach is appropriate where the challenged conduct is "manifestly anticompetitive" and thus no in-depth analysis of the market effect is necessary. Examples of per se violations include price-fixing schemes and concerted refusals to deal.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Sherman Act, Claims

To state a valid claim under § 1 of the Sherman Act, 15 U.S.C.S. § 1, a plaintiff must allege three elements: (1) the existence of a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade under the per se or rule of reason analysis; and (3) that the restraint affected interstate commerce.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN7[] Regulated Practices, Trade Practices & Unfair Competition

Simply because certain insurance plans are not deemed "comparable" is not enough evidence, standing alone, to suggest significant anticompetitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN8[] Tying Arrangements, Sherman Act Violations

A tying arrangement is an agreement by one party to sell a product only on the condition that the buyer purchases a second product, or at a minimum, that the buyer agrees that it will not purchase the second product from any other seller.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] Price Fixing & Restraints of Trade, Tying Arrangements

Certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable per se.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] Price Fixing & Restraints of Trade, Tying Arrangements

A per se tying violation occurs where: (1) there is a tie of two separate products; (2) the seller has "appreciable" or "sufficient" economic power in the tying product market; and (3) the tie affects a substantial volume of commerce in the tied product market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11[] Price Fixing & Restraints of Trade, Tying Arrangements

The answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items. A tying arrangement must link two distinct markets where there is "sufficient demand" for each product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN12[] Price Fixing & Restraints of Trade, Tying Arrangements

Market power is the power to force a purchaser to do something that he would not do in a competitive market. The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market. Market power may also be shown where a seller offers a unique product that competitors cannot offer -such as a patented product or a special tract of land.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN13[] Antitrust & Trade Law, Sherman Act

Section 2 of the Sherman Act states that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Regulated Practices, Monopolies & Monopolization

The offense of monopoly under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] Regulated Practices, Monopolies & Monopolization

Monopoly power is the power to control market prices or exclude competition. In simple terms, the relevant market is composed of (1) the product market and (2) the geographic area involved. The relevant product market generally consists of products that have reasonable interchangeability for the purposes for which they are produced, taking into consideration price, use and quality. This determination often involves an evaluation of the cross-elasticity of demand between products, or the degree that buyers of one product switch to the other in response to price changes.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN16[] Monopolies & Monopolization, Conspiracy to Monopolize

Courts articulate three elements of a conspiracy to monopolize: (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] Regulated Practices, Monopolies & Monopolization

In certain circumstances a single brand of product or service can constitute the relevant market under the Sherman Act.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN18[] Equal Protection, Nature & Scope of Protection

The *equal protection clause* of *U.S. Const. amend. XIV* declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. This constitutional command is essentially a direction that all persons similarly situated should be treated alike.

Constitutional Law > Equal Protection > General Overview

HN19[] **Constitutional Law, Equal Protection**

To prove an equal protection claim, a plaintiff must demonstrate that a defendant has acted with discriminatory intent or purpose.

Constitutional Law > Equal Protection > General Overview

HN20[] **Constitutional Law, Equal Protection**

Discriminatory purposes implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selects or reaffirms a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Constitutional Law > Equal Protection > General Overview

HN21[] **Defenses, Demurrers & Objections, Motions to Dismiss**

To survive a motion to dismiss, an equal protection claim must outline facts sufficient to convey specific instances of unlawful discrimination. A plaintiff may not prevail simply by asserting an inequity and tacking on the self-serving conclusion that the defendant was motivated by a discriminatory animus.

Constitutional Law > Substantive Due Process > Deprivation of Economic Interests

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

HN22[] **Substantive Due Process, Deprivation of Economic Interests**

The due process clause of *U.S. Const. amend. XIV* provides that no state shall deprive any person of life, liberty, or property, without due process of law.

Constitutional Law > Substantive Due Process > General Overview

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Interpretation

HN23[] **Constitutional Law, Substantive Due Process**

Legislative acts adjusting the burdens and benefits of economic life come to a court with a presumption of constitutionality. The burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Governments > Courts > Authority to Adjudicate

HN24[] **Jurisdiction, Jurisdictional Sources**

In the absence of any federal claims, a federal court lacks original jurisdiction and has the discretion to respectfully decline to exercise supplemental jurisdiction over remaining state claims. *28 U.S.C.S. § 1367(c)(3)*.

Counsel: [1]** For Plaintiffs: Keven A. McKenna, Esq., Pawtucket, RI. Sinclair T. Banks, Esq., W. Kingston, RI.

For Life Insurance Co. of North America, Defendant: Michele A. Theroux, Esq., Charles J. McGovern, Esq., William P. Devereaux, Esq., McGovern, Noel & Benik, Providence, RI. For URI, Eddy, Carothers, Morrissey & Board of Governors, Defendants: Jay S. Goodman, Esq., Mandell, Goodman, DeLuca & Schwartz, Providence, RI.

Judges: Pettine

Opinion by: RAYMOND J. PETTINE

Opinion

[*532] ***MEMORANDUM AND ORDER***

PETTINE, RAYMOND J., Senior U.S. District Judge

This is a class action lawsuit on behalf of current and former students at the University of Rhode Island ("URI" or "the university").[1] **[*533]** Plaintiffs allege a multitude of federal and state claims attacking the university's mandatory health clinic fee and health insurance requirement. Jurisdiction is premised on *28 U.S.C. § 1331* (federal question); *28 U.S.C. § 1337(a)* (antitrust); *28 U.S.C. § 1343(a)* (civil rights); and *28 U.S.C. § 1367(a)* (supplemental).

[2]** Defendants have moved to dismiss this suit under *Fed.R.Civ.P. 12(b)(6)* for failure to state a claim. For the reasons stated below, I grant defendants' motion with respect to all federal claims. In addition, I decline to exercise supplemental jurisdiction over the pendent state claims, and dismiss those claims without prejudice.

I. *Standard of Review*

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[1] No plaintiff class is currently certified. All parties have agreed to a stay of plaintiffs' motion for class certification pending resolution of defendants' motion to dismiss.

HN1[] It is not proper to dismiss a complaint under *Fed.R.Civ.P. 12(b)(6)* unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)* (citing *Conley v. Gibson, 335 U.S. 41, 45-46 (1957))*. In making this determination, a court should accept the well-pleaded complaint as true and indulge every reasonable inference in favor of the plaintiff. *Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990)*. This standard of review "does not mean, however, that a court must (or should) accept every allegation made by the complainant, no matter how conclusory or generalized." *U.S. v. Avx Corp., 962 F.2d 108, 115 (1st Cir. 1992)*.

[3]**

II. *Background*

URI operates a University Health Services ("UHS" or "health clinic") on its Kingston, Rhode Island campus. UHS offers ambulatory services and health education to URI undergraduate and graduate students by walk-in or by appointment. It is open 24 hours per day, seven days per week during the academic year.

URI imposes a mandatory health clinic fee for full-time undergraduate and graduate students. Full-time graduate students may only waive the health clinic fee if they are a member of a health maintenance organization, or a member or dependent of the military. Undergraduate students may only waive the fee if they enroll in fewer than 12 hours per semester. In 1991-92, the health clinic fee was $ 124.00 per semester.

URI also requires full-time students to carry health insurance to supplement the medical coverage provided through UHS. Students may satisfy this requirement in two ways. They may (1) purchase a private health insurance policy offered through URI or (2) demonstrate that they have "comparable coverage" through some other health insurance plan. In 1990-91 and 1991-92, the URI-sponsored policy was available through defendant The Life Insurance Company of **[**4]** North American ("LINA"). The cost of the LINA policy (12 month coverage) was $ 282.00 for 1990-91 and $ 330.00 for 1991-92.

The LINA plan was designed to "dovetail" with medical services provided at UHS. Thus, a student enrolled in the LINA plan would only pay for coverage of health services not provided through the student's mandatory health clinic fee. Additionally, under the LINA plan, insurance coverage was only available if students first sought medical assistance from UHS. If necessary, a student was then referred to an outside health care provider by UHS. If UHS was closed (e.g., during official university holidays and the summer), students were required to notify UHS of any medical actions taken.

Students opting for "comparable" plans in 1990-91 and 1991-92 were required to submit a waiver card to the university by a date certain. Failure to submit the waiver card resulted in automatic enrollment in, and billing for, the LINA plan. If the LINA bill was not paid, URI prohibited future registration of that student. URI warned its students in writing that comparable coverage plans must pay for laboratory tests, x-rays, orthopedic supplies and selected gynecological procedures **[**5]** performed at UHS. URI also cautioned its students that Rhode Island Blue Cross and health maintenance organizations **[*534]** in Rhode Island were not deemed "comparable" plans.

In 1990-91 and 1991-92, approximately 40% of the more than 10,000 URI students acquired health insurance through LINA. The remaining 60% obtained coverage from other carriers. While the university claims that it makes no profit on the insurance requirement, it does collect a $ 10.00 administrative fee for processing each student. In addition, UHS is supported, in part, by the laboratory, x-ray, orthopedics and gynecological fees that are paid by student insurance carriers.

On January 31, 1992, plaintiffs filed the present action. Unfortunately, there is no simple way to summarize plaintiffs' legal theories. They have adopted an everything-but-the-kitchen-sink approach to this case. Plaintiffs' amended complaint is a 45 page single-spaced document crammed full of federal and state claims. On the federal side, there are numerous antitrust allegations, as well as claims under the Equal Protection and *Due Process clauses of the Fourteenth Amendment to the United States Constitution*. On the state side, plaintiffs' claims **[**6]** include Money Had and Received, Breach of Contract, Duress, Undue Influence, Negligent Misrepresentation, Innocent Misrepresentation, Breach of Insurer's Duty to Deal Fairly and in Good Faith, Negligence, Breach of Implied Contract, Breach of Fiduciary Duty and Ultra Vires. Plaintiffs also assert equal protection and due process claims under the Rhode Island Constitution, and claims under Rhode Island antitrust statutes. [2] At its core, this suit seeks to recoup health clinic fees and LINA insurance premiums paid by plaintiff URI students, plus treble damages for antitrust violations.

[7]** III. *Discussion*

A. *Federal Antitrust Claims*

I begin my scrutiny of the amended complaint with the federal antitrust allegations (Counts VII, XVI). Plaintiffs advance three sets of antitrust claims: (1) conspiracy claims under *§ 1* of the Sherman Act; (2) *per se* tying claims under *§ 1* of the Sherman Act; and (3) conspiracy to monopolize claims under *§ 2* of the Sherman Act. Defendants' primary argument in support of their motion to dismiss is that plaintiffs have failed to adequately allege the essential elements of any antitrust violations. [3]

[8]** 1. *Conspiracy Claims Under § 1 of the Sherman Act*

HN2[] *Section 1* of the Sherman Act states 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 declared to be illegal." *15 U.S.C. § 1*. Despite this sweeping language, the U.S. Supreme Court has long recognized that the Act prohibits only *unreasonable* restraints of trade. *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*.

HN3[] To determine unreasonable restraint of trade, courts generally evaluate the alleged anticompetitive actions "through case-by-case **[*535]** application of the so-called rule of reason test -- that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" *Id.* (quoting *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977))*. In the First Circuit's words, ***HN4***[] "the 'rule of reason' limits the Act's literal words by forbidding only those arrangements the **[**9]** anticompetitive consequences of which outweigh their legitimate business justifications . . ." *Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 486 (1st Cir. 1988)*, *cert. denied, 488 U.S. 1007, 102 L. Ed. 2d 780, 109 S. Ct. 789 (1989)*. In this special context, the term "'anticompetitive' . . . refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. And, the law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods." *Id.* (citations omitted).

[2] Plaintiffs' sweeping litigation strategy is not confined to their complaint. Plaintiffs originally filed with this Court a two volume, *357 page single-spaced* Memorandum In Support Of Their Objection To Defendants' 12(b)(6) Motion To Dismiss. This Court then directed plaintiffs to re-submit a memorandum of law not more than 60 double-spaced pages. Plaintiffs only superficially complied with the Court's instructions. While they did file a 60 page abbreviated memorandum, plaintiffs repeatedly cross-reference crucial material in the abbreviated memorandum to voluminous passages contained in the original 357 page brief. In the interests of judicial economy, this Court has overlooked plaintiffs' mishandling of this motion and considered arguments contained in both the original and abbreviated filings.

[3] Defendants also contend that they have antitrust immunity from suit based upon three separate grounds: (1) the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-15*, which provides an antitrust exemption for the "business of insurance"; (2) the so-called "state-action" doctrine, which offers immunity for actions taken by state government and certain private actors; and (3) the Local Government Antitrust Act, *15 U.S.C. §§ 34-36*, which bars antitrust damage actions against local governments, including "special function governmental units established by State law in one or more States." Because I hold that plaintiffs have failed to state a valid claim under either *§ 1* or *§ 2* of the Sherman Act, there is no need to address these defenses.

HN5[] In limited circumstances, courts will apply a *per se* standard to antitrust allegations under *§ 1*. The *per se* approach is appropriate where the challenged conduct is "manifestly anticompetitive" and thus no in-depth analysis of the market effect is necessary. *Business Electronics, 485 U.S. at 723-24*. Examples of *per se* violations include price-fixing schemes and concerted refusals to deal. *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9* and n.10 , *80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; **[**10]** *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993)*.

Thus, ***HN6***[] to state a valid claim under *§ 1* of the Sherman Act, a plaintiff must allege three elements: (1) the existence of a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade under the *per se* or rule of reason analysis; and (3) that the restraint affected interstate commerce. *See Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1410* (9th Cir.), *cert. denied, 116 L. Ed. 2d 639, U.S. , 112 S. Ct. 617 (1991)*. *See also* ABA Antitrust Section, ***Antitrust Law*** *Developments* 2 (3d ed. 1992).

In the present case, plaintiffs allege a litany of interconnected claims under *§ 1* of the Sherman Act that relate to some type of conspiracy or exclusionary arrangement between URI and LINA:

(1) URI and LINA conspired in imposing the mandatory clinic fee and insurance requirement. Amended Complaint at PP 97, 112, 152, 255, 256.

(2) URI and LINA conspired in requiring students covered by LINA to first seek treatment at the URI clinic to obtain insurance coverage. Amended Complaint at PP 113, 114.

[11]**

(3) URI and LINA conspired to dictate alternative insurance coverage (i.e., non-LINA) in terms of the health clinic's revenue raising procedures. Amended Complaint at P 127.

(4) URI and LINA conspired to automatically charge some students for the full annual amount of the LINA plan, even though LINA coverage did not actually begin until students paid their bill. Amended Complaint at P 106.

(5) URI and LINA conspired to require "more of a non-LINA policy than is furnished by the LINA policy. Amended Complaint at P 120.

(6) URI and LINA conspired in "carrying out URI's requirement that male students have health insurance that includes coverage for gynecological services . . ." Amended Complaint at P 134.

(7) URI and LINA conspired in "the URI clinic fee's inclusion of a female coverage component for men . . ." Amended Complaint at P 138.

Plaintiffs appear to concede that these allegations should be viewed through the rule of reason lens. But they argue that the anticompetitive nature of the mandatory health clinic fee and insurance requirement is "self-evident." Plaintiffs' Abbreviated Memorandum at 23. I believe that the rule of reason approach is proper in this case. Plaintiffs **[**12]** do not cite any cases to support a *per se* violation, and this Court's research has not unearthed any such precedent. Given **[*536]** this finding, plaintiffs' conspiracy claims must be dismissed.

Plaintiffs' amended complaint does not present sufficient facts to indicate how these challenged actions unreasonably restrained trade in any relevant market, or had significant adverse effects on competition. Only two facts in the amended complaint shed any light on anticompetitive effects. The first is that Rhode Island Blue Cross and health maintenance organizations in Rhode Island were not considered "comparable" insurance plans. The second is that the LINA plan was intentionally "dovetailed" with UHS to provide an insurance package less expensive than that available from other carriers.

These facts are not sufficient to show how the clinic fee or insurance mandate unreasonably restrained trade or harmed the competitive process. Plaintiffs have not pled any facts suggesting that URI or LINA coerced students into buying the LINA plan, or that they sought to unfairly exclude competitors from insuring URI students. Rather, URI allowed students to choose between LINA or "comparable" coverage plans. **[**13]** This policy, plaintiffs acknowledge, resulted in a majority of URI students opting for non-LINA policies. Amended Complaint at P 144 ("Thousands of URI students have non LINA/URI health insurance"); Plaintiffs' Abbreviated Memorandum at 28 n.74, 32-33 (approximately 40% of URI students bought LINA insurance).

Moreover, **HN7**[] simply because certain insurance plans were not deemed "comparable" is not enough evidence, *standing alone,* to suggest significant anticompetitive effects. *See, e.g.,* Reazin v. Blue Cross and Blue Shield, 899 F.2d 951, 960 (10th Cir.), *cert. denied, 497 U.S. 1005, 111 L. Ed. 2d 752, 110 S. Ct. 3241 (1990)* (with rule of reason claim under § 1 of the Sherman Act, "the adverse impact must be on *competition,* not on any individual competitor or on plaintiff's business") (emphasis in original); Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989) ("removal of one or a few competitors need not equate with injury to competition" under rule of reason § 1 claim).

In short, plaintiffs have failed to adequately allege in their amended complaint how URI and LINA conspired to unreasonably **[**14]** restrain trade under § 1 of the Sherman Act. There is no need for this Court to determine the existence of a contract, combination or conspiracy, or whether the challenged actions affected interstate commerce.

2. *Tying Claims Under § 1 of the Sherman Act*

Plaintiffs' second cluster of antitrust claims are *per se* tying allegations under § 1 of the Sherman Act. **HN8**[] A tying arrangement is an agreement by one party to sell a product (the tying product) only on the condition that the buyer purchases a second product (the tied product), or at a minimum, that the buyer agrees that it will not purchase the second product from any other seller. Eastman Kodak Co. v. Image Technical Services, Inc., 119 L. Ed. 2d 265, U.S. , 112 S. Ct. 2072, 2079 (1992); Northern Pacific Railway Company v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). The Supreme Court has long recognized that **HN9**[] "certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'." Jefferson Parish, 466 U.S. at 9. The caselaw indicates that **HN10**[] a *per se* tying violation occurs where: (1) there is a tie **[**15]** of two separate products; (2) the seller has "appreciable" or "sufficient" economic power in the tying product market; and (3) the tie affects a substantial volume of commerce in the tied product market. *See* Kodak, 112 S. Ct. at 2079; Jefferson, 466 U.S. at 16-22; Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-503, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969). *See also* Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988). [4]

[16]** **[*537]** Plaintiffs allege three separate tying arrangements. The first arrangement is between a URI education (tying product) and URI's health clinic (tied product). Amended Complaint at PP 109, 253. The second is between URI's health clinic (tying product) and the LINA insurance (tied product). Amended Complaint at P 149. The third is between a URI education (tying product) and the LINA insurance (tied product). Amended Complaint at P 98.

With all due respect to plaintiffs' efforts in this area, I believe their amended complaint fails to state a viable tying claim. To begin, for two of the three alleged tying arrangements -- the health clinic and LINA insurance, and URI education and LINA insurance -- plaintiffs have simply not alleged sufficient facts to show that an actual tie existed. Plaintiffs do not indicate that URI conditioned a university education or health clinic services on the purchase of LINA insurance. As noted above, students were given a choice of subscribing to the LINA plan or choosing a "comparable" plan. [5]

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[4] In theory, it is also possible to prove that a tying arrangement violates § 1 of the Sherman Act under the rule of reason. Under the rule of reason -- unlike the *per se* test -- a plaintiff bringing a tying claim "has the burden of proving that the [challenged action] violated the Sherman Act because it unreasonably restrained competition." Jefferson Parish, 466 U.S. at 29. The First Circuit has interpreted this requirement to mean that a plaintiff cannot show a tying violation in the absence of the *per se* rules unless the *tie's* anticompetitive effects outweigh its legitimate business justifications. Grappone, 858 F.2d at 799.

In the current action, plaintiffs do not articulate a rule of reason challenge. Nor do they allege sufficient facts in the amended complaint that point to significant anticompetitive effects in any tied product market. Thus, I conclude that plaintiffs have failed to state a rule of reason tying claim.

[5] Plaintiffs argue that the health insurance requirement precludes some students from employing "self-insurance." Abbreviated Memorandum at 24. If students do not wish to purchase any insurance, however, the university's mandate lacks anticompetitive consequences. "When a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in

[17]** With respect to the remaining alleged arrangement -- URI education and the mandatory health clinic fee -- most students were obliged to pay the health clinic fee. Nevertheless, I do not believe plaintiffs have adequately alleged that this arrangement involved two separate products. In *Jefferson Parish, supra,* the U.S. Supreme Court stated "that **HN11**[] the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *466 U.S. at 19*. Stated another way, a tying arrangement must "link two distinct markets" where there is "sufficient demand" for each product. *Id. at 19-22*. *See also* *Kodak, 112 S. Ct. at 2080*.

In the case at hand, plaintiffs have not legitimately alleged that the URI health clinic is part of product market separate from a URI education. They merely argue in their briefs that students go to URI for its academic offerings, not for mandatory clinic coverage. But this conclusory statement does not indicate the existence of a separate market for student **[**18]** clinic services available to URI students.

An additional fatal flaw in all three purported tying schemes is plaintiffs' failure to adequately allege significant economic power in a relevant tying market. **HN12**[] "Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'" *Kodak, 112 S. Ct. at 2080* (quoting *Jefferson Parish, 466 U.S. at 14*). "The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." *Id. at 2081*. Market power may also be shown where a seller offers a unique product that competitors cannot offer -- such as a patented product or a special tract of land. *Jefferson Parish, 466 U.S. at 16-17*; *Grappone, 858 F.2d at 796*.

Plaintiffs argue that there is sufficient proof of economic power in both of the relevant tying product markets. With respect to the URI education, plaintiffs declare that "URI easily enjoys 'a significant market share' of the higher education business of URI students." Plaintiffs' Abbreviated **[*538]** Memorandum at 20. Plaintiffs' market **[**19]** power arguments concerning URI's mandatory health clinic fee are inextricably linked to their URI education market assertions. They state: "Given URI's market power in URI students' education, and that clinic fee risk coverage is tied by it, URI also has market power in said risk coverage." Plaintiffs' Abbreviated Memorandum at 20.

Plaintiffs assert that this market definition is justified because the vast majority of students do not transfer to other schools once they enroll at URI. Several reasons for this low transfer rate, according to plaintiffs, are the trouble and expense for a URI student to transfer to another school, problems transferring URI academic credits to another university, a student's aversion to leaving family or friends, and the higher tuition and costs at other universities. Plaintiff's Original Memorandum at 160-61. In essence, plaintiffs assert that students become "locked-in" to a URI education once they enroll, even if the university does not possess significant economic power over prospective students before they first matriculate. [6] Plaintiffs' Original Memorandum at 161-63. This "lock-in" provides URI with market power over the continued education of **[**20]** its students.

Last year, the U.S. Supreme Court provided support for this line of argument in *Eastman Kodak, supra.* In *Kodak,* independent service organizations brought an antitrust action under *§ 1* and *§ 2* of the Sherman Act challenging Eastman Kodak's policy of restricting the availability of spare parts for its photocopier and micrographic equipment to only those customers who serviced their own machines or hired Kodak service. *112 S. Ct. at 2076-77*. The Ninth Circuit **[**21]** determined that Kodak was not entitled to summary judgment on the *§ 1* tying claims because there was an issue of material fact whether Kodak's economic power in the tying product market (spare parts) restrained competition in the tied product market (service). The Court of Appeals also concluded that summary judgment was inappropriate on the *§ 2* claims. *Id. at 2078-79*.

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the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed. " *Jefferson Parish, 466 U.S. at 16*. *See also* *Grappone, 858 F.2d at 799*.

[6] Plaintiffs do suggest in passing, however, that "before the prospective student enrolls at *any* university, URI has market power regarding that prospective student if s/he is not admitted anywhere else or cannot afford to go anywhere else, or, lacks a non-URI option for any other reason." Plaintiff's Original Memorandum at 161 (emphasis in original). Plaintiffs do not expand upon this highly speculative theory of market power, and thus I believe it merits no attention from the Court.

Kodak argued in the Supreme Court "that even if it concedes monopoly *share* of the relevant parts market, it cannot actually exercise the necessary market *power* for a Sherman Act violation . . . because competition exists in the equipment market [i.e., Kodak and other equipment brands]." *Id. at 2081* (emphasis in original). Kodak asked the Court to adopt a legal presumption that equipment competition precludes a finding of monopoly power in the service or parts "aftermarkets." *Id. at 2082*. The Court rejected this argument in affirming the Ninth Circuit's ruling. In addressing the *§ 1* tying claims, it held that there was a question of fact over: (1) whether there was sufficient information in the marketplace about the "lifecycle" costs of maintaining this type of equipment at the time of purchase; and **[**22]** (2) the costs of switching from Kodak to another product after purchasing the equipment -- that is, whether high switching costs will "lock-in" consumers to Kodak machines. [7] *Id. at 2086-87*.

Turning back to our case, I do not believe plaintiffs have alleged sufficient facts in their amended complaint to support a market restricted to the higher education business of solely URI students. For one thing, no facts are alleged that the health insurance requirement was a hidden cost. The university has apparently required health insurance since 1968. Thus, the premiums at issue in this case were required beginning in the first semester of a student's enrollment at URI. **[*539]** Presumably, students who did not want to buy health **[**23]** insurance had enough information at that stage to decide whether to matriculate at URI or choose another school. This easily discoverable information helps distinguish this case from the facts in *Kodak,* where there was a factual question concerning the availability of information about future repair costs when the Kodak equipment was originally purchased.

In addition, plaintiffs do not present any facts in the amended complaint that point to the inability of students to transfer to other schools. There are no facts on the costs of switching schools. There are no facts on transferring URI credits. Nor are there any facts on the comparative costs of public and private schools inside and outside of Rhode Island. Plaintiffs simply rely on conclusory statements in their supporting memoranda to carry the day.

No further analysis of the tying claims is necessary. I need not determine whether plaintiffs have alleged facts sufficient to demonstrate that a substantial volume of commerce in the tied product market was affected.

3. *Monopolization Claims Under § 2 of the Sherman Act*

Plaintiffs' final grouping of antitrust claims fall under ***HN13***[] *§ 2* of the Sherman Act, which states that "every **[**24]** person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." *15 U.S.C. § 2*. ***HN14***[] "'The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.'" *Kodak, 112 S. Ct. at 2089* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*. ***HN15***[] "Monopoly power is the power to control market prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. *See also* *Kodak, 112 S. Ct. at 2090*. In simple terms, the relevant market is composed of (1) the product market and (2) the geographic area involved. *See du* *Pont 351 U.S. at 404*; **[**25]** *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. The relevant product market generally consists "of products that have reasonable interchangeability for the purposes for which they are produced," taking into consideration price, use and quality. *du* *Pont, 351 U.S. at 404*. This determination often involves an evaluation of the "cross-elasticity" of demand between products -- or "the degree that buyers of one product switch to the other in response to price changes." *H.J., Inc. v. ITT, 867 F.2d 1531, 1538 (8th Cir. 1989)*.

[7] Also critical to the Supreme Court's denial of summary judgement on the *§ 1* tying claims was evidence "that Kodak's control over the parts market has excluded service competition, boosted service prices and forced unwilling consumption of Kodak service." *112 S. Ct. at 2081*.

Plaintiffs' claims here can best be characterized as alleging a conspiracy to monopolize. [8] First, they allege that LINA and URI conspired to monopolize for the URI health clinic "the health care business" of URI students enrolled in the LINA plan. Amended Complaint at P 128. Second, they allege that LINA and URI conspired to monopolize the "health risk coverage of those URI students whose health was *not* already insured elsewhere . . . **[*540]** " Amended Complaint at PP 155 and 254 (emphasis in original). In other words, URI and LINA targeted their marketing efforts at **[**26]** those students who were not already covered by an "automatic" source of insurance (e.g., a parent's or spouse's policy) and thus "had to go shopping in order to become insured." Plaintiffs' Abbreviated Memorandum at 30.

[27]** ***HN16***[]

Courts have articulated three elements of a conspiracy to monopolize: (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize. *See Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1576 (11th Cir. 1991)*; *Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2nd Cir. 1988)*; *Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373, 1382 (10th Cir. 1988)*. *See also* ABA, ***Antitrust Law*** *Developments* at 270 (collecting cases). Assuming plaintiffs have properly alleged the existence of a combination or conspiracy and an overt act, the amended complaint does not allege sufficient facts to show a specific intent to monopolize for either of the *§ 2* claims. More precisely, neither claim alleges a specific intent to monopolize in a *relevant market.*

With respect to the first claim, plaintiffs appear to assert that the relevant market is the type of medical services available at the URI health clinic for LINA-insured students. In support of this market definition, plaintiffs **[**28]** make an incomprehensible declaration: "Obviously there is nothing reasonably interchangeable with the health care available at the URI clinic, as, by their nature, medical services and techniques are highly specialized. For instance, there are no reasonable substitutes for any of the following: x-rays, laboratory tests, gynecological tests, or orthopedic services." Plaintiffs' Original Memorandum at 195.

I recognize that ***HN17***[] in certain circumstances a single brand of product or service can constitute the relevant market under the Sherman Act. *Kodak, 112 S. Ct. at 2090*. In the case at bar, however, plaintiffs do not present any facts to show why the relevant market for this *§ 2* monopolization claim should be limited to URI health clinic services for students enrolled in the LINA plan. Under the facts alleged, students voluntarily chose to subscribe to the LINA-URI health care arrangement -- a set-up that provided insurance coverage only if students first visited the URI health clinic. If the LINA-URI option did not appeal to them, they could subscribe to a "comparable" plan with an alternative health care scheme. While the LINA plan was designed to "dovetail" **[**29]** with the URI health clinic services, the amended complaint does not allege sufficient facts to indicate that these "comparable" plans were not "reasonably interchangeable" with LINA either in cost or in quality of health care coverage. Equally significant in light of *Kodak,* students were not "locked-in" to the LINA plan -- they could easily switch carriers at the end of the year.

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[8] Both plaintiffs and defendants have characterized these *§ 2* claims as "attempted monopolization" rather than conspiracy to monopolize. In my view, conspiracy to monopolize is a better label because the claims allege a conspiracy between two entities -- URI and LINA. In any case, the choice of category is not critical to the outcome. As discussed below, plaintiffs have failed to allege a specific intent to monopolize in the relevant market -- an essential element for both attempted monopolization and conspiracy to monopolize. *Compare Spectrum Sports, Inc. v. McQuillan 122 L. Ed. 2d 247, __ U.S. __, 113 S. Ct. 884, 890-892 (1993)* (elements of attempted monopolization) with *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1576 (11th Cir. 1991)* (elements of conspiracy to monopolize) and *Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2nd Cir. 1988)* (same). Moreover, conspiracy to monopolize might be viewed as an easier claim to plead than attempted monopolization because the plaintiff need not address the element of a "dangerous probability of success" in the market. ABA, ***Antitrust Law*** *Developments* at 272.

Thus, based upon amended complaint, the relevant market for plaintiffs' first *§ 2* claim must, at a minimum, include LINA and other "comparable" health care plans available to URI students. [9] In this broader market, plaintiffs have not alleged any facts to indicate **[*541]** a specific intent to monopolize. Indeed, as noted, URI's program enabled the majority of URI students to enroll in non-LINA plans.

[30]** Focusing on the second monopolization allegation, plaintiffs suggest that the relevant market is limited to health insurance available to those students "whose health was not already insured elsewhere." This is another attempt by plaintiffs to bootstrap an antitrust claim to a narrowly drawn market. But this market definition makes no sense. This subset of students -- if this group can be delineated at all -- was equally free to choose or reject LINA. Plaintiffs have not proffered any facts to indicate that these students were somehow forced into buying the LINA plan, or that they faced different options than other URI students choosing among insurance carriers. Thus, the relevant market for this claim must also be broader than defined by plaintiffs -- encompassing at least LINA and "comparable" insurance plans. And, once again, there are no facts alleged to show a specific intent to monopolize this type of market.

In sum, none of the federal antitrust allegations state a valid claim. All of these claims are dismissed.

B. *Equal Protection Claims*

I now examine plaintiffs' federal equal protection claims under the *Fourteenth Amendment* (Count IX). The gravamen of these claims is **[**31]** that URI and LINA intentionally charged male students the same amount in health clinic fees and insurance premiums as female students, even though a portion of these costs were exclusively spent on medical services for women (e.g., gynecological care). This structure, plaintiffs assert, discriminated against male students on the basis of sex and denied them the equal protection of the law.

HN18[] The *Equal Protection Clause of the Fourteenth Amendment* declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This constitutional command "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)*. Even assuming the operations of URI and LINA constituted state-action for purposes of the *Fourteenth Amendment*, plaintiffs' equal protection claims are meritless.

It is now a bedrock principle that ***HN19***[] to prove an equal protection claim, a plaintiff must demonstrate that the defendant acted with discriminatory intent or purpose. *See Washington v. Davis, 426 U.S. 229, 239-42, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976)*; *Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988)*. **[**32]** And ***HN20***[] "'discriminatory purposes' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979)* (citation omitted). *See also McCleskey v. Kemp, 481 U.S. 279, 298, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987)*.

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[9] This position is supported by one pre-Kodak U.S. District Court case from New York, *Metropolitan Life Insurance Co. v. Adler, 1988 U.S. Dist. LEXIS 1146*, 1988-1 Trade Cases P 67,907 (S.D.N.Y. 1988). In that case, the defendant, Dr. Adler, brought a *§ 2* antitrust counterclaim alleging that Metropolitan Life Insurance Company sought to limit any competition that could affect its alleged monopoly of group medical insurance for New York State employees. Specifically, Adler charged that Metropolitan Life attempted to deprive members of the insurance plan of the physician of their choice solely to enhance profits and lower costs. *1988 U.S. Dist. LEXIS 1146*, at *10. Adler contended that the relevant market for this monopolization allegation was limited to the employees of New York State covered by the plaintiffs' health insurance plans. *Id. at *11-12*.

The Court dismissed the counterclaim. It found, among other things, that Adler had failed to plead an appropriate market definition. The Court wrote: ". . . Dr. Adler attempts to allege a monopoly simply by definition of the market. Surely the relevant market cannot be those New York State employees who have opted to subscribe to Metropolitan's health insurance. In such a case, there could be no finding other than one of monopoly." *Id. at *12*.

In this case, plaintiffs have not pled any facts to indicate that URI or LINA intentionally discriminated against male students in the imposition of the clinic fees or insurance premiums. Plaintiffs simply complain that URI and LINA were cognizant that a portion of these costs were funneled into women's health services. Indulging all reasonable inferences in favor of plaintiffs, I do not see how this naked allegation states a claim under the *Equal Protection clause*. As the First Circuit has recently stated:

> ***HN21***[] To survive a motion to dismiss, an equal protection claim "must 'outline facts sufficient to convey specific instances of unlawful discrimination.'" A plaintiff **[**33]** "may not prevail simply by asserting an inequity and tacking on the self-serving conclusion that the defendant was motivated by a discriminatory animus." *Coyne v. City of Somerville, 972 F.2d 440, 444 (1st Cir. 1992)* (citations omitted).

In conclusion, without sufficient facts to indicate discriminatory intent or purpose, **[*542]** plaintiffs' federal equal protection claims must be dismissed.

C. *Due Process Claims*

Plaintiffs also plead separate claims under the *Due Process Clause of the Fourteenth Amendment* (Count XII). They assert that URI's mandatory clinic fee and insurance requirement deprive students of liberty "to contract" and "of property." Plaintiffs are particularly troubled by URI's policy of automatically billing for LINA if a student did not pick another insurance carrier, and of URI's policy of prohibiting registration if students did not pay their LINA bill.

HN22[] The *Due Process Clause of the Fourteenth Amendment* provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Plaintiffs appear to allege a substantive due process violation based upon the right or liberty to contract. They ground this **[**34]** argument on language contained in the 1923 Supreme Court case, *Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923)*:

> While this court has not attempted to define with exactness the liberty . . . guaranteed [by the *Fourteenth Amendment*], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the *right of the individual to contract,* to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (emphasis added).

While these are majestic words, since the 1930s the Supreme Court has severely curtailed substantive due process theories based on economic assertions and the right to contract. *See Ferguson v. Skrupa, 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963)* (upholding Kansas statute making it a misdemeanor to engage in business of debt adjustment except as incident to **[**35]** practice of law); *West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1937)* (upholding Washington State statute establishing minimum wages for women); *Nebbia v. New York, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505 (1934)* (upholding New York Milk Board's order fixing milk prices for distributors and storekeepers). *See also Tenoco Oil Co. v. Department of Consumer Affairs, 876 F.2d 1013, 1021 (1st Cir. 1989)* ("Since 1937, when 'substantive' due process lost favor, courts have reviewed economic legislation with great deference to the legislature's policies . . ."). "It is by now well established that ***HN23***[] legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976)*. *See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust For Southern California, 124 L. Ed. 2d 539, U.S. , 113 S. Ct. 2264, 2287 (1993)*. **[**36]**

Even assuming URI is a state actor, and assuming further that the factual setting in this case implicates the right to contract, plaintiffs' amended complaint still fails to state a valid substantive due process claim. Plaintiffs fail to allege any facts that URI or LINA acted in an arbitrary or irrational manner. Nor do they cite any specific authority to support their broad assertions of constitutional harm. Simply put, under the broadest reading of the amended complaint, plaintiffs' disfavored economic due process allegations must be dismissed.

IV. *Conclusion*

In sum, I dismiss with prejudice plaintiffs' federal antitrust, equal protection and due process claims. ***HN24***[] In the absence of any federal claims, this case lacks original jurisdiction in this Court. Within my discretion, I respectfully decline to exercise supplemental jurisdiction over the remaining state claims. *See* *28 U.S.C. § 1367(c)(3)*. I wish to emphasize that this ruling in no way reflects on the **[*543]** merits of those state claims. All state law claims are dismissed *without* prejudice.

[37]** SO ORDERED:

Raymond J. Pettine

Senior U.S. District Judge

August 5, 1993

End of Document

Rosen v. Hyundai Group (Korea)

United States District Court for the Eastern District of New York

August 10, 1993, Decided

CV 90-3674

Reporter

829 F. Supp. 41 *; 1993 U.S. Dist. LEXIS 11169 **; 1993-2 Trade Cas. (CCH) P70,415

JOSEPH ROSEN and SANDRA McNEIL, Plaintiffs, v. HYUNDAI GROUP (KOREA), HYUNDAI CORPORATION and HYUNDAI PIANO; SAMICK (KOREA), SAMICK (AMERICA) and SAMICK MUSIC CORP., Defendants.

Core Terms

pianos, terminate, plaintiffs', customers, price-fixing, defendants', boycott, promissory estoppel, manufacturer, distributor, antitrust, summary judgment motion, enrichment, promise, prices, breach of warranty, joint venture, speculation, middleman, brand, summary judgment, relevant market, rule of reason, unambiguous, vertical

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN1[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical price-fixing schemes are considered per se illegal under the antitrust laws. In order to succeed on the merits of their claim, a plaintiff need only prove that the defendants entered into an agreement to fix prices. Because vertical price-fixing is a per se violation of the antitrust laws, a plaintiff does not have to allege or show how the agreement adversely affected interbrand competition in the relevant product and geographic market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

In order to survive a motion for summary judgment, a plaintiff must come forward with unambiguous evidence that defendants entered into an agreement to terminate the plaintiff and to sell their products thereafter at specific price levels. Further, that evidence must tend to exclude the possibility that defendants acted independently.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN3[] Vertical Restraints, Price Fixing

A plaintiff can avoid summary judgment with respect to their claim of vertical price-fixing only if they can show unambiguous evidence of an agreement among the defendants to fix prices.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN4[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Boycotts traditionally fell into a category of per se unlawful conduct requiring proof only of an agreement between defendants. In recent years, however, the Supreme Court has required a plaintiff alleging a non-horizontal boycott to show, in addition to such an agreement, that the defendants have market power in the relevant market. Absent market power, the plaintiff must proceed under the rule of reason.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN5[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

The product market must be plausibly defined according to the traditional methodology courts prescribe to define a market for antitrust purposes an analysis of the interchangeability of use or the cross-elasticity of demand for potential substitute products. Simply put, goods are in the same relevant product market if they are reasonably interchangeable for the purposes for which they were produced.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order to survive summary judgment under the rule of reason, a plaintiff would have to show, in addition to an agreement between defendants not to deal, an adverse affect of the agreement on interbrand competition in the relevant market.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > Statute of Frauds > General Overview

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN7[] Consideration, Detrimental Reliance

Under New York law, in order to recover for promissory estoppel, a plaintiff must show that there was an unambiguous promise, that plaintiff reasonably relied on that promise and that plaintiff was injured as a result of that reliance. Additionally, the claim of promissory estoppel, even if established, is further subject to the defense of the Statute of Frauds.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > Statute of Frauds > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Contracts Law > Defenses > Unconscionability > General Overview

HN8[] Consideration, Detrimental Reliance

Under New York law, the Statute of Frauds is a proper defense to a claim of promissory estoppel as long as its application is not unconscionable. Under settled principles of New York law, there is no unconscionability in invoking the Statute of Frauds in a situation where a distributor who has been terminated already has received substantial benefits from the distributorship.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Defamation > Libel

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Defamation > Defenses > Statute of Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

HN9[] Statute of Limitations, Time Limitations

Under New York law, a claim that is bottomed on libel has a one-year statute of limitation.

Contracts Law > Remedies > Restitution

HN10[] Remedies, Restitution

In order to recover for unjust enrichment in New York, a plaintiff must show that the defendant was enriched, that the enrichment was at plaintiff's expense and that circumstances are such that in equity and good conscience defendant should return money or property to plaintiff.

Business & Corporate Law > Joint Ventures > Formation

Torts > Vicarious Liability > Partners > General Overview

Business & Corporate Law > Joint Ventures > General Overview

HN11[] Joint Ventures, Formation

In order to successfully make out a joint venture claim, a plaintiff must show: (1) a specific agreement to engage in a joint venture; (2) which manifests the intent of the parties to join together in a joint venture; (3) that each principal made a contribution; (4) some degree of joint proprietorship and control of the enterprise; (5) some provision for sharing of profits and losses.

Commercial Law (UCC) > ... > Standards of Performance & Liability > Breach, Excuse & Repudiation > General Overview

Commercial Law (UCC) > ... > Contract Provisions > Warranties > General Overview

HN12[] Standards of Performance & Liability, Breach, Excuse & Repudiation

Only "sellers" are liable for breach of warranty under the New York Uniform Commercial Code.

Counsel: [1]** YANNACONE & YANNACONE, ESQS., BY: VICTOR JOHN YANNACONE, JR., ESQ., Attorneys for Plaintiffs, 39 Baker Street, P.O. Drawer 109, Patchogue, New York 11772-0109. THOMAS V. DANA, ESQ., Co-Counsel for Plaintiff, 11 Park Place, Suite 606, New York, New York 10007.

REID & PRIEST, ESQS., BY: LAURA LONGOBARDI, ESQ., Attorneys for Defendants HYUNDAI, 233 Broadway, Suite 1075, New York, New York 10279. PAUL A. BATISTA, ESQ., Attorney for Defendant SAMICK MUSIC CORP., 950 Third Avenue, New York, New York 10022.

Judges: WEXLER

Opinion by: LEONARD D. WEXLER

Opinion

[*43] *MEMORANDUM AND ORDER*

(Wexler, J.)

Joseph Rosen, Sandra McNeil, Family Melody Center of Patchogue, Inc. and Schumann International Inc., (collectively "plaintiffs") distributed the Schumann brand piano manufactured by defendant Samick Musical Instruments Corporation ("SMIC") and sold to them by defendant Hyundai Corporation ("Hyundai") who acted as a middleman for plaintiffs and SMIC. Plaintiffs brought a slew of antitrust and state law claims stemming from their termination as a distributor of SMIC-manufactured pianos. Presently before the Court is defendants' motion for summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. For the reasons **[**2]** stated below, defendants' motion for summary judgment with respect to plaintiffs' antitrust claims is granted. Additionally, summary judgment is also granted with respect to all state claims except plaintiffs' breach of warranty claim.

I. *BACKGROUND*

This is one of the many cases in which a terminated distributor of goods alleges a **[*44]** myriad of antitrust claims and state law based tort claims flowing from its termination. Unfortunately, plaintiffs' amended complaint and memorandum of law are rambling and disjointed, making it exceedingly difficult to decipher plaintiffs' claims.

Plaintiffs were involved in the wholesale distribution of pianos to dealers located in the United States. SMIC is a Korean Corporation that manufactures pianos. [1] **[**3]** Defendant Samick (USA) is a California corporation whose principal business is the wholesale distribution of SMIC-manufactured pianos under the trade name Samick. SMIC owns 80% of the shares of Samick (USA). The remaining 20% is owned by Kyo Chu, who is the president of Samick (USA) and one of the managing directors of SMIC. [2]

Hyundai is a large-scale Korean trading company. Defendant Hyundai (USA) is a wholly-owned subsidiary of the Hyundai Corporation that accepts orders from Hyundai's customers in the United States as well as parts of Latin and South America. [3] From approximately 1979 until 1990, Hyundai acted as a middleman for plaintiffs and SMIC, purchasing SMIC-manufactured pianos under the trade name Schumann and reselling them to plaintiffs. Plaintiffs never entered into a written contract with Hyundai nor did plaintiffs have any contract with SMIC for a continuous supply of Schumann pianos. Indeed, plaintiffs had no direct dealings with SMIC whatsoever. In addition to its role as a middleman, Hyundai also purchased pianos from SMIC under the trade name Hyundai and distributed these pianos directly in the United States wholesale market.

[4]** The relationship between SMIC and plaintiffs was rocky from the outset. SMIC constantly threatened to terminate plaintiffs' supply of Schumann brand pianos and towards the end of the relationship broadcast its intent to terminate plaintiffs to dealers in the trade. It also appears that Hyundai attempted to convince SMIC on many occasions not to terminate plaintiffs, apparently because it was in Hyundai's economic interest to continue acting as a middleman for SMIC and plaintiffs. [4] Additionally, plaintiffs also allege that large quantities of pianos were purposefully delivered in defective condition and that defendants failed to cure the defects.

[5]** In their complaint, plaintiffs allege that SMIC, Samick (USA), Hyundai and Hyundai (USA) entered into an agreement to terminate plaintiffs as distributors of the SMIC-manufactured Schumann brand piano because plaintiffs refused to lower their prices. SMIC contends that it unilaterally decided to terminate plaintiffs as part of its

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[1] It should be noted that SMIC has not been served in this case.

[2] SMIC and Samick (USA) will collectively be referred to as the "Samick defendants".

[3] Hyundai and Hyundai (USA) will collectively be referred to as the "Hyundai defendants".

[4] Although all the documentary evidence is to the contrary, plaintiffs suggest that the Hyundai defendants did not really attempt to convince the Samick defendants to continue supplying plaintiffs. Rather, plaintiffs speculate that the two groups of defendants engaged in a "good cop/bad cop" charade, whereby the Hyundai defendants only pretended to try to convince SMIC to continue supplying plaintiffs.

overall sales strategy. It claims that plaintiffs sold the Schumann pianos cheaply and as a result failed to provide its customers with any after-sales services. According to SMIC, people in the trade were aware that SMIC manufactured the Schumann brand pianos and SMIC was concerned that the reputation of its pianos would be injured as a result of plaintiffs' discounting.

Plaintiffs, on the other hand, claim that SMIC terminated them as distributors because of pressure placed upon it by Hyundai. Plaintiffs speculate that Hyundai, who competed against plaintiffs at the distributor level, pressured SMIC to terminate plaintiffs because plaintiffs refused to lower their prices. Plaintiffs suggest that Hyundai exercised control over SMIC because of its position as one of SMIC's largest customers. Plaintiffs further contend that Samick (USA) was also in favor **[**6]** of their termination because it too competed against plaintiffs at the distributor level.

In addition to the alleged price-fixing scheme, plaintiffs also allege that defendants **[*45]** unlawfully agreed to boycott plaintiffs, so that they could take over plaintiffs' customers and thereby increase their own profit. Plaintiffs also alleged a Robinson-Patman Act violation and monopoly claim which they withdrew at oral argument. Finally, in their complaint, plaintiffs allege a variety of state-law based torts. At oral argument they withdrew their common law monopoly claim, their prima facie tort claim, their refusal to deal claim, and their restraint on alienation claim. The remaining state claims are for unjust enrichment, joint venture, promissory estoppel, tortious interference with business relations and breach of warranty.

II. *DISCUSSION*

A. *Federal Antitrust Claims*

1. *Section 1 Claims Vertical Price-Fixing Claim*

Plaintiffs allege that the Hyundai defendants entered into an illicit price-fixing agreement with the Samick defendants in violation of § 1 of the Sherman Antitrust Act. [5] ***HN1***[] Vertical price-fixing schemes are considered *per se* illegal under the antitrust laws. **[**7]** *See* *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. In order to succeed on the merits of their claim, plaintiffs need only prove that the Hyundai defendants on the one hand and the Samick defendants on the other hand entered into an agreement to fix prices. [6] **[**8]** Because vertical price-fixing is a *per se* violation of the antitrust laws, plaintiffs do not have to allege or show how the agreement adversely affected interbrand competition in the relevant product and geographic market. [7]

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[5] § 1 of the Sherman Act makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. . ."

[6] The only actionable agreement that plaintiffs could assert involving the Hyundai defendants would be between the Hyundai defendants collectively and the Samick defendants. As Hyundai (USA) is a wholly owned subsidiary of Hyundai, the Hyundai defendants are legally incapable of conspiring with each other for the purposes of § 1. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-77, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* (because corporate parents and their wholly owned subsidiaries have "a complete unity of interest. . . . the very notion of an 'agreement' in Sherman Act terms between a parent and wholly owned subsidiary lacks meaning").

Moreover, the same rationale that prevents a parent and wholly owned subsidiary from conspiring with each other for the purposes of the antitrust laws, also prevents Samick (USA) from conspiring with SMIC. Although SMIC only owns 80% of Samick (USA), the remaining 20% is controlled by one of its managing directors. Under these facts, this Court concludes that there is "a complete unity of interest" between SMIC and Samick USA making an agreement between them meaningless in Sherman Act terms.

[7] The Samick defendants argue that because the complaint alleges a vertical restriction on trade, the rule of reason is the proper analysis to be applied to this case. Although the recent trend in ***antitrust law*** favors rule of reason analysis over the *per se* approach, the Supreme Court has not adopted the rule of reason in the context of vertical price-fixing schemes. Rather, the Supreme Court continues to hold that vertical price-fixing is *per se* illegal.

[9]** According to plaintiffs, Hyundai (USA) and Samick (USA) competed with them at the distributor level and were unhappy with plaintiffs' discounting. Thus, plaintiffs allege that Hyundai, who exercised economic power over Samick by virtue of its position as one of Samick's largest customers, coerced SMIC into terminating plaintiffs. Hyundai strenuously denies plaintiffs' assertion and suggests that contrary to plaintiffs' allegation, it attempted to convince SMIC to continue supplying pianos to plaintiffs. Indeed, Hyundai argues that it was to its economic benefit to continue acting as middleman for plaintiffs. [8] **[*46]** Moreover, SMIC claims that it unilaterally decided to terminate plaintiffs. SMIC argues that plaintiffs' discounting was having a deleterious effect on its reputation in the industry. By failing to provide any after-sales services to its customers, SMIC argues that plaintiffs were undermining its sales plan of providing a top-notch product.

[10]** The Supreme Court has enunciated clear and stringent evidentiary standards for plaintiffs to show the required agreement under the antitrust laws. ***HN2***[] In order to survive a motion for summary judgment, plaintiffs must come forward with unambiguous evidence that the Samick defendants and the Hyundai defendants entered into an agreement to terminate plaintiffs and to sell their products thereafter at specific price levels. *See* *Business Elecs. Corp., 485 U.S. at 726 (1988)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Further, that evidence must tend to exclude the possibility that the Samick defendants and Hyundai defendants acted independently. *See* *Matsushita, 475 U.S. at 588*; *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. Plaintiffs have simply failed to meet this standard. The record in the present case is bereft of any evidence that tends to show any agreement on prices or price levels among defendants.

Defendants have met their initial burden of showing a lack of agreement between the defendants. The affirmative **[**11]** evidence indicates that there was clear disagreement between the Hyundai defendants and SMIC concerning plaintiffs. Indeed, the uncontroverted evidence in this case suggests that Hyundai opposed, not supported SMIC's decision to terminate plaintiffs. *See* Lim Dec. PP 11-16, 21-22, 24-25, 34, 36, 38, and Exhs. 2-3, 8-10, 14-15, 25, 28-29; Joo Dec. PP 17, 26. Plaintiffs have offered only sheer speculation to meet their burden to present evidence that shows an agreement or "that tends to exclude the possibility that the [defendants] acted independently." Thus, Rosen summarized his "evidence" that the Hyundai defendants agreed to fix prices with SMIC as follows:

> I was threatened that, if I did not raise my prices, that Samick would discontinue my supply. This is what Hyundai told me. *I have no way of knowing whether Hyundai -- I have to assume at this point that Hyundai was involved in that also. . . .*

Rosen Dep. at 774 (emphasis added).

The apparent basis for plaintiffs' assumption that SMIC and Hyundai must have conspired is Rosen's speculation that Hyundai had sufficient economic power to force SMIC to adhere to its wishes. *See* Rosen Dep. at 84, 99, 188, 309-310, **[**12]** 550, 559-60, 607, 731 and 744. Such speculative evidence of conspiracy, however, is insufficient to defeat a motion for summary judgment in a dealer termination case.

In *Oreck Corp. v. Whirlpool Corp., 639 F.2d 75 (2d Cir. 1980)*, *cert. denied, 454 U.S. 1083, 70 L. Ed. 2d 618, 102 S. Ct. 639 (1981)*, the plaintiff put forth evidence that a competing distributor was a major customer of the manufacturer. *Id. at 79-80*. The plaintiff urged that the competitor, by virtue of being an "important customer" of the manufacturer, has some economic power" to compel the manufacturer to terminate the plaintiff's distributorship. *Id. at 80*. The Second Circuit found that this "evidence" rested on "sheer speculation insufficient to support a

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Moreover, Samick's reliance on cases that suggest that vertical non-price-fixing restraints should be analyzed under the rule of reason is misplaced. *See* *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Here, plaintiffs allege a price-fixing scheme. In *Sylvania,* the plaintiffs claimed that Sylvania violated § 1 "by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations." *Id. at 40*. Thus, the plaintiffs in *Sylvania* did not allege, as plaintiffs do here, that the defendants entered into price-fixing agreements.

[8] This Court is uncertain whether it was to Hyundai's economic benefit to continue supplying pianos to plaintiffs. Because Hyundai competed against plaintiffs at the wholesale level, plaintiffs' termination as a distributor may have benefited Hyundai.

conclusion that [the defendants] engaged in an illegal [agreement]." *Id. See also* H.L. Hayden Co. of New York, Inc. v. Siemens Medical Sys., Inc., 879 F.2d 1005, 1016 (2d Cir. 1989); Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919, 923-25 (2d Cir. 1985).

In sum, under the controlling Supreme **[**13]** Court and Second Circuit precedents, ***HN3***[] plaintiffs can avoid summary judgment with respect to their claim of vertical price-fixing only if they can show unambiguous evidence of an agreement among the defendants to fix prices. Since plaintiffs rely on only speculation that such an agreement exists, their vertical price-fixing claim cannot survive and is hereby dismissed.

[*47] 2. *Group Boycott Claim*

In addition to the price-fixing claim, plaintiffs also raise a second § 1 claim based on an alleged agreement between the Hyundai defendants and the Samick defendants not to deal with plaintiffs in an effort to drive them out of business and take over their customers. ***HN4***[] Boycotts traditionally fell into a category of *per se* unlawful conduct requiring proof only of an agreement between defendants. *See* United States v. General Motors Corp., 384 U.S. 127, 140, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959). In recent years, however, the Supreme Court has required a plaintiff alleging a non-horizontal boycott to show, in addition to such an agreement, that the defendants have market power in the relevant **[**14]** market. [9] *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290-98, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985). Absent market power, the plaintiff must proceed under the rule of reason.

[15]** Plaintiffs' claim of an unlawful boycott by the defendants, whether analyzed under a *per se* or rule of reason approach, fails for the same reason that their price-fixing claim fails. Plaintiffs have no more evidence to show that the defendants agreed to refuse to deal with plaintiffs than they have to show that defendants entered into a price-fixing agreement. On this ground alone, defendants' motion for summary judgment must be granted.

Moreover, although attempting to allege a *per se* violation, plaintiffs have failed to show that defendants have sufficient market powers to warrant *per se* treatment. Plaintiffs do not identify a relevant market in which competition was harmed. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979), *cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. Both plaintiffs and defendants agree that the relevant geographic market in this case is the United States. The parties disagree, however, over the proper definition of the relevant product market. ***HN5***[] The product market must be plausibly defined according to the traditional "methodology courts prescribe to define a market for **[**16]** antitrust purposes an analysis of the interchangeability of use or the cross-elasticity of demand for potential substitute products." Gianna Enters. v. Miss World (Jersey) Ltd., 551 F. Supp. 1348, 1354 (S.D.N.Y. 1982). Simply put, goods are in the same relevant product market if they are reasonably interchangeable for the purposes for which they were produced.

Plaintiffs' proposed product market, which defines the market as that for the sale of SMIC-manufactured pianos, is patently unreasonable. Plaintiffs offer no rational explanation to support such a definition. If such a definition was

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[9] Plaintiffs argue that any agreement between the Hyundai defendants and the Samick defendants to boycott plaintiffs should be viewed as horizontal. Plaintiffs' theory evidently is that goods made by the same manufacturer compete "horizontally" if they bear different trade names and are sold by different distributors. Plaintiffs offer no case law to support this characterization.

In Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.), *cert. denied,* ***439 U.S. 946, 58 L. Ed. 2d 338, 99 S. Ct. 340 (1978)***, the defendant whirlpool manufactured vacuum cleaners that were sold by the plaintiff under the brand name "whirlpool" and sold by Sears, another distributor, under the brand name "Kenmore." The plaintiff argued that this market structure rendered the competition between Sears and the plaintiff "horizontal," because as a result of the plaintiff's termination, "competition of both an interbrand and intrabrand nature was eliminated." Id. at 131 n.6. The Second Circuit, however, rejected this argument, holding that the existence of multiple brands sold by different distributors "does not *ipso facto,* convert this case into a horizontal conspiracy warranting per se treatment." Id. at 131. Likewise, the existence of multiple trade names here does not transform the vertical nature of this case. This is especially so where the purported agreement is between the manufacturer of goods and another distributor.

allowed to stand, all manufacturers would have absolute monopoly power in the relevant product market, since by definition they control the total output of their own products. The case law is clear that such a market definition is untenable. *See* *Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674, 678 (S.D.N.Y. 1987)*; *Gianna Enters.,* 531 F. Supp. at 1354; *Morse V.* ***[*48]*** *Swank, Inc., 493 F. Supp. 110, 115 (S.D.N.Y. 1980)*.

Defendants' definition of the relevant product market, all **[**17]** pianos (except high quality professional models) manufactured for sale in the United States, is more plausible. Under this definition, the Hyundai defendants' market share for sales of pianos in the United States in less than 2%, while the Samick defendants' market share has never been more than 11%. Because defendants clearly do not have market power in the relevant market, plaintiffs' boycott claim must be analyzed under the rule of reason.

HN6[] In order to survive summary judgment under the rule of reason, plaintiffs would have to show, in addition to an agreement between defendants not to deal, an adverse affect of the agreement on *interbrand* competition in the relevant market. *See* *Schwartz v. Jamesway Corp., 660 F. Supp. 138, 141 (S.D.N.Y. 1987)*. Plaintiffs do not attempt to explain how defendants' purported boycott agreement could in any way affect interbrand competition in the United States piano market. Indeed, none of the defendants have sufficient power in this market to sustain a boycott claim under the rule of reason. *See* *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 791 F. Supp. 956, 965-67 (N.D.N.Y. 1992)* **[**18]** (In order to show an adverse affect on interbrand competition, plaintiffs must demonstrate that defendants have market power in the relevant market.). Thus, even if there were evidence of an agreement between the defendants to boycott plaintiffs, plaintiffs boycott claim would still have to be dismissed.

B. *State Law Claims*

1. *Promissory Estoppel*

Although plaintiffs did not have a written contract with any of the defendants for a continuous supply of Schumann brand pianos, they seek to recover for their termination under a promissory estoppel theory. ***HN7***[] Under New York law, in order to recover for promissory estoppel, a plaintiff must show that there was an unambiguous promise, that plaintiff reasonably relied on that promise and that plaintiff was injured as a result of that reliance. *See* *R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 78 (2d Cir. 1984)*. Additionally, the claim of promissory estoppel, even if established, is further subject to the defense of the Statute of Frauds. *See* *D&N Boening, Inc. v. Kirsch Beverages, Inc., 99 A.D.2d 522, 471 N.Y.S.2d 299, 302* (2d Dep't 1984).

According to plaintiffs, even though SMIC **[**19]** repeatedly threatened to terminate their supply of Schumann pianos and even though plaintiffs requested and were denied a written contract for a continuous supply of pianos, defendants are liable to them for their termination under a promissory estoppel theory. Plaintiffs appear to rely on a series of correspondence between Hyundai and themselves wherein Hyundai stated that they would do everything possible to assure the continuous supply of Schumann pianos. This correspondence, however, cannot be viewed as an unambiguous promise for the continuous supply of pianos. At the most, the letters suggest merely that the Hyundai defendants would attempt to do what they could to convince SMIC to supply pianos. Such an undertaking is hardly an unambiguous promise to plaintiffs assuring an indefinite supply of SMIC-made pianos. *See* *R. G. Group, Inc., 751 F.2d at 79*.

In any event, even if Hyundai had promised plaintiffs an unending supply of pianos, given that plaintiffs were well aware of SMIC's stated intention to terminate them, it is difficult to see how plaintiffs could have reasonably relied on such a promise. Moreover, because Hyundai was only a middleman **[**20]** and not the manufacturer reliance on Hyundai's promise would have been unreasonable. Furthermore, and equally fatal to plaintiffs' claim, they have not shown any reliance injury. Plaintiffs suggest that they opened up certain letters of credit in anticipation of receiving pianos. However, the opening of letters of credit concededly did not injure plaintiffs, for as Rosen stated at his deposition, plaintiffs received every piano for which they opened a letter of credit. *See* Rosen Dep. at 676-78. Plaintiffs also point to the sale of their business as some indication that they were harmed by their termination. However, nowhere in their voluminous **[*49]** papers do plaintiffs suggest that the sale was for anything other than fair market value.

Finally, even if plaintiffs could establish the elements of promissory estoppel, they still have set forth no facts to avoid the application of the Statute of Frauds. ***HN8***[] Under New York law, the Statute of Frauds is a proper defense to a claim of promissory estoppel as long as its application is not unconscionable. *See D & N Boening, Inc., 471 N.Y.S.2d at 302*. Under settled principles of New York law, there is no unconscionability **[**21]** in invoking the Statute of Frauds in a situation where a distributor who has been terminated already has received substantial benefits from the distributorship. *See Id.* Here, plaintiffs admittedly received substantial benefits from their distributorship. Thus, application of the Statute of Frauds cannot be avoided. Accordingly, plaintiffs claim for promissory estoppel must be dismissed.

2. *Business Disparagement, Product Disparagement and Tortious Interference with Prospective Economic Advantage*

Plaintiffs bring a welter of state claims all based on the allegation that defendants spread false rumors about the quality of the Schumann piano in order to steal away plaintiffs' customers. When pressed at oral argument to support these claims, plaintiffs relied on the testimony of a single customer who stated that sometime in 1983 an unidentified Samick (USA) employee made untrue disparaging remarks about the Schumann brand piano. It is clear that ***HN9***[] under New York law, a claim that is bottomed on libel has a one year statute of limitation. *See N.Y. Civ. Prac. L. & R. § 215* (McKinney 1990). Because this case was commenced way beyond the one year statute of limitation, all state **[**22]** claims based on this alleged libel must be dismissed.

3. *Unjust Enrichment*

Plaintiffs claim that defendants' alleged agreements in restraint of trade are of a type that should cause this Court to demand that defendants turn over to plaintiffs any enrichment plaintiffs may have garnered as a consequence of those agreements. ***HN10***[] In order to recover for unjust enrichment in New York, a plaintiff must show that the defendant was enriched, that the enrichment was at plaintiff's expense and that circumstances are such that in equity and good conscience defendant should return money or property to plaintiff. *See South Shore Bank v. Int'l Jet Interiors, Inc., 721 F. Supp. 29, 32 (E.D.N.Y. 1989)*.

This Court has already determined that there is insufficient evidence supporting the existence of any illicit agreements amongst the defendants. Accordingly, plaintiffs' claim for unjust enrichment is dismissed.

4. *Joint Venture*

Plaintiffs also bring a claim against defendants under a joint venture theory. ***HN11***[] In order to successfully make out a joint venture claim, plaintiffs must show: (1) a specific agreement to engage in a joint venture; (2) which manifests the **[**23]** intent of the parties to join together in a joint venture; (3) that each principal made a contribution; (4) some degree of joint proprietorship and control of the enterprise; (5) some provision for sharing of profits and losses. *See Itel Containers Inter. Corp. v. Atlanttrafik Exp. Serv. Ltd., 725 F. Supp. 1303, 1310 (S.D.N.Y. 1989)*, *aff'd in part, rev'd in part on other grounds. 909 F.2d 628 (2d Cir. 1990)*. Because Rosen admitted that the parties never entered into a joint venture agreement, or agreed on any profit sharing or joint control over plaintiffs' business, this claim must be dismissed. *See* Rosen Dep. at 108-09.

5. *Breach of Warranty*

Finally, plaintiffs also bring a claim against defendants for breach of warranty. Recognizing that issues of facts exist, the Hyundai defendants do not move this Court to grant summary judgment on this claim. The Samick defendants, however, do move for summary judgment. They claim that because they never sold pianos to plaintiffs, they may not be sued for any economic loss suffered by plaintiffs under a breach of warranty theory. ***HN12***[] Because only "sellers" are liable for breach **[**24]** of warranty under the New **[*50]** York Uniform Commercial Code and it is undisputed that the Samick defendants never sold any pianos to plaintiffs, the Samick defendants' motion for summary judgment is granted. [10] *See* *County of Westchester v. General Motors Corp., 555 F. Supp. 290 (1983)*.

III. *CONCLUSION*

For the above-stated reasons, defendants' motion for summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure* is granted **[**25]** in part and denied in part.

SO ORDERED.

LEONARD D. WEXLER

UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York

August 10, 1993

[10] Plaintiffs' argument that the Samick defendants should be held liable for breach of warranty because they had at some point agreed to correct certain defects as a courtesy is unavailing. Plaintiffs do not represent that the Samick defendants in any way communicated to them their intention to be held liable for the defects. Moreover, plaintiffs have not provided this Court with any authority that New York would impose liability on a non-seller manufacturer solely because that manufacturer agreed as a courtesy to correct defects in its products.

Butterworth v. Nat'l League of Prof'l Baseball Clubs

Court of Appeal of Florida, Fifth District

August 13, 1993, Filed

Case No. 93-69

Reporter

622 So. 2d 177 *; 1993 Fla. App. LEXIS 8448 **; 1993-2 Trade Cas. (CCH) P70,341; 18 Fla. L. Weekly D 1796

ROBERT A. BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, Appellant, v. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS and WILLIAM D. WHITE, Appellees.

Subsequent History: **[**1]** Released for Publication September 1, 1993.

Prior History: Appeal from the Circuit Court for Osceola County, R. James Stroker, Judge.

Disposition: AFFIRMED; QUESTION CERTIFIED.

Core Terms

demands

Counsel: Robert A. Butterworth, Attorney General, and Jerome W. Hoffman, Assistant Attorney General, Department of Legal Affairs, Antitrust Section, Tallahassee, for Appellant.

Gregory A. Presnell and Kathryn B. Nixon of Akerman, Senterfitt & Eidson, P.A., Orlando, for Appellees.

Judges: GOSHORN, HARRIS, PETERSON

Opinion by: GOSHORN

Opinion

[*178] GOSHORN, J.

The appellant, Robert A. Butterworth, as Attorney General of the State of Florida, appeals from a final order of the circuit court granting the appellees' petition to set aside the appellant's civil investigative demands and denying the appellant's cross-motion to compel the appellees to comply with those demands.

We affirm, but pursuant to *Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v)*, we certify the following question to the Florida Supreme Court as a question of great public importance:

> DOES THE ANTITRUST EXEMPTION FOR BASEBALL RECOGNIZED BY THE UNITED STATES SUPREME COURT IN *FEDERAL BASE BALL CLUBS OF BALTIMORE, INC. v. NATIONAL LEAGUE OF PROFESSIONAL BASE BALL CLUBS, 259 U.S. 200, 42 S. CT. 465, 66 L. Ed. 898 (1922)* **[**2]** AND ITS PROGENY EXEMPT ALL DECISIONS INVOLVING THE SALE AND LOCATION OF BASEBALL FRANCHISES FROM FEDERAL AND FLORIDA ***ANTITRUST LAW***?

AFFIRMED; QUESTION CERTIFIED.

HARRIS, C.J. and PETERSON, JJ., concur.

Appraisers Coalition v. Appraisal Inst.

United States District Court for the Northern District of Illinois, Eastern Division

August 18, 1993, Decided

No. 93 C 913

Reporter

1993 U.S. Dist. LEXIS 11770 *; 1993-2 Trade Cas. (CCH) P70,364

The APPRAISERS COALITION, ALAN B. BLAU, ALAN BLAU & ASSOCIATES, W.S. BUCKLEY, BUCKLEY APPRAISAL SERVICES, INC., VINCENT A. SOLANO, and V.A. SOLANO & ASSOCIATES, Plaintiffs, v. APPRAISAL INSTITUTE, an Illinois corporation, THE AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, an Illinois corporation, and PATRICIA MARSHALL, BERNARD FOUNTAIN, DOUGLAS BROWN, C. DAVID MATTHEWS, CLIFFORD E. FISHER, JR., JOHN R. UNDERWOOD, JR., BRUCE R. WILLMETTE, BONNIE D. ROERIG, DAVID F. PEATFIELD, DONALD L. BURKE, NANCY M. MUELLER, GERALD A. TEEL, NORMAN E. HALL, and JOE R. PRICE, Defendants.

Core Terms

allegations, enterprise, antitrust, predicate act, violations, pattern of racketeering activity, counts, motion to dismiss, defamatory, designation, Appraisal, requisite, antitrust claim, real estate, continuity, real estate appraiser, fail to satisfy, legal theory, notice, mail, wire

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] Defenses, Demurrers & Objections, Motions to Dismiss

To survive a motion to dismiss based on *Fed. R. Civ. P. 12*, a complaint must allege sufficient facts to outline a cause of action. The court must accept as true all facts alleged in the complaint and reasonable inferences based on those facts, but the court need not accept as true conclusory legal allegations. A defendant's motion to dismiss may be granted only if it is indisputably clear that a plaintiff is not entitled to relief based on the allegations in the plaintiff's complaint. However, the court may grant a motion to dismiss based on *Fed. R. Civ. P. 8* or *9(b)* if the complaint alleges potentially actionable facts but fails to sufficiently notify a defendant of the plaintiff's claims.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] Regulated Practices, Private Actions

Fed. R. Civ. P. 8 requires only a short and plain statement of the claim showing that the pleader is entitled to relief. How much factual detail is required of an antitrust claim has been an issue of diverging opinion in the past. Some courts required complaints to contain detailed factual allegations while other courts permitted complaints to proceed so long as they provided minimal facts sufficient to provide fair notice to defendants. The current approach permits the more liberal of these requirements.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN3[] Regulated Practices, Private Actions

The current status of antitrust pleading requires a plaintiff to specify the theory upon which he expects to recover and to make enough factual allegations to identify each of the elements required by that theory.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN4[] Private Actions, Remedies

Derivative injuries sustained by employees, officers, shareholders, and creditors of an injured company do not constitute "antitrust injury" sufficient to confer antitrust standing. Associations lack standing to assert damage claims on behalf of their members.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5[] Private Actions, Racketeer Influenced & Corrupt Organizations

To state a RICO claim for any subsection of 18 U.S.C.S. § 1962, a plaintiff must allege a "person", an "enterprise", and a "pattern of racketeering activity." To allege a pattern of racketeering activity, a plaintiff must properly allege (1) the commission of two or more of the predicate acts listed in 18 U.S.C.S. § 1961(1); (2) relationship among those predicate acts; and (3) "continuity" among the predicate acts.

Criminal Law & Procedure > ... > Racketeering > Travel Act > Elements

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

Criminal Law & Procedure > ... > Racketeering > Travel Act > General Overview

HN6[] **Travel Act, Elements**

Because *18 U.S.C.S. §§ 1341*, *1343* require allegations of fraud, an alleged predicate act under either of those sections is governed by *Fed. R. Civ. P. 9(b)*. The rule provides: In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. This "particularity requirement" contrasts with the "short and plain statement" requirement of *Fed. R. Civ. P. 8* which governs allegations that *18 U.S.C.S. § 1952* has been violated.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN7[] **Pleadings, Heightened Pleading Requirements**

A plaintiff may satisfy the particularity requirement of *Fed. R. Civ. P. 9(b)* with regard to a particular fraudulent communication by pleading the time of the communication, the place or manner of the communication, the specific content of the communication, the identities of the parties to the communication and who initiated the it, and how the communication furthered the scheme to defraud.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN8[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

An enterprise under RICO is any individual, partnership, corporation, association, or other legal entity, and any union or group of individual associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The court requires that the involvement of an enterprise in a RICO allegation be alleged with enough specificity such that the defendants are put on notice of the plaintiffs theory or theories of RICO violations.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN10[] **Heightened Pleading Requirements, Fraud Claims**

An Illinois Consumer Fraud and Deceptive Business Practices Act violation must be plead within the requirements of *Fed. R. Civ. P. 9(b)*. To satisfy these requirements, a plaintiff must plead the time, place, and contents of the representations made, along with the identity of the party making the representation and what resulted from the representation.

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Intentional Torts > Defamation > General Overview

Torts > Intentional Torts > Defamation > Procedural Matters

HN11[] **Defamation, Defamation Per Se**

A statement may be defamatory per se or per quod. A statement is per se defamatory when the words used are so obviously and materially harmful to the plaintiff that injury to his reputation is may be presumed. A statement is pur quod defamatory if extrinsic facts demonstrate the harmfulness to the plaintiffs reputation of the statement or statements in question. Initially, to plead a defamation claim, a plaintiff must specifically state the words considered actionable. A statement is per se defamatory in Illinois if it imputes the commission of a crime, if it imputes infection with a loathsome communicable disease, if it imputes inability to perform or want of integrity in the discharge of one's employment or business, or if it prejudices a party in his or her business. Even, if a statement falls within one of these categories, however, it is not per se defamatory if it is reasonably capable of an innocent construction. The publication of an employee's termination is not defamatory per se. To allege a per quod defamation, a plaintiff must allege facts demonstrating the defamatory meaning of the statement or statements in question.

Judges: [*1] NORDBERG

Opinion by: JOHN A. NORDBERG

Opinion

MEMORANDUM OPINION AND ORDER

The Appraisers Coalition (the "Coalition") and six other Plaintiffs have sued the Appraisal Institute (the "Institute"); the Institute's wholly-owned subsidiary, the American Institute of Real Estate Appraisers ("AIREA"); and several individuals. The Plaintiffs claim relief based upon five counts in their First Amended Complaint. The five counts allege violations of the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.* (West 1973 & Supp. 1993), violations of the Clayton Antitrust Act, *15 U.S.C. § 12 et seq.* (West 1973 & Supp. 1993), violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C.A. § 1961 et seq.* (West 1984 & Supp. 1993), violations of Illinois state antitrust laws, Ill. Rev. Stat. ch. 38, paras. 60-3(1) to -3(4) (Smith-Hurd Supp. 1992), [1] violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2, paras. 261 *et seq.* (Smith-Hurd Supp. 1992), [2] and, in Count Five, state law libel and slander. The Defendants currently **[*2]** have two motions to

[1] Currently codified at *740 ILCS 10/3(1)*-10/3(4) (Smith-Hurd 1993).

dismiss before the Court: a motion to dismiss based on asserted inadequacies in the First Amended Complaint's and a motion to dismiss based on Plaintiffs' initial failure to file a memorandum in opposition to the first motion.

The Plaintiffs have now responded to the original motion to dismiss and the Defendants have replied to that responsive memorandum. Accordingly, Defendants' second Motion to Dismiss is DENIED as moot. The Court now turns to the original Motion to Dismiss.

HN1[] To survive a motion to dismiss based on Rule 12, a complaint must allege sufficient facts to outline a cause of action. *Davis v. Frapolly, 747 F. Supp. 451 (N.D. Ill. 1989)*. The court must accept as true all facts alleged in the complaint and reasonable inferences based on those facts, *Bane v. Ferguson, 890 F.2d 11 (7th Cir. 1989)*, but **[*3]** the court need not accept as true conclusory legal allegations. *Coronet Ins. Co. v. Seyfarth, 665 F. Supp. 661, 665 (N.D. Ill. 1987)*. A defendant's motion to dismiss may be granted only if it is indisputably clear that a plaintiff is not entitled to relief based on the allegations in the plaintiff's complaint. *See* *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Skinner v. Shirley of Hollywood, 723 F. Supp. 50, 52 (N.D. Ill. 1989)*. However, the Court may grant a Motion to Dismiss based on *Rules 8* or *9(b)* if the complaint alleges potentially actionable facts but fails to sufficiently notify a defendant of the plaintiff's claims.

I. ALLEGED FACTS

Defendant Appraisal Institute is an Illinois not-for-profit corporation having its principal place of business in Illinois. The Institute started doing business in January of 1991, serving as the parent and controlling corporation of the Society of Real Estate Appraisers, Inc. (the "Society") and of AIREA. The Society and AIREA are organizations of independent real estate appraisers having similar functions and providing similar services to real estate **[*4]** appraisers and their clients. Before its control by the Institute, the Society members competed with AIREA's members.

Founded in the 1930s, the Society qualifies and promotes its member independent real estate appraisers for real estate appraisement opportunities in both the residential and nonresidential ("commercial") real estate markets. Based on their ability and experience, members of the Society might attain one or more of three possible "pinnacle designations" or highest organizational appraisal qualifications. These possible qualifications differed by member practice area. The highest designation attainable by a commercial real estate appraiser was the "Senior Real Property Appraiser", or "SRPA." The highest designation attainable by a residential real estate appraiser was the "Senior Residential Appraiser", or "SRA." And, the highest possible designation in the field of real estate advisory analysis was the "Senior Real Estate Analyst", or "SREA."

Similarly, since the 1930s, AIREA has qualified and promoted its member appraisers. However, AIREA's activities have been primarily limited to the commercial real estate appraisal field. The highest appraiser designation of an AIREA **[*5]** member was the "Member Appraisal Institute", commonly referred to as "MAI Member" or "MAI."

Each of the Plaintiffs in this case, and the members of the coalition, was a member of the Society having attained the SRPA designation, the highest possible in the commercial real estate field for members of the Society. The Plaintiffs now generally claim that, through various anticompetitive means, AIREA, several of its members, and the Institute have wrongly monopolized or attempted to monopolize several of the commercial real estate appraisal markets in favor of MIA members at the cost of SRPA members and have wrongly taken control of the Society in order to devalue the SRPA designation.

II. ANALYSIS

A. Counts One and Three

In Counts One and Three respectively, the Plaintiffs allege federal and state antitrust violations. The Court treats these two counts together because the language of the Illinois Antitrust Act tracks the language of the Sherman Act.

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[2] Currently codified at 815 ILCS 505/1-505/12 (1993).

Collins v. Associated Pathologists, Ltd., 676 F. Supp. 1388, 1405 (C.D. Ill. 1987), *aff'd,* 844 F.2d 473 (7th Cir.), *cert. denied, 488 U.S. 852, 102 L. Ed. 2d 110, 109 S. Ct. 137 (1988)*. **[*6]**

Defendants object to Plaintiffs' antitrust claims on three grounds: (1) the claims fail to satisfy the requirements of Rule 8 of the Federal Rules of Civil Procedure; (2) they do not state a claim and should be dismissed pursuant to Fed. R. Civ. P. 12; and (3) several of the Plaintiffs lack standing to sue as antitrust plaintiffs.

HN2[] Rule 8 of the Federal Rules of Civil Procedure requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). How much factual detail is required of an antitrust claim has been an issue of diverging opinion in the past. 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1228 (Civil 2d ed. 1990). Some courts required complaints to contain detailed factual allegations while other courts permitted complaints to proceed so long as they provided minimal facts sufficient to provide fair notice to defendants. *See id. at 216-20* nn.2-3 (listing case examples). The current approach permits the more liberal of these requirements. *See id. at 217, 222* (stating that "it is now reasonably clear" that pleading standards for complex cases is the same as that for simpler cases **[*7]** and that the "modern trend is toward greater liberality" in permitting antitrust pleadings).

Despite the more recent convergence of opinion regarding the detail of factual allegations necessary to support an antitrust claim, disagreement remains over the elements of antitrust actions must be plead. *Id. at 220*. In particular, one element at issue is whether a plaintiff must plead some public injury or detrimental effect on a specific market. *Id. at 221*. Generally, this issue has come to turn on whether a plaintiff's theory of relief is based on an antitrust violation that is *per se* illegal or one that is based on the "rule of reason". *See id. at 221-22* (stating that this issue currently turns on whether a violation is *per se).* [3]

HN3[]

The current status **[*8]** of antitrust pleading requires a plaintiff to specify the theory upon which he expects to recover and to make enough factual allegations to identify each of the elements required by that theory. *See* Seglin v. Esau, 769 F.2d 1274, 1279 (7th Cir. 1985) (citing and quoting cases that support the conclusion that an antitrust complaint "must contain either direct or inferential allegations respecting all the materials elements necessary to sustain a recovery under some viable legal theory."); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied, 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)*; Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984) (same); *see also* Wright & Miller, *supra,* at 222 (stating that "Enough data should be pleaded from which the elements of the claim for relief can be identified."). There are several bases for this rule. Among these are the following: first, given that the public policy allegation turns on whether or not an alleged violation is *per se* illegal, the plaintiff must specify a theory so that **[*9]** the defendant and the court can determine if an allegation of public injury is necessary; second, while public policy may suggest that a plaintiff not be required to plead facts not within its knowledge, no such justification exists with respect to the theory upon which the plaintiff expects to recover. *See* 2 Phillip E. Areeda & Donald F. Turner, ***Antitrust Law*** P 317(e) (1978). And, third, by requiring a plaintiff to specify a theory and the elements of that theory, courts may evaluate more easily the substantive merits of such claims. *See id.*

In the opinion of the Court, the Plaintiffs have failed to satisfy the requirements of both Rule 8 and Rule 12(b)(6) of the Federal Rules of Civil Procedure. In an apparent effort to be complete in their forty-one page First Amended Complaint, Plaintiffs have obfuscated their antitrust theory or theories such that their complaint cannot be said to have made a short and plain statement of their claim or to have properly notified the Defendants of the claims against them. At least three difficulties exist.

First, Plaintiffs do not state a specific theory upon which they expect to recover. Instead, Plaintiffs use language throughout their **[*10]** complaint that indicates that more than one theory might be contemplated. Some of this

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[3] The "rule of reason" requires analysis of the market said to be harmed by the violation and the effects of the competitive restriction on that market. Consequently, such harm is a necessary element of an antitrust claim based on the "rule of reason".

language is inappropriately vague. Plaintiffs accuse or appear to accuse the Defendants of monopolization; attempted monopolization; "a course of anticompetitive activities"; boycotting, creating barriers to entry; violations of sections one and two of the Sherman Act; 15 U.S.C. §§ 1, 2; violations of sections fourteen, fifteen, and twenty-six of the Clayton Act, 15 U.S.C. §§ 14, 15, & 26; "various contracts, combinations and conspiracies"; and violations of Illinois State Antitrust claims. All of these "theories", save the Illinois State law violations, are crammed into Count One, thus obfuscating any reasoned inquiry into the actual theory or theories to be relied upon.

Second, by lumping several theories into one count, Plaintiffs confuse inquiry into whether they are entitled to recovery on multiple or alternate antitrust theories. From the facts alleged and the legal theories mentioned in the complaint, Plaintiffs may be entitled to proceed with multiple federal and state antitrust counts that potentially could allow for multiple **[*11]** or alternate recoveries. As written, Plaintiffs' complaint does not provide Defendants with sufficient notice to prepare a defense regarding these issues.

Third, Plaintiffs' complaint does not provide Defendants sufficient notice or opportunity to challenge the *per se* elements of Plaintiffs' claim. Plaintiffs allege that:

> The actions of defendants and those in concert with them were intended to, did and continue to restrain trade and commerce. Certain of those restraints have been and are *per se* illegal; to the extent not *per se* illegal, the actions complained of did and continue to unreasonably restrain trade.

(Compl. P 55.) Given that Plaintiffs fail to state the legal theories on which they rely, this paragraph requires Defendants to speculate about which theories upon which the Plaintiffs in tend to rely on *per se* liability. In this regard, Plaintiffs accurately plead that the boycotts charged are *per se* illegal. (Compl. P 50.) No such specificity is accorded the other theories contained in the complaint.

In addition to Plaintiffs' difficulties specifying a legal theory for their antitrust claims, several Plaintiffs appear to lack standing to assert **[*12]** an antitrust claim. The Seventh Circuit Court of Appeals has stated that: ***HN4***[] "Derivative injuries sustained by employees, officers, shareholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing. *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1378 (7th Cir. 1987)*. From the complaint, it appears that individual Plaintiffs Blau, Buckley, and Solano lack standing to sue, assuming they are seeking damages for derivative injuries suffered by their businesses. Additionally, it is unclear from the Complaint what capacity the Coalition is suing in. Associations lack standing to assert damage claims on behalf of their members. *See id. at 1380 n.3*.

Accordingly, with respect to Plaintiffs' Antitrust Counts, Counts One and Three, Defendants' Motion to Strike and Dismiss is GRANTED. In the opinion of the Court, Plaintiffs have alleged facts which may support more specifically pleaded antitrust theories. Thus, the Court dismisses Counts One and Three without prejudice to Plaintiffs' filing another amended complaint within twenty-one **[*13]** days. Any such complaint must comply with the above discussion by specifying the legal theories relied upon in distinct counts, and by specifying the individuals suing on each count.

B. Count Two

In Count Two, Plaintiffs allege four violations of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § § 1961-1968*. Specifically, Plaintiffs claim the defendants (1) used or invested money from a pattern of racketeering activity in violation of *18 U.S.C. § 1962(a)*; (2) used a pattern of racketeering activity to acquire an interest in an interstate enterprise in violation of *18 U.S.C. § 1962(b)*; (3) conducted a pattern of racketeering activity in violation of *18 U.S.C. § 1962(c)*; and *(4)* conspired to violate *§§ 1962(a)-1962(c)* in violation of *18 U.S.C. § 1962(d)*.

HN5[] To state a RICO claim for any subsection of *section 1962*, a plaintiff must allege a "person", an "enterprise", and a "pattern of racketeering activity. " *See R.E. Davis Chem. Corp. v. Nalco Chem. Co., 757 F. Supp. 1499, 1507 (N.D. Ill. 1990)* **[*14]** (stating that all *section 1962* claims have these three common fundamental elements). Here, Plaintiff has failed to adequately plead a pattern of racketeering activity and the enterprise or enterprises associated with that activity.

To allege a pattern of racketeering activity, a plaintiff must properly allege (1) the commission of two or more of the predicate acts listed in *18 U.S.C. § 1961(1)*; (2) relationship among those predicate acts; and (3) "continuity" among the predicate acts. *See* *H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237-39, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989)* (explaining that a pattern of racketeering activity is established by at least two or more predicate acts and "continuity plus relationship"). Here, Plaintiff has failed to adequately plead the requisite acts necessary to establish a pattern of RICO activity.

Plaintiffs' attempts to allege the requisite predicate acts by stating that the Defendants violated the federal mail fraud statute, *18 U.S.C. § 1341*; the federal wire fraud statute, *18 U.S.C. § 1343*; and, the federal interstate travel **[*15]** in aid of racketeering statute, *18 U.S.C. §§ 1952(a)(1)* and *(3)*. A violation of each of these statutes qualifies as a predicate act underRICO. 18 U.S.C. *§ 1961(1)*. While Plaintiffs claim that Defendants violated these statutes, conclusory allegations, without the requisite factual support, are insufficient to satisfy the pleading requirements of RICO. *See* *Jennings v. Emry, 910 F.2d 1434, 1438 (7th Cir. 1990)* (stating that conclusory allegations are "of no consequence if unsupported by proper factual allegations).

The requisite factual support for a given allegation of a predicate act is governed by the pleading requirements for the statute itself. ***HN6***[] Because *sections 1341* and *1343* require allegations of fraud, an alleged predicate act under either of those sections is governed by *Rule 9(b) of the Federal Rules of Civil Procedure*. The rule provides:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

This "particularity **[*16]** requirement" contrasts with the "short and plain statement" requirement of *Fed. R. Civ. P. 8* which governs allegations that *section 1952* has been violated.

HN7[] A plaintiff may satisfy the particularity requirement of *Rule 9(b)* with regard to a particular fraudulent communication by pleading the time of the communication, the place or manner of the communication, the specific content of the communication, the identities of the parties to the communication and who initiated the it, and how the communication furthered the scheme to defraud. *See* *Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1020 (7th Cir. 1992)*; *Graue Mill Dev. Corp. v. Colonial Bank & Trust Co., 927 F.2d 988, 992-93 (7th Cir. 1991)*; *R.E. Davis Chem. Corp. v. Nalco Chem. Co., 757 F. Supp. at 1516*.

Here, Plaintiffs have failed to satisfy the requirements of *Rule 9(b)* with respect to their allegations of mail and wire fraud. Plaintiffs have alleged, throughout their complaint, various misrepresentations made by defendants. They do not, however, specify the particular communications, truthful or not, upon which they rely. In an **[*17]** attempt to remedy this default Plaintiffs argue that they need not indicate that any given communication was itself fraudulent. While this is an accurate statement of the law, it fails to correct for the fact that they do not identify individual communications said to promote fraud. Given this failure, the Court finds that Plaintiffs cannot base their RICO allegations on any predicate acts of mail or wire fraud.

In an attempt to allege predicate acts other than mail and wire fraud, Plaintiffs state:

> In executing and furthering the illegal schemes described herein, the defendants and others have repeatedly made use and conspired and agreed to make use of the United States mails and of electronic wire communications systems, including telephones, and have engaged in interstate travel in furtherance thereof in violations of *18 U.S.C. Secs. 1341*, *1343* and *1952(a)(1)* and *(3)* and have repeatedly caused and conspired and agreed to cause fraudulently-obtained money and property to be transported across State lines and in interstate commerce, in violation of *18 U.S.C. Secs. 2314* and *2315*, on many more than two occasions in the four year next preceding the filing of this Complaint.

[*18] (Compl. P 74.) Plaintiffs argue that their complaint alleges offenses committed under *18 U.S.C. §§ 1952(a)(1)*, *1952(a)(3)*, *2314*, and *2315*. Despite this claim, those sections, or any one of them, are mentioned in a total of two paragraphs in the complaint. Neither paragraph makes any allegation other than the naked assertion that the statutes were violated. Such conclusory allegations cannot support a complaint. The Court finds that Plaintiffs have failed to properly allege any predicate acts under *Rule 8*.

Plaintiffs' failure to properly allege the requisite predicate acts to establish a pattern of racketeering activity, makes inquiring into the relationship and continuity elements difficult. Given that the Court is willing to dismiss Count Two without prejudice, as indicated below, the Plaintiff should pay particular attention to Seventh Circuit case law regarding continuity in attempting to replead any RICO claims.

Having failed to plead the requisite predicate acts within the requirements of *Rule 9(b)* and *Rule 8 of the Federal Rules of Civil Procedure*, Plaintiffs have failed to adequately notify any of the Defendants of their individual roles **[*19]** in the purported schemes or to demonstrate the requisite relationship and continuity of the claimed predicate acts. These conclusions alone warrant a dismissal of the Count Two. In addition, Plaintiffs fail to adequately allege a relationship between any predicate acts and a given enterprise.

HN8[] An enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individual associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*. Plaintiffs have alleged that Defendant AIREA is an enterprise, that Defendant Institute is an enterprise, and that the association in-fact of the Individual Defendants with other unnamed individuals was an enterprise. (Compl. PP 58-59). While each of these purported enterprises, as described in the complaint might constitute an "enterprise", Plaintiffs have failed to identify which enterprises are considered to have conducted which predicate acts.

Plaintiffs has generally pleaded the existence of three enterprises but has left the Defendants and the Court to speculate as to how the enterprises were responsible for the *section 1962* violations alleged in the complaint. **[*20]** It is not enough for a plaintiff to allege the existence of an enterprise or to explain its structure. Plaintiffs have vaguely made separate reference to one or more of the enterprises in each of the subparagraphs of paragraph 75 of the complaint. These allegations fail to satisfy the requirement that a plaintiff identify "a single enterprise" that is related to a specific pattern of racketeering activity. *See* *Bastian v. Petren Resources Corp., 681 F. Supp. 530, 538 (N.D. Ill. 1988)* (stating that to state a *section 1962(c)* claim, a plaintiff must "identify a single enterprise, the affairs of which the defendants conducted through a pattern of [racketeering] activity."). This is not to say that a RICO complaint may not contain allegations of more than one enterprise. Rather, ***HN9***[] the Court requires that the involvement of an enterprise in a RICO allegation be alleged with enough specificity such that the Defendants be put on notice of Plaintiffs theory or theories of RICO violations. [4]

[*21] In the opinion of the Court, Plaintiffs have failed to state a claim for RICO violations in Count Two. Accordingly, with respect to that Count, Defendants' Motion to Dismiss is GRANTED. As the Plaintiffs have made allegations sufficient to permit further exploration of a RICO claim, the Court is willing to permit the Plaintiffs one more opportunity to plead a RICO claim. Thus, the Court grants the motion to dismiss without prejudice. This being stated, however, the Court cautions Plaintiffs against "trying to fit a square peg into a round hole by squeezing garden-variety business disputes into civil RICO actions." *Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1025 (7th Cir. 1992)*. Since the *H.J.* decision, very few civil RICO claims have succeeded in establishing a pattern of

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[4] Defendants also complain that Plaintiffs have named the Appraisal Institute as both a person and an enterprise with respect to their *section 1962(c)* claim. Such is prohibited in *Haroco v. American Nat'l Bank & Trust of Chicago, 747 F.2d 384, 400 (7th Cir. 1984)*, *aff'd*, *473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 (1985)*. Plaintiffs correctly point out that they do not claim that the Institute violated *section 1962(c)* in their complaint. While this fact requires the rejection of this element of Defendants argument, it also demonstrates the confusion nature of the manner in which Plaintiffs have made their RICO claims.

Plaintiffs' complaint contains at least two other infirmities. First, it fails to make allegations regarding the management of any enterprise as required by *Reves v. Ernst & Young, __ U.S. __, 113 S. Ct. 1163 (1993)*. Second, it fails to describe the "continuity of structure and personality" or "structure, purpose, function and course of conduct" of the alleged association-in-fact. *See* *O'Rear v. American Family Life Assurance Co., 139 F.R.D. 418, 422 (M.D. Fla. 1991)* (demonstrating means of pleading the existence of an enterprise).

racketeering activity. *See* *Shields Enters., Inc. v. First Chicago Corp., 975 F.2d 1290 (7th Cir. 1992)* (discussing the Seventh Circuit's post-H.J. decisions on the issue of continuity of racketeering activity in civil cases).

C. Count Four

Defendants argue that Plaintiffs fail to state a claim under the Illinois Consumer Fraud and Deceptive **[*22]** Business Practices Act ("Illinois Act") because they fail to plead that claim with the particularity required by *Fed. R. Civ. P. 9(b)*. The Court agrees.

HN10[] An Illinois Act violation must be plead within the requirements of *Rule 9(b)*. *Ramson v. Layne, 668 F. Supp. 1162, 1170 (N.D. Ill. 1987)*. To satisfy these requirements, a plaintiff must plead the time, place, and contents of the representations made, along with the identity of the party making the representation and what resulted from the representation. *Wislow v. Wong, 713 F. Supp. 1103, 1105 (N.D. Ill. 1989)*; *Frank E. Basil, Inc. v. Leidesdorf, 713 F. Supp. 1194, 1198 (N.D. Ill. 1989)*.

In Count IV, Plaintiffs make no allegations with particularity. They make their Count IV allegation by referring "the foregoing schemes" and "the foregoing conduct." (Compl. PP 82, 83.) These allegations are insufficient to satisfy the requirements of *Rule 9(b)*. Accordingly, with respect to Count IV, Defendants' Motion to Dismiss is GRANTED.

D. Count Five

In Count Five, Plaintiffs allege that Defendants defamed them by removing them from buyer's lists and from **[*23]** positions inside and outside the Defendant organizations. ***HN11***[] A statement may be defamatory *per se* or *per quod.* *Kolegas v. Heftel Broadcasting Corp., 154 Ill. 2d 1, 607 N.E.2d 201, 206, 180 Ill. Dec. 307 (Ill. 1992)*. A statement is *per se* defamatory when the words used are "so obviously and materially harmful to the plaintiff that injury to his reputation is may be presumed." *Id.* A statement is *pur quod* defamatory if extrinsic facts demonstrate the harmfulness to the plaintiffs reputation of the statement or statements in question. *Id.*

Initially, to plead a defamation claim, a plaintiff must "specifically state the words considered actionable." *Derson Group, Ltd. v. Right Management Consultants, Inc., 683 F. Supp. 1224, 1227 (N.D. Ill. 1988)*. Here, Plaintiffs make no allegations regarding any statement made by Defendants. This failure alone warrants dismissal as it fails to satisfy the requirements of notice pleading. *Id.* Additionally, Plaintiffs have failed to allege facts from which one could infer they were defamed.

A statement is *per se* defamatory in Illinois if it imputes the Commission of a crime, if it imputes infection with **[*24]** a "loathsome communicable disease, if it imputes "inability to perform or want of integrity in the discharge" of one's employment or business, or if it prejudices a party in his or her business. *Id.* Even, if a statement falls within one of these categories, however, it is not *per se* defamatory if "it is reasonably capable of an innocent construction." *Id.* The publication of an employee's termination is not defamatory *per se. See Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F. Supp. 1359, 1371 n.12 (N.D. Ill. 1990)*. Defendants' alleged removal of Plaintiffs' names from several lists is no worse and cannot be considered defamatory *per se.*

To allege a *per quod* defamation, a plaintiff must allege facts demonstrating the defamatory meaning of the statement or statements in question. *Heerey v. Berke, 188 Ill. App. 3d 527, 544 N.E.2d 1037, 1041, 136 Ill. Dec. 262 (Ill. App. Ct. 1989)*. Plaintiffs fail to plead any such facts.

Accordingly, Defendants' Motion to Dismiss is GRANTED with respect to Count Five. [5]

[*25] III. CONCLUSION

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[5] Defendants' also claim that Plaintiffs have failed to satisfy the pleading requirements of *Rule 9(g)* relating to special damages. Since Plaintiffs do not specify their defamation theory and specify their damages, the Court does not further discuss this issue.

For the foregoing reasons, Defendants' original Motion to Dismiss is GRANTED with respect to each Count of Plaintiffs' complaint. As each of the dismissed counts might satisfy the pleading requirements of *Rules 8* and *9 of the Federal Rules of Civil Procedure* if more properly alleged, the Court's decision is made without prejudice to Plaintiffs' filing an amended complaint within twenty-one days of the date of this Memorandum Opinion and Order. If no such complaint is filed within that time period, then this dismissal shall be considered to have been made with prejudice. Defendants' second Motion to Dismiss is DENIED as moot.

ENTER:

JOAN A. NORDBERG

United States District Judge

DATED: August 18, 1993

El Cajon Cinemas v. American Multi-Cinema

United States District Court for the Southern District of California

August 19, 1993, Decided ; August 20, 1993, Filed

CASE NO. 90-0710 IEG (P)

Reporter

832 F. Supp. 1395 *; 1993 U.S. Dist. LEXIS 18213 **; 1993-2 Trade Cas. (CCH) P70,367

EL CAJON CINEMAS, INC., a California corporation, Plaintiff, v. AMERICAN MULTI-CINEMA, INC., a Missouri corporation, COLUMBIA PICTURES INDUSTRIES, INC., a Delaware corporation; MGM/UA ENTERTAINMENT, INC., a Delaware corporation; ORION PICTURES CORPORATION, a California corporation; PARAMOUNT PICTURES CORPORATION, a Delaware corporation; TRI-STAR PICTURES, INC., a Delaware corporation, Defendants. AMERICAN MULTI-CINEMA, INC., a Missouri corporation, Counterclaimant, v. EL CAJON CINEMAS, INC., a California corporation; GEORGE KRIKORIAN, Counterdefendants. EL CAJON CINEMAS, INC., a California corporation, Plaintiff, v. PACIFIC THEATRES CORPORATION, and VISTA THEATRES CORPORATION, Defendants. PACIFIC THEATRES CORPORATION, a California corporation, and VISTA THEATRES CORPORATION, Counterclaimants, v. EL CAJON CINEMAS, INC., a California corporation, and GEORGE KRIKORIAN, an individual, Counterdefendants.

Core Terms

clearances, distributors, sham, summary judgment motion, COUNTERCLAIMS, antitrust, baseless, lawsuit

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN1[] **Noerr-Pennington Doctrine, Sham Exception**

Under the Noerr-Pennington doctrine, the filing of a lawsuit is immune from the application of the antitrust laws unless the suit is a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2[] **Noerr-Pennington Doctrine, Sham Exception**

There is a two-part definition of sham litigation. Under the first part of this test, the lawsuit must be objectively baseless in the sense that no reasonable litigant can realistically expect success on the merits. If an objective litigant can conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under the Noerr-Pennington doctrine, and an antitrust claim premised on the sham exception must fail.

Counsel: **[**1]** GEORGE A. FOSTER (C.S.B. #065824), SHALL, BOUDREAU & GORE, INC., 501 W. Broadway, Suite 900, San Diego, California 92101, Telephone: (619) 230-7200 and ROBERT C. HACKETT, DAVID W. DOW, MOHR, HACKETT, PEDERSON, BLAKLEY, RANDOLPH & HAGA, P.C., 3807 North Seventh Street, Phoenix, Arizona 85014, Telephone: (602) 277-7600, Attorneys for Defendant/Counter-Claimant AMERICAN MULTI-CINEMA, INC.

SOLOMON, WARD, SEIDENWURM & SMITH, James E. King, Suite 1200, 401 "B" Street, San Diego, California 92101, One of the attorneys for El Cajon Cinemas, Inc.

FERRIS & BRITTON, Allan J. Reniche, Suite 300, 1855 First Avenue, San Diego, California 92101, One of the attorneys for Pacific Theatres Corporation and Vista Theatres Corporation.

Judges: GONZALEZ

Opinion by: IRMA E. GONZALEZ

Opinion

[*1397] ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING SUMMARY JUDGMENT ON HORIZONTAL CONSPIRACY ISSUES AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' SECTION ONE COUNTERCLAIMS

Plaintiff El Cajon Cinemas, Inc. ("El Cajon") has requested that this Court reconsider and vacate its October 23, 1992 ruling, *El Cajon Cinemas, Inc. v. American Multi-Cinema, Inc.,* 1992-2 Trade Cas. P 70,038 (S.D. Cal. 1992), **[**2]** made as part of the summary judgment proceedings, with regard to the existence of an alleged horizontal conspiracy in violation of Section One of the Sherman Act (*15 U.S.C. § 1*) between motion picture exhibitor defendants (a) American Multi-Cinema, Inc. ("AMC") and (b) Pacific Theatres Corporation and/or Vista Theatres Corporation (collectively "Pacific"). El Cajon has also requested that this Court grant it summary judgment on the counterclaims of AMC and Pacific that El Cajon conspired with motion picture distributors to violate Section One of the Sherman Act.

The Court, having thoroughly reviewed the papers filed in support of and in opposition to the motion, and having heard arguments and comments of counsel, finds as follows:

MOTION FOR RECONSIDERATION OF EL CAJON'S HORIZONTAL CONSPIRACY CLAIM

The motion is untimely in that it fails to comply with Local *Rule 7.1* and *Rules 59* and *60 of the Federal Rules of Civil Procedure*. Although the motion is untimely, the Court has, nevertheless, elected to hear the request to reconsider its earlier ruling.

First, El Cajon contends that the holding by the Court was at odds with a rule that was set out **[**3]** in a particular Ninth Circuit case, *In Re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990)*, *cert. denied, U.S. , 114 L. Ed. 2d 725, 111 S. Ct. 2274 (1991)*, and as echoed by the Supreme

Court in *Eastman Kodak Company v. Image Technical Services, Incorporated, U.S. , 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

In particular, El Cajon focuses on one statement that was made in the Court's oral ruling when the Court said that, "El Cajon cannot prevail on a motion for summary judgment by presenting the Court with facts that are just as susceptible to an interpretation of proper conduct as improper conduct." El Cajon contends that this statement is at odds with the Ninth Circuit's interpretation in *Petroleum Products* of the Supreme Court's decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. The Court believes that El Cajon is correct that this statement is facially at odds with the Ninth Circuit's view in *Petroleum Products.* But a review of the evidence presented reveals that this statement **[**4]** really is not correct, so the Court will go behind the statement and look at the evidence. The Court inadvertently said something that it did not mean to say.

El Cajon presented evidence that, number one, both AMC and Pacific have similar alleged clearances over El Cajon and both declined to lift the alleged clearances; and two, after the commencement of the suit, an employee of Pacific inquired of an employee of AMC whether AMC was going to continue to request clearances over El Cajon in light of the pending lawsuit and the alleged requests by various distributors to discontinue clearances. The AMC employee replied only that Pacific would have to speak to the distributor about AMC's position on the alleged clearances. Three, that after the commencement of this suit, a Pacific executive and an AMC executive ran into one another at some kind of industry gathering and the Pacific executive inquired as to AMC's position regarding the alleged clearances and was told that he would, "hear about it," if AMC decided to lift the alleged clearances.

El Cajon, as the Court understands it, does not contest the finding that the parallel **[*1398]** conduct is insufficient to suggest conspiratorial objectives. **[**5]** Rather, El Cajon contends that the conversations, and the Court's mistaken comment that they are susceptible to an interpretation of improper conduct, requires reversal of the Court's ruling.

The real finding of the Court is found in the sentences preceding the offending sentence. The Court specifically found that the instances of contact between AMC and Pacific that were cited by El Cajon belie the sinister import that El Cajon would imply. Moreover, the Court specifically found that when Pacific attempted to initiate the conversations with AMC, that AMC declined to speak with Pacific on the issues, saying only either that Pacific would have to talk to the distributors about AMC's position on clearances, or that Pacific would probably hear about it if AMC decided to change its course regarding the clearances.

When AMC declined to speak to Pacific, the potential for a conspiracy, the Court finds, was wholly negated. To the extent that the word "conversation" implies an exchange of information between two parties, the Court finds that in this case there were no conversations using that definition. One party inquired and the other declined to comment, and that is the way the Court sees **[**6]** the evidence.

El Cajon's inference that this is conspiratorial conduct is not reasonable. To the extent that this Court suggested otherwise, it was mistaken, and any such finding is specifically stricken from the record. This Court never found, or at least never intended to find, that the evidence presented by El Cajon was susceptible to a conspiratorial interpretation. This Court believes that the ruling reflected in its order of October 23, 1992, *El Cajon Cinemas, Inc. v. American Multi-Cinema, Inc.,* 1992-2 Trade Cas. P 70,038 (S.D. Cal. 1992), is correct, and reaffirms that order.

DEFENDANTS' SECTION ONE COUNTERCLAIMS

AMC and Pacific have counterclaimed against El Cajon based upon allegations that the lawsuit instituted by El Cajon against the distributors AMC and Pacific constituted "sham" litigation. ***HN1***[] Under the *Noerr-Pennington* doctrine, the filing of a lawsuit is immune from the application of the antitrust laws unless the suit is a sham. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; *United Mineworkers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1969)*. **[**7]**

In *Professional Real Estate Investors, Incorporated v. Columbia Pictures Industries, Inc.,* 1993 Trade Cas. P 70,207 (U.S. S. Ct.), ***HN2***[] the Supreme Court outlined a two-part definition of sham litigation. Under the first part of this test, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and an antitrust claim premised on the sham exception must fail. Under this test AMC and Pacific must prove that the litigation against the distributors constituted the pursuit of a baseless claim so that a reasonable litigant could not realistically expect to secure favorable relief.

El Cajon has not cited, nor has the Court found, any case which holds that the mere fact that an action manages to survive a summary judgment motion automatically renders it immune under the *Noerr-Pennington* doctrine. Whether a claim is baseless is a question of law. Because the parties have not briefed this issue, this Court defers ruling on the questions whether **[**8]** the underlying litigation against the distributors was baseless. Therefore, for purposes of this motion for summary judgment, the Court will assume that AMC and Pacific survived this prong of the test for sham litigation.

Next, the Court must examine the litigant's subjective motive of bringing the action. Under the second prong of the Supreme Court's test for sham litigation, the focus is whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the courts as anti-competitive weapons. Here, AMC and Pacific allege that **[*1399]** El Cajon instituted the proceedings against the distributors to force them into giving a certain percentage of their films to El Cajon even though it was not in their best interest to do so. The argument assumes that those films would have gone to one or the other of AMC and Pacific had they not been given to El Cajon. Thus, there is some evidence in the record from which a reasonable juror could determine that there had been interference with a business relationship through the use of this court and that the interference was anti-competitive.

El Cajon and AMC and Pacific at this point are **[**9]** in disagreement as to whether the conduct in question is a *per se* violation of ***antitrust law*** or is subject to the rule of reason. The operational difference between these two positions is whether AMC and Pacific are required to show relevant product and geographic markets. The Court finds that sham litigation is a *per se* violation of the antitrust laws, for there is no redeeming value to the practice. Therefore, there is no requirement that AMC and Pacific prove an anticompetitive effect upon a defined relevant market.

If AMC and Pacific establish the first two prongs, they are only required to show a causal antitrust injury and damages. AMC and Pacific are not required at this stage to make a detailed revelation of the actual amount of damages suffered. It is sufficient for the Court to determine that, should the theory of AMC and Pacific be accepted, a reasonable jury could find that damages were sustained. If the theory of AMC and Pacific is correct, they are damaged to the extent that a film was given to El Cajon when it might otherwise have been given to either or both AMC and Pacific.

For these reasons, El Cajon's motion for summary judgment on the counterclaims of AMC **[**10]** and Pacific is denied.

. . .

IT IS SO ORDERED.

IRMA E. GONZALEZ

United States District Judge

Dated: August 19, 1993.

End of Document

Helder v. Hitachi Power Tools

United States District Court for the Western District of Michigan, Southern Division

August 20, 1993, Decided

File No. 1:91-CV-515

Reporter

1993 U.S. Dist. LEXIS 13220 *; 63 Empl. Prac. Dec. (CCH) P42,793; 1993-2 Trade Cas. (CCH) P70,422

ROBERT J. HELDER and BARBARA I. HELDER, Husband and Wife, Plaintiffs, v. HITACHI POWER TOOLS, USA LTD., a Georgia corporation; BANK OF TOKYO, a California Bank; NORMAN JAEGER; FASTENERS INC., and BETTYE MARCIOCH, Defendants.

Core Terms

plaintiffs', terminated, pricing, benefits, vertical, employees, competitors, antitrust, anticompetitive, retail, relevant market, consumers, summary judgment, present case, discount, indirect, dealers, anticompetitive conduct, discriminatory, manufacturer, conspiracy, products, damages, fixing, hiring, sales representative, similarly situated, antitrust claim, distributorship, monopolize

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN1[] **Standing, Clayton Act**

15 U.S.C.S. § 4 of the Clayton Act provides in part: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost suit, including reasonable attorney fees.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN2[] **Private Actions, Standing**

The courts apply a five-factor analysis to determine antitrust standing. No single factor is dispositive, and all must be balanced. The factors include: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. Whether a plaintiff has antitrust standing is a question of law.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN3[ ] **Regulated Practices, Market Definition**

An action under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, requires proof: (1) that the antitrust defendant contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects; (3) within relevant product and geographical markets; (4) that the objects and conduct pursuant to that contract or conspiracy were illegal; and (5) that the plaintiff was injured as a proximate result of that conspiracy. In cases where the rule of reason applies, a court determines the existence of adverse effects on competition. This requires inquiry into market definition and market power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN4[ ] **Per Se Rule & Rule of Reason, Sherman Act**

Even if facts in a case alleging violation of the Sherman Act support the claim of an exclusive dealership agreement, a plaintiff still must prove, under the rule of reason, that the agreement had an adverse impact on competition in a relevant market. The mere existence of an exclusive agreement is insufficient. A manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. Vertical confinement of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others would not violate the Sherman Act.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN5[] **Clayton Act, Claims**

The elements of a vertical price fixing action are: (1) defendant intended to fix prices of resellers down the distributive chain; (2) defendant coerced plaintiff into charging higher or lower prices; (3) defendant's conduct resulted in antitrust injury; and (4) entitlement to relief exists. Only dealers or customers of a seller in a vertical price fixing scheme could suffer the requisite antitrust injury to satisfy the standing requirements under *§ 4* of the Clayton Act, *15 U.S.C.S. § 4*. Even competitors who allege antitrust injury in a vertical price fixing scheme must present evidence of predatory pricing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN6[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Differential pricing does not violate *§§ 1* or *2* of the Sherman Act unless the pricing is predatory, that is, below the manufacturer's cost, and resulted in a radical and anticompetitive restructuring of the dealer's market. If suppliers must cut prices to all competing dealers or to none, they cannot decide to factor a single dealer. They may as well decide not to cut prices at all, perhaps to the benefit of the dealers, but certainly to the detriment of the Sherman Act's ultimate beneficiary, the consumer.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] **Regulated Practices, Monopolies & Monopolization**

A claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, requires proof that defendants: (1) possess monopolistic power or acquired such power willfully and unfairly; or (2) engaged in anticompetitive conduct designed to destroy competition while intending to monopolize a relevant market, or possessing sufficient market power to present a dangerous probability of successfully monopolizing; or (3) have conspired or committed an overt act in furtherance of a conspiracy specifically intending to monopolize a relevant market.

Business & Corporate Compliance > ... > Discrimination > Public Contracts > Scope & Definitions

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination

Civil Rights Law > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > General Overview

Civil Rights Law > ... > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Classes

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

Labor & Employment Law > Discrimination > Public Contracts > General Overview

HN8[] **Public Contracts, Scope & Definitions**

42 U.S.C.S. § 1981 provides in part: All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts as is enjoyed by white citizens.

Business & Corporate Compliance > ... > Discrimination > National Origin Discrimination > Federal & State Interrelationships

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

Labor & Employment Law > Discrimination > Actionable Discrimination

Labor & Employment Law > ... > Employment Practices > Adverse Employment Actions > Discharges & Failures to Hire

HN9[] **National Origin Discrimination, Federal & State Interrelationships**

Title VII actions are assessed under a three-step process. The three-step analysis requires plaintiffs to establish a prima facie case of discrimination, which the defendants can rebut by articulating a legitimate nondiscriminatory business reason for its action, which in turn the plaintiffs then can attempt to dismiss as pretextual. A claim of disparate treatment under Title VII requires plaintiff to show that the defendant acted with discriminatory intent or motive. Further, a similarly situated employee must be similarly situated in all relevant respects.

Business & Corporate Compliance > ... > Pensions & Benefits Law > ERISA > Civil Penalties

Pensions & Benefits Law > ... > Civil Litigation > Causes of Action > Failures to Respond

Pensions & Benefits Law > ERISA > General Overview

Pensions & Benefits Law > ERISA > Civil Litigation > General Overview

HN10[] **Employee Retirement Income Security Act (ERISA), Civil Penalties**

Section 502(c) of the Employee Retirement Income Security Act (ERISA), *29 U.S.C.S. § 1132(c)*, requires an administrator of a plan to provide any information required by ERISA, such as specified in § 104(b)(4), to a plan participant or beneficiary within 30 days of a request. Failure to do so subjects the plan administrator, in the discretion of the court, to a penalty up to $ 100 a day. A demand for payment of benefits is not a "request for information" for purposes of *§ 1132(c)*. If a claim is denied and the participant or beneficiary requests in writing an explanation of the denial, then the penalty provision applies.

Judges: [*1] Gibson

Opinion by: BENJAMIN F. GIBSON

Opinion

Hon. Benjamin F. Gibson

OPINION

Defendants move for summary judgment under *Federal Rule of Civil Procedure 56* on plaintiffs' complaint. Plaintiffs complained that defendants violated ***antitrust law***, ERISA, and Title 28 United States Code Section 1981, after Robert Helder claims that he was fired for refusing to engage in anticompetitive conduct by limiting his development of new accounts for HPT to those approved by Fasteners.

I. BACKGROUND

Plaintiffs are Robert J. Helder, a former sales representative for defendant Hitachi Power Tools, Inc., and his wife Barbara I. Helder. Hitachi Power Tools, Inc. ("HPT") is a distributor for Hitachi Koki Co., Ltd., with its headquarters in Norcross, Georgia. HPT employs sales representatives to sell its products to wholesalers and retailers. Defendant Norman Jaeger is a regional sales manager for HPT. Defendant Bettye Marcioch was a personnel and benefit administrator for HPT when Helder worked for HPT.

HPT hired Robert Helder as a salesman on January 24, 1989, to develop and service accounts in Michigan and northern Indiana. Helder's employment agreement provided for at-will employment governed by Georgia law.

According **[*2]** to plaintiffs, Helder "performed very well" by increasing total sales in his territory and received a commendatory letter from the president of HPT, Mr. Nidaira.

Shortly after Helder started working for HPT, he met with Fred Klaty, president of Fasteners, Inc., HPT's largest account in Michigan. Klaty advised Helder that if HPT wanted to maintain Fasteners' volume of business that Helder would have to inform Klaty of the status of his accounts and obtain Fasteners' permission to open any new wholesale accounts. Klaty also informed Helder that Helder's position with HPT depended upon his compliance with Klaty's request. HPT was not technically a wholesaler as defined in HPT's marketing materials, but HPT did receive discount rates of a wholesaler. Initially Helder did not protest this arrangement. However, Helder did open new accounts without advising Klaty or requesting his approval.

HPT terminated Helder's employment on February 19, 1990. As reflected in a separation notice, HPT purportedly terminated Helder for not making customer calls and his failing to file weekly client contact reports. Helder asserts that HPT's proffered reason is pretextual and that HPT actually terminated **[*3]** him in retaliation for not cooperating with Fasteners.

After his termination, Helder telephoned defendant Marcioch and requested immediate payment of his vested benefits under HPT's benefit plan. On May 24, 1990, Marcioch wrote Helder that his money would be sent to him and also provided Helder with a plan summary. HPT paid Helder his benefits on May 7, 1991.

Helder maintains that HPT only terminated "American citizens and/or caucasians" in the United States but never terminated a Japanese employee in the United States.

On December 7, 1990, plaintiffs filed their complaint in the United States District Court for the Eastern District of Michigan and alleged seven counts: restraint of trade and monopoly (Count I); breach of contract (Count II); wrongful discharge (Count III); infliction of emotional distress (Count IV); negligent administration of personnel policies (Count V); ERISA (Count VI); and civil rights under Title 43 United States Code Section 1981 (Count VII).

Defendants answered the complaint on January 21, 1991, and moved to dismiss defendant Hitachi Koki Co., Ltd., and change venue to the Western District of Michigan. On February 5, 1991, the court *sua sponte* dismissed **[*4]** all pendent state claims. On June 5, 1991, the court transferred this action to the Western District of Michigan. On September 10, 1991, this Court dismissed defendant Hitachi Koki because plaintiffs failed to serve process on it. Defendant Fasteners then moved to dismiss Count I, restraint of trade and monopoly, arguing that plaintiffs lacked standing. On February 25, 1993, this Court denied Fasteners' motion in part because discovery was still open.

II. SUMMARY JUDGMENT

Defendants move for summary judgment on all of plaintiffs' remaining counts arguing that no genuine issues of material fact exist and that they are entitled to judgment as a matter of law. Defendants maintain that plaintiffs cannot establish violations of the antitrust laws, or ERISA, or a *prima facie* case under Title *42 United States Code Section 1981*.

A. *Antitrust*

1. *Standing*

Defendants argue that plaintiffs lack standing to sue under the antitrust laws. ***HN1***[↑] *Section 4* of the Clayton Act, Title *15 United States Code Section 15(a)*, provides in part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court **[*5]** of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost suit, including reasonable attorney fees.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*, the Court recommended ***HN2***[↑] a five-factor analysis to determine antitrust standing. No single factor is dispositive, and all must be balanced. *Bodie-Rickett & Assoc. v. Mars, Inc., 957 F.2d 287, 290 (6th Cir. 1992)*. The factors include:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.
>
> Examination of these factors facilitates identification **[*6]** of "who is entitled to prosecute an action under *§ 4*."

Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983) (quoting *Associated General Contractors, supra, at 544 n.51*). Whether a plaintiff has antitrust standing is a question of law. *Bodie-Rickett, 957 F.2d at 289*.

Under the five-factor analysis, plaintiff lacks antitrust standing in this action. In the marketplace, parties may be vertically related at different levels in a distributive chain or horizontally related as competitors in the same level. By their nature, agreements between vertically related parties typically do not adversely affect competition as readily as agreements between horizontally related parties. Accordingly, vertical agreements are scrutinized under a "rule of reason" analysis, rather than a *per se* analysis, to assess their anticompetitive effects within relevant geographic and product markets. *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802 (6th Cir. 1988)*. In *Crane,* the Sixth Circuit noted *in dicta* that vertical restraints are "generally found to be potentially **[*7]** beneficial to interbrand competition." *Id. at 808*.

Defendants claim that two Sixth Circuit cases control this dispute. In *Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209 (6th Cir. 1989)*, the court dismissed for lack of standing the claims of a regional sales representative who claimed that he was terminated because he refused to participate in a price fixing scheme in which the defendant boycotted discount retailers who sold at less than the defendant's "keystone price." The court reasoned that vertical agreements are typically aimed at either consumers by maintaining or raising retail prices or at other distributors through exclusive sales territories or preferential privileges and practices. The court determined that reduction of plaintiff's commissions was not the target of the defendant's vertical agreements. The court held that the causal connection between the plaintiff's injury and the defendant's conduct was too attenuated to confer standing.

In *Bodie-Rickett,* the Sixth Circuit relied on *Fellows* and affirmed a summary judgment dismissing the antitrust claim of a commissioned sales broker who was replaced **[*8]** by another broker. In *Bodie-Rickett,* the court determined that a manufacturer's sales representative lacked standing to challenge an allegedly anticompetitive exclusive dealing and full line representation requirement imposed by the manufacturer on distributors. The court held that the plaintiff's injury was indirect and speculative and more direct victims existed in a better position to challenge the conduct.

Plaintiffs attempt to distinguish *Fellows* from the present case. Plaintiffs observe that in *Fellows* the vertical price fixing scheme existed independently of plaintiff because the defendant simply boycotted certain discount retailers. Plaintiffs argue that Helder integrally participated in the allegedly anticompetitive conduct so that he was the "actual instrument of the prohibited conduct." Plaintiffs conclude that Helder was the target of the anticompetitive conduct and, therefore, a causal nexus existed between his injury and the defendants' anticompetitive conduct.

Plaintiffs' argument fails for at least two reasons. First, Helder's deposition testimony plainly indicates that he was not involved in setting the pricing structure of any of his accounts for Hitachi **[*9]** products and that the agreements between HPT and Fasteners existed before he was hired. Second, even if Helder did integrally participate in and control the identity of wholesalers for HPT, this did not make him a target or object of the allegedly anticompetitive agreements between HPT and Fasteners. Plaintiffs admit that HPT's interest was to retain Fasteners' business and that Fasteners' target was to control its profit margin and obtain the best discount that it could. Accordingly plaintiffs failed to demonstrate that Helder was the target of the agreements between HPT and Fasteners.

The second factor in the *Associated General/Southaven* analysis deals with the nature of a plaintiff's alleged injury including the plaintiff's status as consumer or competitor in the relevant market. As a sales representative for HPT power hand tool products, Helder was neither a consumer of HPT products nor a competitor in the power hand tool market. However, the *Fellows,* court also observed that a plaintiff's standing is increased under this analysis where the plaintiff's "injury is 'inextricably intertwined' with the antitrust violation." *Fellows,* 866 F.2d at 211. **[*10]** An inextricably intertwined injury may exist where a defendant "manipulated or utilized" plaintiff as a "fulcrum, conduit or market force to injure competitors." *Id.*

In their complaint, plaintiffs did not allege that Helder was a "fulcrum" or "conduit" in a conspiracy between HPT and Fasteners. Although Helder claims that he initially complied with Fasteners' request to review and approve Helder's new accounts, Helder soon opened new distributorships that competed with Fasteners. Furthermore, Helder testified in a deposition that he was not involved in any of the pricing decisions between HPT and Fasteners. Even accepting Helder's representations as true, Helder simply was not "inextricably intertwined" and did not function as a significant "fulcrum" or "conduit" in the alleged illegal anticompetitive agreement between HPT and Fasteners.

The third factor in the *Associated General/Southaven* analysis deals with the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative. In *Fellows,* the court reasoned that a potential plaintiff who suffers only indirect injury may not have standing. The *Fellows* court stated "the 'wrongful **[*11]** result' [defendant] allegedly sought was vertical price maintenance, 'not termination of the plaintiff's employment' . . . or the diminution of his commissions." *866 F.2d at 211*.

In the present case, the object of the alleged illegal anticompetitive agreement between HPT and Fasteners may have been an exclusive dealing arrangement, low price preferences, and possibly retail price maintenance. However, no evidence suggests that the object was the diminution of Helder's commissions and termination of his employment. The parties directly injured were Fasteners' competitors and retail consumers, not Helder. Helder even admits as much in his answers to interrogatories. Thus, the indirectness of Helder's injury undercuts plaintiffs' standing.

The fourth factor in the *Associated General/Southaven* analysis deals with the potential for duplicative recovery or complex apportionment of damages. Plaintiffs' injury is indirect and derivative of Fasteners' competitors and retail consumers. An award of damages to plaintiffs under these circumstances for the alleged anticompetitive conduct of HPT and Fasteners is not germane in the absence of any other antitrust actions **[*12]** against defendants. However, it increases the potential for duplicative damages should other potential plaintiffs sue. That situation, in turn, would require an apportionment of damages.

The fifth factor in the *Associated General/Southaven* analysis deals with the existence of more direct victims of the alleged antitrust violation. Victims with direct injury of antitrust violations have more incentive to sue. In the present case, plaintiffs have only indirect and derivative injuries. Other potential plaintiffs, such as competitors of Fasteners and retail consumers, have more direct injuries and, therefore, would be in a better position to challenge the anticompetitive conduct.

After balancing the five factors, it simply appears that plaintiffs simply do not have antitrust standing. Plaintiffs were not the object of the alleged anticompetitive agreement; they were not consumers or competitors in any relevant market; their injury was indirect and derivative of more direct victims.

2. *Antitrust Claims*

In addition to plaintiffs' lack of standing, defendants argue that summary judgment is appropriate because plaintiffs' antitrust claims are unsupported by the law or facts.

HN3[] An action **[*13]** under *Section 1* of the Sherman Act, Title *15 United States Code Section 1*, requires proof:

> (1) that the antitrust defendant contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects; (3) within relevant product and geographical markets; (4) that the objects and conduct pursuant to that contract or conspiracy were illegal; and (5) that the plaintiff was injured as a proximate result of that conspiracy.

International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989), *cert. denied, 494 U.S. 1066, 108 L. Ed. 2d 784, 110 S. Ct. 1783 (1990)*. In cases where the rule of reason applies, a court determines the existence of adverse effects on competition. This requires inquiry "into market definition and market power." *Lie v. St. Joseph Hosp. of Mount Clemens, 964 F.2d 567, 569 (6th Cir. 1992)* (quoting *F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 460, 90 L. Ed. 2d 445, 106 S. Ct. 2009* [1986]).

Defendants assert that plaintiffs cannot factually support their claims. Plaintiffs claim that HPT and Fasteners conspired in an exclusive dealership **[*14]** agreement to prevent Helder from opening new dealerships and decrease his sales commissions. However, plaintiffs never produced a copy of an exclusive written agreement and did not know whether one even existed. Moreover, Helder admitted in his deposition that five other HPT distributorships existed in Michigan when he took over the territory and that he opened nine more. Helder admits that neither Fasteners nor HPT prevented him from opening a distributorship with any company other than Bee Line, Inc. Thus, plaintiffs have presented little factual support for their claim that an exclusive distributorship agreement existed between Fasteners and HPT.

HN4[] Even if facts supported the claim of an exclusive dealership agreement, plaintiffs still must prove, under the rule of reason, that the agreement had an adverse impact on competition in a relevant market. *Continental T.V. Inc. v. G.T.E. Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. The mere existence of an exclusive agreement is insufficient. In *United States v. Arnold Schwinn & Co., 388 U.S. 365, 376, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*, the Court recognized the legality of exclusive arrangements:

> [A] manufacturer **[*15]** of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. . . . Vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, . . . would not violate the Sherman Act.

See also Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984); *Fray Chevrolet Sales, Inc. v. General Motors Corp., 536 F.2d 683 (6th Cir. 1976)*; *Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc., 459 F.2d 138, 145-46 (6th Cir. 1972)*.

Plaintiffs have shown no evidence of an adverse impact on competition in a relevant market. Plaintiffs identified the relevant market as Helder's sales territory in Michigan. Plaintiffs claimed that defendants' allegedly unlawful agreement "destroyed" the business of Fasteners' competitors. However, plaintiffs have not presented any evidence to the Court that defendants' agreement had an adverse effect on the relevant market. In *General Aviation, Inc. v. Garrett Corp., 743 F. Supp. 515, 521 (W.D. Mich. 1990)*, **[*16]** an engine manufacturer agreed with an airplane manufacturer not to appoint any dealer as a service center for its engines without the latter's approval. The court held that substitution of one distributor for another does not violate any antitrust laws, absent a showing of "anti-competitive purpose or effect at the interbrand level." *743 F. Supp. at 521*. Plaintiffs identified only one of Fasteners' competitors, Bee Line, Inc., who may have been injured. However, they failed to present documentary evidence of Bee Line's injury or other adverse effect in the interbrand market. Consequently this claim should be dismissed.

Defendants also assert that plaintiffs cannot support their claim of vertical price fixing in which HPT fixed the prices at which Fasteners had to sell HPT's products. ***HN5***[] The elements of a vertical price fixing action are: (1) defendant intended to fix prices of resellers down the distributive chain; (2) defendant coerced plaintiff into charging higher or lower prices; (3) defendant's conduct resulted in antitrust injury; and (4) entitlement to relief exists. *Bender v. Southland Corp., 749 F.2d 1205, 1212 (6th Cir. 1984)*. **[*17]** In *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*, the court held that only dealers or customers of a seller in a vertical price fixing scheme could suffer the requisite antitrust injury to satisfy the standing requirements under *Section 4* of the Clayton Act, Title *15 United States Code Section 15(a)*. Even competitors who allege antitrust injury in a vertical price fixing scheme must present evidence of predatory pricing. *Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525 (1st Cir. 1989)*.

Plaintiffs have presented no documentary evidence that: (1) defendants intended to fix prices; (2) defendants coerced Helder or any other person into setting a particular price; or (3) that any antitrust injury resulted. Rather, it appears on the uncontroverted affidavits of both Helder and Klaty that HPT unilaterally developed its own suggested retail pricing list. It also appears that Fasteners was free to use or not use the retail price list. Further, plaintiffs simply have not indicated how they were injured by the alleged vertical price fixing. Plaintiffs did not allege or present evidence of predatory pricing **[*18]** in the present case. Consequently this claim should be dismissed.

Defendants also contend that plaintiffs' claim of unlawful preferential pricing cannot be factually and legally supported. Plaintiffs allege that HPT agreed with Fasteners not to sell their products to any other distributorship at a lower discount. ***HN6***[] Differential pricing does not violate *Sections 1* or *2* of the Sherman Act unless the pricing is predatory, i.e., below the manufacturer's cost, and resulted in a "radical and anticompetitive restructuring of the dealer's market." *Monahan's Marine, 866 F.2d at 527*. In *Monahan,* the court stated:

> If suppliers must cut prices to all competing dealers or to none, they cannot decide to factor a single dealer, . . . they may as well decide not to cut prices at all, perhaps to the benefit of the dealers, but certainly to the detriment of the Sherman Act's ultimate beneficiary, the consumer.

Id. at 527-28. *See also* *Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1196 (6th Cir. 1982)*, *cert. denied, 466 U.S. 931 (1984)*.

Plaintiffs have not supported **[*19]** their claim with any documentary evidence that HPT's alleged discount to Fasteners was predatory or that it had a radical and anticompetitive effect in the market. Plaintiffs also have not presented any evidence that HPT and Fasteners actually conspired to set discounts. In his deposition, Helder admitted that HPT unilaterally established the discounts for each distributor. Further, in spite of the alleged agreement Helder opened nine distributorships. Consequently this claim should be dismissed.

Defendants also contend that plaintiffs cannot legally or factually support their claim under *Section 2* of the Sherman Act, Title *15 United States Code Section 2*, which prohibits monopolization or attempts or conspiracies to monopolize any part of interstate commerce. ***HN7***[] A claim under *Section 2* requires proof that defendants: (1) possess monopolistic power or acquired such power willfully and unfairly; or (2) engaged in anticompetitive conduct designed to destroy competition while intending to monopolize a relevant market, or possessing sufficient market power to present a dangerous probability of successfully monopolizing; or (3) have conspired or committed an overt act in furtherance of a **[*20]** conspiracy specifically intending to monopolize a relevant market.

In *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988)*, the court required the elements of a private antitrust claim to be alleged in more than vague and conclusory terms. Plaintiffs have failed to specify the character of their monopolization claim as monopoly, attempt, or conspiracy. Moreover, they also failed to support their claim by adequate documentary evidence. Consequently, this claim also should be dismissed.

B. *Discrimination Under* *42 U.S.C. § 1981*

Plaintiffs allege that HPT discrimination against Helder and white employees in favor of its Japanese employees. Plaintiffs claim that: (1) HPT, a wholly owned subsidiary of the now dismissed defendant Hitachi Koki Co., Ltd., did not terminate its Japanese employees; (2) Japanese employees did not have a waiting period for medical insurance; (3) only American employees were laid off when HPT's office in California was reorganized; and (4) all of HPT's management positions were staffed by Japanese. Defendants argue that plaintiffs failed to state a claim under Title **[*21]** *42 United States Code Section 1981*.

HN8[] *Section 1981* provides in part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.

Prior to its 1991 amendments, *Section 1981* did not prohibit discrimination generally. Rather, it prohibited only discrimination in the making and enforcing of contracts. In *Patterson v. McLean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)*, the court construed the pre-amendment language "to make and enforce contracts" in the context of employment to apply only to hiring practices and not to breaches of employment contracts or discriminatory working conditions. *Id. at 2373-74*. The Sixth Circuit similarly limited application of *Section 1981* to discriminatory practices and conditions in hiring practices. *Ang v. Proctor & Gamble Co., 932 F.2d 540, 544-45 (6th Cir. 1991)*; *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505, 508* (6th Cir.) *cert. denied, 111 S. Ct. 2917 (1991)*; **[*22]** *Prather v. Dayton Power & Light Co., 918 F.2d 1255, 1258 (6th Cir. 1990)*, *cert. denied, 115 L. Ed. 2d 1054, 111 S. Ct. 2889 (1991)*.

In 1991, Congress enacted the Civil Rights Act of 1991, *42 U.S.C. § 1981*, effective November 21, 1991, which specifically overruled *Patterson,* to include claims based on the "performance, modification and termination of contracts . . . ." *42 U.S.C. § 1981(b)*. In *Vogel v. City of Cincinnati, 959 F.2d 594* (6th Cir.), *cert. denied, 121 L. Ed. 2d 49, 113 S. Ct. 86 (1992)*, the court determined that the amended act could not be applied retroactively to pre-amendment conduct.

In the present case, plaintiffs filed their action prior to the effective date of the amendment, therefore, plaintiffs must prove that HPT discriminated against Helder during the hiring stage of his employment. Under *Patterson,* HPT's subsequent discriminatory conduct is not actionable. Plaintiffs allege post hiring discriminatory conduct as to benefits and termination. Plaintiffs failed to state and support their claim under **[*23]** *Section 1981*. Further, plaintiffs have not provided any documentary evidence of discriminatory conduct by HPT in hiring Helder.

Defendants additionally argue that even if the *Patterson* limitation did not apply, foreign corporations are permitted by treaties to favor their nationals in employment in this country. Defendants argue that pursuant to treaties such preferential treatment, as a matter of law, will not support claims of disparate treatment or impact under either federal or state statutes. Case law supports this proposition. *Fortino v. Quasar, 950 F.2d 389 (7th Cir. 1991)* (treaty with Japan); *Wickes v. Olympic Airways, 745 F.2d 363, 366 (6th Cir. 1984)* (treaty with Greece). In *Fortino,* plaintiffs filed a national origin claim under Title VII of the Civil Rights Act of 1964, *42 U.S.C. §§ 2000e et seq.,* alleging that American executives of defendant were treated less favorably in terminations than were the Japanese expatriate executives temporarily transferred from the Japanese parent corporation. The district court found in favor of the plaintiffs but the circuit **[*24]** court reversed. The Seventh Circuit distinguished claims of discrimination based on national origin from discrimination based on citizenship. *Id. at 392-93*. The court reasoned that evidence of discrimination based on citizenship could not be used to infer national origin discrimination because defendant's preferential treatment of employees who were Japanese citizens was lawful under the treaty.

In the present case, plaintiffs claim that HPT treated its executive who were Japanese nationals more favorably than its employees who were American nationals. Only three of HPT's employees are Japanese nationals. HPT also admits that its parent corporation, Hitachi Koki, Co., Ltd., relocates certain executives in the United States and that these executives can retain their own pension plans. These plans may differ from plans available to employees who are American citizens.

In the present case, plaintiffs alleged that HPT preferentially favored Japanese nationals. However, plaintiffs neither alleged nor supported any claim that HPT discriminated against Helder or other white employees because of their national origin. Consequently plaintiffs' claim should be **[*25]** dismissed.

Defendants also argue that plaintiffs cannot state a *prima facie* case of intentional discrimination under Title VII. ***HN9***[] Title VII actions are assessed under a three-step process. *McDonnell Douglas v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*; *Trans World Orleans, Inc. v. Thurston, 469 U.S. 111, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985)*; *Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992)*; and *Daniels v. Board of Educ. of Ravenna City Sch. Dist., 805 F.2d 203, 207 (6th Cir. 1986)*. The three-step analysis requires plaintiffs to establish a *prima facie* case of discrimination, which the defendants can rebut by articulating a legitimate nondiscriminatory business reason for its action, which in turn the plaintiffs then can attempt to dismiss as pretextual.

A claim of disparate treatment under Title VII requires plaintiff to show that the defendant acted with discriminatory intent or motive. *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)*; *Beauford v. Sisters of Mercy-Province of Detroit, Inc., 816 F.2d 1104, 1107* **[*26]** (6th Cir.), *cert.*

denied, 484 U.S. 913, 98 L. Ed. 2d 217, 108 S. Ct. 259 (1987). Further, a similarly situated employee must be similarly situated in all relevant respects. *Mitchell, 964 F.2d at 583*.

Plaintiffs have not demonstrated a *prima facie* case of intentional or disparate discrimination. Plaintiffs have not presented any evidence of HPT's discriminatory intent or motive. Furthermore, plaintiffs have not identified any similarly situated employees who were Japanese. HPT employed Helder as a sales representative. HPT did not employ any Japanese or even Americans of Japanese descent as sales representatives. HPT only employed three Japanese nationals who were management executives. Plaintiffs have not demonstrated that Helder was treated differently than any similarly situated employees who were Japanese nationals, because there were no similarly situated employees who were Japanese nationals. Therefore, plaintiffs failed to establish a *prima facie* case of discrimination.

C. *ERISA Claims*

Defendants also move for summary judgment on plaintiffs' claim under Section 502(c) of ERISA, Title *29 United States Code Section 1132(c)*. Plaintiffs **[*27]** claim that they are entitled to penalties because HPT made Helder wait fourteen months for payment of his benefits under a 401(k) plan administered by HPT.

HN10[] Section 502(c) requires an administrator of a plan to provide any information required by ERISA, such as specified in Section 104(b)(4), to a plan participant or beneficiary within thirty days of a request. Failure to do so subjects the plan administrator, in the discretion of the court, to a penalty up to $ 100 a day. *Kleinhans v. Lisle Savings Profit Sharing Trust, 810 F.2d 618, 623 (7th Cir. 1987)*. The *Kleinhans* court held that a demand for payment of benefits is not a "request for information" for purposes of *Section 1132(c)*. *Id. at 623*. However, the court further reasoned that if a claim is denied and the participant or beneficiary requests in writing an explanation of the denial, then the penalty provision applies. *Id. at 623-24*.

Plaintiffs also claim that defendants breached a fiduciary duty under Section 409(a) of ERISA, Title *29 United States Code Section 1109(a)*, by paying to Helder his ERISA benefits fourteen months after he requested **[*28]** them.

Section 409(a) does not describe any particular fiduciary duties, but simply provides that any fiduciary who breaches any duties that ERISA imposes upon fiduciaries shall compensate the plan for any loss resulting to the plan from a breach and be subject to any other equitable remedy that the court deems appropriate. Section 404(a)(1)(D) requires an administrator to act in accord with the terms of the plan.

In the present case Helder was terminated on February 19, 1990, and requested by telephone immediate payment of his benefits. In Article 7, Section 7.02(a) HPT's benefit plan provides that upon termination benefits totalling less that $ 3,500 will commence not later than sixty days after the next December 31, or if the value of the benefits cannot be determined, then sixty days after the valuation process. The value of Helder's benefit was not calculated until after HPT's consultant completed the year-end valuation process. The year-end valuation process for calendar year 1990 was completed on March 15, 1991. Helder's benefit totalled $ 263.91. On March 25, 1991, defendant Bettye Marcioch sent Helder a benefit election form, which he completed on April 9, 1991, and then apparently **[*29]** gave to his counsel who mailed it to HPT on April 29, 1991. HPT issued a benefit check to Helder on May 7, 1991, which was within 60 days of the valuation date of March 15, 1991.

Under Section 502(c) and *Kleinhans,* Helder's request for benefits is not a request for information that must be answered within thirty days. Consequently, HPT's failure to pay Helder his benefits within thirty days does not violate Section 502(c) and does not trigger any potential penalties. Moreover, it appears that HPT complied with the sixty-day requirement for payment of benefits under the 401(k) plan and, therefore, did not breach any fiduciary duty, even though Helder did not receive his benefits until fourteen months after he requested them. Therefore, plaintiffs' ERISA claim should be dismissed.

III. CONCLUSION

This court determines that plaintiffs' antitrust claims should be dismissed because they lack standing to bring these claims, have failed to adequately state their claims, and also failed to demonstrate that any genuine issue of material fact exists, so that as a matter of law, defendants are entitled to summary judgment on plaintiffs' antitrust claims. Plaintiffs' claim under Title *42 **[*30]** United States Code Section 1981* should be dismissed because they failed to adequately state a claim and failed to demonstrate any genuine issue of material fact supporting their claim that defendants discriminated against Helder as a minority employee in favor of any similarly situated nonminority employee. Similarly, plaintiffs' claims under §§ 409 and 502 of ERISA should be dismissed because Helder did not request any information under Section 502 to trigger its penalties and paid to Helder his benefits within sixty days of the valuation date under the plan.

BENJAMIN F. GIBSON

U.S. DISTRICT JUDGE

DATED: August 20, 1993.

JUDGMENT

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 20th day of August, 1993.

PRESENT: HON. BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

In accordance with the opinion of this date, IT IS HEREBY ORDERED that defendants' motion for summary judgment (pleading no. 114) is GRANTED and plaintiffs' complaint (pleading no. 1) is DISMISSED.

IT IS SO ORDERED.

BENJAMIN F. GIBSON

U.S. DISTRICT JUDGE

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Computer Assocs. Int'l v. American Fundware

United States District Court for the District of Colorado

August 26, 1993, Decided ; August 26, 1993, Filed

Civil Action No. 86-K-2562

Reporter

831 F. Supp. 1516 *; 1993 U.S. Dist. LEXIS 11974 **; 1993-2 Trade Cas. (CCH) P70,477

COMPUTER ASSOCIATES INTERNATIONAL, INC., Plaintiff, v. AMERICAN FUNDWARE, INC., Defendant.

Core Terms

programs, trade secret, software, damages, royalty, unfair competition, argues, counterclaim, cases, pretrial order, antitrust, sham, predecessor, discovery, financial condition, injunctive relief, motion in limine, equitable, lawsuit, documents, courts, misappropriation, negotiations, Deposition, frivolous, baseless, estopped, summary judgment motion, independent contractor, grant a motion

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Civil Procedure > Sanctions > Baseless Filings > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN1[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Under the Noerr-Pennington doctrine, those who petition government for redress are generally immune from antitrust liability. The right to petition government includes within its scope litigating activity. In the adjudicatory setting, the Noerr-Pennington doctrine protects a litigant from antitrust liability unless his opponent can establish that the litigant's case is a sham. To do this, the opponent must first show that the lawsuit is objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits. If the opponent succeeds in this first step, then and only then may the court examine the litigant's subjective motivation to determine whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Whether applying the Noerr-Pennington doctrine as an antitrust doctrine or invoking it in other contexts, evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington immunity is a constitutional, not an antitrust, doctrine.

Civil Procedure > Appeals > Frivolous Appeals

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN4[] **Appeals, Frivolous Appeals**

Under *Colo. Rev. Stat. § 13-17-101* to -103 (1987), a court may award attorney fees against a litigant whose claims are frivolous or groundless. It applies in diversity cases.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Appeals > Frivolous Appeals

HN5[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

An award of attorney fees is contingent on proof that a claim/defense is, indeed, substantially frivolous and/or groundless. This assessment depends on whether there is any credible evidence to support the claim at trial. Because an award of attorney fees under the Colorado statute, *Colo. Rev. Stat. § 13-17-101* to -103 (1987), is contingent on there being no evidence at trial, it does not infringe on the right to petition government protected by the Noerr-Pennington doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

To establish that plaintiff's litigation is a sham, defendant must first show that plaintiff's claims are objectively baseless. Only then is evidence of plaintiff's subjective intent in suing the defendant relevant.

Labor & Employment Law > Employment Relationships > Independent Contractors

Torts > ... > General Premises Liability > Defenses > Independent Contractors

Trade Secrets Law > Federal Versus State Law > Common Law

Copyright Law > Scope of Copyright Protection > Ownership Interests > Works Made for Hire

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Employee Inventions

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Federal Versus State Law > General Overview

HN7[] **Employment Relationships, Independent Contractors**

Although status as an employee or an independent contractor is relevant to the ownership of a copyright, it is irrelevant to the ownership of a trade secret. These concepts of intellectual property are different. Copyright protection extends to the particular expression used by the author; trade secrets are the very ideas of the author.

Labor & Employment Law > Wage & Hour Laws > Scope & Definitions > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Copyright Law > Scope of Copyright Protection > Ownership Interests > Works Made for Hire

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Employee Inventions

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Labor & Employment Law > Employment Relationships > Independent Contractors

HN8[] **Wage & Hour Laws, Scope & Definitions**

If an employer pays you to design, the employer owns the fruit of your labor. This common law ownership rule clearly applies to employee ideas and developments which meet the definition of a trade secret, even in the absence of a written contract. The rule is now even extended to nonemployment situations, such as when an independent contractor is hired to design or develop a process or machine. Such a contractor is equivalent to an employee hired to develop an idea, so that the results of this work are owned by the hiring company.

Copyright Law > Scope of Copyright Protection > Ownership Interests > Joint Authors & Works

Trade Secrets Law > Protection of Secrecy > Reasonable Measures > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Interests > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Interests > Works Made for Hire

Mergers & Acquisitions Law > General Business Considerations > Labor Laws

HN9[] Ownership Interests, Joint Authors & Works

An employer of independent contractor owns copyright in specially commissioned work and joint copyright in work merged into inseparable parts of a unitary whole.

Trade Secrets Law > Protection of Secrecy > Reasonable Measures > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Breach of Contract > Licensing Agreements

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN10[] Protection of Secrecy, Reasonable Measures

Whether programs containing trade secrets are marked confidential is only one factor to be considered when determining whether a party took reasonable measures to protect against unauthorized disclosure of trade secrets.

Civil Procedure > Appeals > Frivolous Appeals

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN11[] Appeals, Frivolous Appeals

Under the subjective prong of a "sham" analysis, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon.

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

Civil Procedure > Pretrial Matters > General Overview

Civil Procedure > Pretrial Matters > Conferences > General Overview

HN12[] Conferences, Pretrial Orders

Whether to allow amendment of the pretrial order is a matter in the district court's discretion. Modification should be permitted when the danger of surprise is small and a failure to amend might result in an injustice to the moving party.

Torts > Remedies > Damages > General Overview

Trade Secrets Law > ... > Remedies > Damages > Royalties

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > ... > Remedies > Damages > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Use

HN13[] **Remedies, Damages**

The proper measure of damages for misappropriation of trade secrets case can be elusive, and courts are encouraged to be "flexible" and "imaginative." Because the primary concern in most cases is to measure the value to the defendant of what he actually obtained from the plaintiff, the proper measure is to calculate what the parties would have agreed to as a fair price for licensing the defendant to put the trade secret to the use the defendant intended at the time the misappropriation took place. This is, in essence, the reasonable royalty rule, which most courts now apply in trade secret cases. Trade secret cases typically embrace some form of royalty.

Torts > Remedies > Damages > General Overview

Trade Secrets Law > ... > Remedies > Damages > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > General Overview

HN14[] **Remedies, Damages**

Determination of a reasonable royalty is simplified in cases where there is already a royalty agreement in place. Hence, the first inquiry of the courts generally has been whether there is any factual basis, such as a royalty agreement from which one might legitimately determine the value which the parties themselves actually assigned to the misappropriated information. If there is, the contractually established royalty will be the best measure of the parties' intent.

Patent Law > ... > Damages > Patentholder Losses > Reasonable Royalties

Trade Secrets Law > Protection of Secrecy > Reasonable Measures > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Patent Law > Remedies > General Overview

Patent Law > Remedies > Damages > Measure of Damages

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Torts > Remedies > Damages > General Overview

Trade Secrets Law > ... > Remedies > Damages > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

HN15[] Patentholder Losses, Reasonable Royalties

Plaintiff in a misappropriation of trade secrets case is entitled to full measure of his loss, an amount no less than all profits the defendant realized from his tortious conduct.

Torts > Remedies > Damages > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Disclosures

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > ... > Remedies > Damages > General Overview

Trade Secrets Law > ... > Remedies > Damages > Royalties

Trade Secrets Law > Misappropriation Actions > General Overview

HN16[] Remedies, Damages

In lieu of damages measured by any other methods, the damages caused by a misappropriation of a trade secret may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Torts > Remedies > Damages > General Overview

Trade Secrets Law > Protection of Secrecy > Reasonable Measures > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > ... > Remedies > Damages > General Overview

HN17[] Remedies, Damages

Under the reasonable royalty rule, the amount of royalties is determined on the basis of the volume of the defendant's actual sales of trade secret product. The defendant need not have actually turned a profit on that product.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN18[] Damages, Punitive Damages

Under *Colo. Rev. Stat. § 13-21-102* (Supp. 1986), in any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Torts > Procedural Matters > Statute of Limitations > General Overview

HN19[] Tolling of Statute of Limitations, Discovery Rule

Under the common law "discovery rule" and *Colo. Rev. Stat. § 13-80-108(6)*, -108(8) (1987), contract and tort claims accrue when the plaintiff discovers or should have discovered through the exercise of reasonable diligence the breach of contract or tortious conduct giving rise to its claims.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Trade Secrets Law > ... > Remedies > Injunctions > Duration

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Trade Secrets Law > Civil Actions > Evidence

Trade Secrets Law > ... > Remedies > Injunctions > General Overview

HN20[] Injunctions, Permanent Injunctions

A claim for injunctive relief is a matter for the district court's determination, not the jury's. Any financial data relevant to this claim will be presented to the court after the jury reaches a verdict, not during trial. Factors relevant to permanent injunction for trade secret misappropriation include the relative hardship likely to result to the defendant if injunction is granted. The fact that a defendant might be put out of business if an injunction is issued would be due to defendant's unlawful actions, not the court's legitimate exercise of its discretion in awarding equitable relief.

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

HN21[] Formalities, Deposit & Registration Requirements

Copyrighting intellectual property does not automatically vitiate its trade secret status. Under the procedure in *37 C.F.R. § 202.20(c)(vii)(A)(2)*, only a portion of the copyrighted code is actually on file with the Copyright Office.

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Trade Secrets Law > Federal Versus State Law > Federal Preemption

Trade Secrets Law > Federal Versus State Law > General Overview

HN22[] **Formalities, Deposit & Registration Requirements**

To prove that a plaintiff could no longer claim that certain programs were trade secrets, the defendant would have to show that it or someone in the industry actually learned of plaintiff's trade secrets by reviewing the limited information on file with the Copyright Office.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Trade Secrets Law > Federal Versus State Law > Federal Preemption

Trade Secrets Law > Federal Versus State Law > General Overview

HN23[] **Constitutional Copyright Protections, Federal & State Law Interrelationships**

Question of preemption of state trade secret law under Copyright Act (Act) is moot after passage of 1980 revisions to Act.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN24[] **Pleadings, Amendment of Pleadings**

While inconsistent allegations in different lawsuits are admissible, such as where the plaintiff files separate lawsuits alleging different defendants were responsible for the same injuries, this rule does not apply to amended pleadings in the same lawsuit, as it interferes with the right to plead claims alternatively under *Fed. R. Civ. P. 8(e)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN25[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Under Colorado law, the doctrine of equitable estoppel is employed to prevent manifest injustice. In order for the doctrine to apply, the party to be estopped must know the true facts and intend that its conduct be acted upon by the party asserting the defense. Thus, it focuses on one party's conduct or representations which induce another party, who does not know the true facts, to rely on the conduct or misrepresentations.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Admissibility > Statements as Evidence > Compromise & Settlement Negotiations

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN26[] **Discovery, Privileged Communications**

Fed. R. Evid. (Rule) 408 limits the introduction of evidence regarding offers or acceptance of compromises or settlements and conduct or statements made in compromise negotiations. It does not, however, require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. *Rule 408* is a preclusionary rule, not a discovery rule. It is meant to limit the introduction of evidence of settlement negotiations at trial and is not a broad discovery privilege. Information that may not be admissible at trial under the rule is still discoverable so long as that information may lead to the discovery of other admissible evidence.

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Judges: KANE, JR.

Opinion by: JOHN L. KANE, JR.

Opinion

[*1519] ORDER ON PENDING MOTIONS

KANE, J.

This is a diversity action based on the alleged plagiarism of computer software. It is set for a ten-day jury trial commencing September 13, 1993. Four motions are pending in this case: (1) Plaintiff's motion for summary judgment on Defendant's counterclaims, (2) Defendant's second motion for reconsideration of my ruling permitting amendment of the pretrial order, (3) Plaintiff's motion in limine, and (4) Defendant's motion in limine. I first review the facts and procedural history of this case.

I. *Facts and Procedural History.*

On May 25, 1979, Stuart P. Orr & Associates, Inc. ("SPO") and Steamboat Computer Services ("SCS"), predecessors in interest to the parties in this case, entered into a Computer Software Agreement (the "1979 Agreement"), whereby SPO agreed to provide SCS with certain accounting software. The 1979 Agreement placed several limitations on SCS' use of the software. All materials provided under the **[**2]** 1979 Agreement were designated as trade secrets that could not be reproduced without SPO's written consent, SCS was prohibited from using the software to go into the software business (i.e., to sell to entities other than end-users), SCS was to obtain SPO's consent before converting the software to a different computer type, SCS was to pay SPO royalties on sales of the software after the first ten installations, and SPO retained exclusive rights to market the software in Southern California. *(See* Am. Compl., Ex. A.)

Under the 1979 Agreement, SCS paid $ 21,671.75 for the six programs that SPO delivered (the "SPO programs"). In the next few years, SPO also provided SCS with updates of the SPO programs. No royalties were ever paid to SPO under the 1979 Agreement. Plaintiff Computer Associates International, **[*1520]** Inc. ("CA") acquired SPO in 1983. Defendant American Fundware, Inc. ("AFW") became successor-in-interest to SCS.

In August 1986, AFW notified CA that it was terminating the 1979 Agreement because it was no longer using the SPO programs. After examining the software that AFW was then marketing, known as PC-Fund, CA came to believe that AFW had usurped its code in developing this **[**3]** software. (Later, CA reached the same conclusion as to software known as Fundware). On December 19, 1986, CA filed this lawsuit, alleging claims for breach of contract and misappropriation of trade secrets and seeking injunctive relief and punitive damages. [1] AFW answered on February 2, 1987, asserting counterclaims for unfair competition and for "groundless and frivolous claims." On March 31, 1987, CA was permitted to supplement its complaint to assert a claim for copyright infringement. It withdrew this claim in an amended complaint filed on August 26, 1991.

On July 10, 1987 the court entered a protective order limiting disclosure of trade secrets and other information revealed through discovery. [2] On October 26, 1987, CA moved for entry of a default judgment against AFW because AFW had destroyed the original source code **[**4]** used to develop the PC-Fund and Fundware software after this action was filed, making it nearly impossible for CA to prove that AFW had plagiarized its software. Judge Carrigan granted the motion and entered a default judgment against AFW as to liability only on December 6, 1990. He found that AFW had

> intentionally destroyed portions of the source code not only after being served in this action and thus put on notice that the source code was irreplaceable evidence, but even after the request for production and motion to compel had dramatically and specifically emphasized the significance of the code versions being destroyed as evidence.

(Mem. Op. & Order at 6.)

[5]** On November 26, 1991, AFW moved for sanctions against CA, claiming that CA had lost or destroyed all versions of the SPO programs provided to AFW's predecessor in 1979. On December 6, 1991, the court entered an order setting aside the default judgment against AFW on the grounds that CA had concealed that it, too, had lost or destroyed critical evidence and thereby misled the court into granting the default judgment. The matter was then set for jury trial on November 9, 1992.

On October 25 and 26, respectively, AFW and CA each filed motions in limine. Before these motions were heard, CA moved to disqualify Judge Carrigan, and he transferred the case to me. After the transfer, CA moved to amend the pretrial order to delete any reference to it having lost the SPO programs, since it discovered the original version of the programs in a mis-labeled storage box and provided it to AFW in February, 1993. I granted the motion, and AFW moved to reconsider. On April 22, 1993, I granted the motion to reconsider, reaffirmed my ruling permitting amendment of the pretrial order and granted AFW additional discovery until July 1, 1993. AFW again moved to reconsider.

Finally, on July 23, 1993, CA moved **[**6]** for summary judgment on AFW's counterclaims for unfair competition and groundless and frivolous claims, arguing they were barred by the *Noerr-Pennington* doctrine as recently clarified in the Supreme Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*.

[*1521] II. *Pending Motions.*

A. *Plaintiff CA's Motion for Summary Judgment.*

1. *Does the Noerr-Pennington Doctrine Apply?*

I first consider CA's motion for summary judgment on AFW's counterclaims for unfair competition and frivolous and groundless claims because it is dispositive of other issues. CA argues that both of these claims are barred by the *Noerr-Pennington* doctrine. *See* *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*; *Eastman R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S.*

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[1] In addition to AFW, CA named as defendants Richard Yeager, AFW's president, and Jerome C. Dayton, AFW's vice-president. CA dismissed its claims against these individuals in December, 1991.

[2] At various times, both sides to this dispute moved for the entry of sanctions. AFW also moved to add a counterclaim based on CA's alleged violation of the protective order. Judge Carrigan deferred these motions until after trial but apparently advised the parties they could file independent suits for violation of the protective order. They did. *See Computer Assocs. Int'l, Inc. v. Flagship Group,* No. 92-K-1660; *American Fundware, Inc. v. Computer Assocs, Int'l, Inc.,* No. 92-K-1185. On April 28, 1993, the parties stipulated to the dismissal of these suits and the withdrawal of any motions for sanctions pending in this case.

Ct. 523 (1961). ***HN1***[] Under this doctrine, "[those who petition government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 113 S. Ct. at 1926*; *see also* **[**7]** *Oberndorf v. City & County of Denver, 900 F.2d 1434, 1440* (10th Cir.), *cert. denied, 498 U.S. 845, 112 L. Ed. 2d 97, 111 S. Ct. 129 (1990)*.

The right to petition government includes within its scope litigating activity. *See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*. In the adjudicatory setting, the *Noerr-Pennington* doctrine protects a litigant from antitrust liability unless his opponent can establish that the litigant's case is a sham. To do this, the opponent must first show that the lawsuit is "objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits." *Professional Real Estate Investors, 113 S. Ct. at 1928*. If opponent succeeds in this first step, then and only then may the court examine the litigant's subjective motivation to determine whether the "baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor.'" *Id.* (citing *Noerr, 365 U.S. at 144*.

As AFW notes in its response, CA glosses over an important threshold question: **[**8]** whether the *Noerr-Pennington* doctrine bars not only federal antitrust claims under the Sherman Act, but also tort claims under state law, such as the unfair competition and frivolous lawsuit claims at issue here. CA cites one case in its opening brief, *Aydin Corporation v. Loral Corporation,* in which the Ninth Circuit affirmed the dismissal of a federal antitrust claim and two pendent state law claims, including one for unfair competition. *See 718 F.2d 897 (9th Cir. 1983)*. A close reading of that case, however, does not indicate whether the dismissal of the unfair competition claim was under the *Noerr-Pennington* doctrine or by application of state law. The court simply stated: "As we concluded in connection with Aydin's *Noerr-Pennington* claim, *see* part IV, *supra,* whether the state actions were a sham or a genuine effort by Loral and Conic to obtain redress is a factual issue and, based upon the record before us, Aydin failed to raise an issue of material fact." *See id. at 905*.

AFW, on the other hand, relies on a decision from this district, *Ball Corporation v. Xidex Corporation, 705 F. Supp. 1470 (D. Colo. 1988)*. **[**9]** AFW argues that the court in *Ball* refused to apply the doctrine to bar a claim based on the tort of unfair competition. This is not a correct statement. In fact, the court, while skeptical that the doctrine applied, eschewed the issue in *Ball* because the parties had not adequately briefed it. *See id. at 1472*. Nevertheless, the court assumed for the purpose of argument that the *Noerr-Pennington* doctrine *did* apply, but held that the plaintiff had satisfied the requirements for the sham litigation exception to the doctrine. *Id.* Therefore, *Ball* provides little authority for the proposition that *Noerr-Pennington* immunity cannot be extended to a defendant in an unfair competition claim.

Alternatively, AFW posits a fairly elaborate argument that the principles underlying the doctrine are rooted in ***antitrust law*** and cannot be extended to other contexts. AFW relies on reasoning in the *California Motor Transport* and *Noerr* cases balancing *First Amendment* principles against the interests protected by federal ***antitrust law***. *See California Motor Transp., 404 U.S. at 510*; *Noerr, 365 U.S. at 137*. **[**10]** It goes on to argue that, because the tort of unfair competition is fundamentally **[*1522]** different from a federal antitrust violation, "the Noerr-Pennington doctrine cannot be automatically applicable to the common law tort of unfair competition." (Br. Opp'n Pl.'s Mot. Summ. J. at 11.) I disagree with this conclusion.

First, in fairness to AFW, few courts have carefully analyzed this issue. As the court observed in *Salomon S.A. v. Alpina Sports Corporation:*

> It is not settled that the *Noerr-Pennington* doctrine provides immunity from unfair competition claims. The *Noerr-Pennington trilogy--Noerr Motor Freight, Pennington,* and *California Motor Transport--* apply the doctrine only in the context of antitrust claims asserted under authority of the Sherman Act, *15 U.S.C. § 1, et seq.* Alpina does not invoke the Sherman Act, but instead predicates its claim on a common-law unfair competition theory.
>
> Some courts have applied *Noerr-Pennington* to dismiss common-law claims related to unfair competition. But none of these courts grappled with the issue; each assumed that *Noerr-Pennington* applied to common-law claims as well as statutory antitrust **[**11]** claims.

737 F. Supp. 720, 724 (D.N.H. 1990). Rather than analyzing the issue itself, however, the court in *Salomon* followed the same approach as *Ball,* assuming for the sake of argument that the doctrine applied to Alpina's counterclaim for unfair competition but holding it had presented sufficient evidence that Salomon's action was a sham. *See* id. at 724-25.

Despite the lack of reasoned authority on this question, there are numerous federal, district and state court cases in which the *Noerr-Pennington* doctrine has been applied to non-antitrust claims. *See, e.g.,* South Dakota v. Kansas City S. Indus., Inc., 880 F.2d 40, 50-53 (8th Cir. 1989), *cert. denied, 493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 726 (1990)*; Sierra Club v. Butz, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972); Pacific Gas & Elec. v. Bear Stearns & Co., 50 Cal. 3d 1118, 791 P.2d 587, 595-97, 270 Cal. Rptr. 1 (Cal. 1990) (citing cases). These courts recognize that, while the doctrine arose in connection with antitrust cases, it is fundamentally based on First Amendment principles. More than one **[**12]** court has held that the doctrine "is a principal of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, *regardless of the underlying cause of action asserted by the Plaintiffs."* Azzar v. Primebank, FSB, 198 Mich. App. 512, 499 N.W.2d 793, 796 (Mich. App. 1993) (citing Webb v. Fury, 167 W.Va. 434, 282 S.E.2d 28, 36-37 (W. Va. 1981)). While criticized as overbroad, *see, e.g.,* Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases,* 36 Stan. L. Rev. 1243, 1258 (1984), recent Supreme Court guidance lends credence to this view. [3]

[13]** In *Professional Real Estate Investors,* the Supreme Court established the requirements for the sham exception to the *Noerr-Pennington* doctrine. In its analysis, the Court wrote: ***HN2***[] "Whether applying *Noerr* as an antitrust doctrine *or invoking it in other contexts,* we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." 113 S. Ct. at 1927 (emphasis added). This statement indicates the Court's view that *Noerr-Pennington* is not limited to the antitrust arena. In support, the court cited, among other cases, NAACP v. Claiborne Hardware Company, 458 U.S. 886, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982).

In *Claiborne Hardware,* the NAACP organized a boycott of white-owned businesses in Claiborne County, Mississippi when their demands for racial equality fell on the deaf ears of white elected officials. The business owners successfully sued the NAACP and other individuals for damages and injunctive relief on three state law conspiracy theories, including one based on the tort of malicious **[*1523]** interference with business interests. Id. at 891. **[**14]** The tort judgment was upheld by the Mississippi Supreme Court. The United States Supreme Court reversed, holding that the defendant's nonviolent boycott activities--"speech, assembly, association and petition"--were protected by the First Amendment. Id. at 911. It relied heavily on *Noerr:*

> It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr,* the petitioners certainly foresaw--and directly intended--that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.

Id. at 914.

Thus *Professional Real Estate Investors* **[**15]** and *Claiborne Hardware* support the proposition that ***HN3***[] *Noerr-Pennington* immunity is a constitutional, not an antitrust, doctrine. Moreover, ignoring principles of federalism

[3] On the other hand, the *Noerr-Pennington* doctrine has been advocated as a first-line defense to "SLAPP" suits, an acronym coined by University of Denver Professors Penelope Canan and George Pring for Strategic Lawsuits Against Public Participation. *See generally* Thomas A. Waldman, Comment, *SLAPP Suits: Weaknesses in* First Amendment *Law and in the Court's Responses to Frivolous Litigation,* 39 UCLA L. Rev. 979 (April 1992).

and taking the questionable approach of one court, which viewed this as an issue of state law, *see* Florida Farm Growers Association v. Concerned Citizens, 616 So. 2d 562, 568 (Fla. App. 1993), the result is the same. Colorado courts have twice applied the *Noerr-Pennington* doctrine to bar state law claims. *See* Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361, 1365-66 (Colo. 1984) (applying doctrine to abuse of process and civil conspiracy claims); Anchorage Joint Venture v. Anchorage Condominium Ass'n, 670 P.2d 1249 (Colo. App. 1983) (upholding dismissal of negligence, abuse of process and tortious interference with business expectancy claims). Consequently, I hold that the *Noerr-Pennington* doctrine is applicable to AFW's counterclaim for unfair competition.

The same result does not hold as to AFW's counterclaim for "groundless and frivolous" litigation under Colo. Rev. Stat. § 13-17-101 to **[**16]** -103 (1987). ***HN4***[] Under this statute, a court may award attorney fees against a litigant whose claims are frivolous or groundless. Apparently, it applies in diversity cases. *See* Seismic Int'l Research Corp. v. South Ranch Oil Co., 793 F.2d 227, 232 (10th Cir. 1986), *cert. denied, 479 U.S. 1089, 94 L. Ed. 2d 153, 107 S. Ct. 1297 (1987)*; Harrison v. Luse, 760 F. Supp. 1394, 1401 (D. Colo.), *aff'd, 951 F.2d 1259 (10th Cir. 1991)*.

CA offers no explanation why the *Noerr-Pennington* doctrine bars this counterclaim. In fact, although denominated as a separate counterclaim, it is, in effect, only a request that the court consider whether to impose sanctions against CA for asserting claims lacking substantial justification, which the court may do on its own motion or at the request of a party. *Township Homeowners Ass'n, Inc. v. Arapahoe Roofing & Sheet Metal Co., 844 P.2d 1316, 1318 (Colo. App. 1992)*. ***HN5***[] "An award is contingent on proof that a claim/defense was, indeed, substantially frivolous and/or groundless." *Id.* This assessment depends on whether there was any credible **[**17]** evidence to support the claim *at trial.* *Colorado Supply Co. v. Stewart, 797 P.2d 1303, 1307 (Colo. App. 1990)*. Because an award of attorney fees under the Colorado statute is contingent on there being no evidence at trial, it does not infringe on the right to petition government protected by the *Noerr-Pennington* doctrine. Thus, while CA may obtain the dismissal of AFW's counterclaim under the *Noerr-Pennington* doctrine, it cannot preclude scrutiny of its own claim under the standards of Colorado's attorney fee statute. Therefore, I find that AFW's request for attorney fees is not barred.

2. *Application of the "Sham" Exception.*

CA is entitled to immunity on AFW's counterclaim for unfair competition unless AFW can demonstrate that CA's litigation is a sham. To do this, ***HN6***[] AFW must first show that CA's claims are "objectively baseless." *Professional Real Estate Investors,* ***[*1524]*** *113 S. Ct. at 1928*. Only then is evidence of CA's subjective intent in suing AFW relevant. *Id.* In *Professional Real Estate Investors,* this determination was more simple because the predicate facts of the underlying lawsuit were not disputed **[**18]** and summary judgment had been entered against the plaintiff. *See* *id. at 1930*. Here, however, the predicate facts of CA's claims are hotly disputed. Nevertheless, applying the standards on summary judgment, AFW has failed to show that CA's litigation is a sham.

Under the first prong of the *Noerr-Pennington* analysis, AFW puts forth two reasons CA's claims are objectively baseless. First, it argues that CA does not own the SPO programs; instead, it claims they are owned by the independent contractors hired to produce them. Second, AFW argues that because CA's predecessor did not label the SPO programs as trade secrets when providing them to AFW or other licensees, it cannot claim them as proprietary. It cites the deposition of two of CA's witnesses to establish that the SPO programs were developed by independent contractors and that SPO did not label the programs as trade secrets.

AFW's first argument is a red herring. To support its contention, AFW relies on *Community for Creative Non-Violence v. Reid, 490 U.S. 730, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989)*. In that case, the Supreme Court held that an independent contractor who produced certain artwork **[**19]** was its author and could claim copyright ownership. *Id. at 753*. ***HN7***[] Although status as an employee or an independent contractor is relevant to the ownership of a copyright, it is irrelevant to the ownership of a trade secret. These concepts of intellectual property are different. *See* *Southern Miss. Planning & Dev. Dist., Inc. v. Robertson, 660 F. Supp. 1057, 1061 (S.D. Miss. 1986)* (copyright protection extends to the particular expression used by the author; trade secrets are the very ideas of the author.) Under the common law of trade secrets,

> ***HN8***[] If an employer pays you to design, the employer owns the fruit of your labor. This common law ownership rule clearly applies to employee ideas and developments which meet the definition of a trade secret, even in the absence of a written contract. . . .
> The rule is now even extended to nonemployment situations, such as when an independent contractor is hired to design or develop a process or machine. Such a contractor is equivalent to an employee hired to develop an idea, so that the results of this work are owned by the hiring company.

2 Melvin F. Jager, *Trade Secrets Law* **[**20]** § 8.01[1] at 8-2 to -3 (1993); *see, e.g.,* *Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 972-73 (9th Cir. 1991)* (affirming grant of preliminary injunction to potato processor holding trade secret in blade system developed by independent contractor). [4]

[21]** Likewise, AFW's contention that CA lost its trade secrets because its predecessor did not label the materials it delivered to AFW and other licensees as such is not dispositive. The issue is whether CA and its predecessor took reasonable measures under the circumstances to protect against unauthorized disclosure of the secrets. *Colorado Supply Co., 797 P.2d at 1306*. ***HN10***[] Whether the programs themselves were marked confidential is only one factor to be considered. Distribution of software under other confidential restraints may also suffice. *See, e.g., Continental Data Sys. v. Exxon Corp.,* No. 84-2538, 1986 WL 20432, at *2 (E.D. Pa. June 30, 1986) (agreement requiring customers to treat software manual as confidential and practice of distributing software by license **[*1525]** sufficient to safeguard trade secrets); *Management Science of Am., Inc. v. Cyborg,* 6 Comp. L. Serv. Rep. 921, 924-25 (Callaghan) (N.D. Ill. 1978) (distribution of software to six hundred licensees does not as a matter of law establish public dissemination of trade secrets). Furthermore, the 1979 Agreement provided that "all materials supplied by SPO are proprietary and trade secrets and **[**22]** are of considerable value. They cannot be reproduced without express written consent of SPO." (Am. Compl., Ex. A at 1.) In addition, AFW and its predecessor were to exercise control over their employees and sublicensees to protect the integrity of the 1979 Agreement, and CA and its predecessor were given certain rights to ensure compliance with the license. [5] Thus, there is evidence that CA and its predecessor took significant steps to protect these trade secrets. For these reasons, AFW has failed to show that CA's claims are objectively baseless, and it has failed to satisfy the first prong of the *Noerr-Pennington* sham exception.

Even assuming for the purpose of argument that AFW has shown that CA's litigation is objectively baseless, AFW has **[**23]** failed to produce any evidence, under the subjective prong of the sham exception, that CA intended to prejudice AFW's financial interests through this lawsuit. Anticipating AFW's attack, CA supports its motion for summary judgment with reference to the depositions of three officers or former employees of AFW. In their depositions, these witnesses fail to identify any factual basis for AFW's belief that CA is using this litigation for improper purposes, such as to extort a settlement, put AFW out of business or to usurp its market. AFW, in turn, relies on the affidavit of Richard Yeager, the former president of AFW, who relates only that the Chairman of CA told him that CA intended to sue so that CA's attorney, Steven Kahn, could build a new house.

AFW's evidence of CA's subjective intent is irrelevant. Yeager's affidavit goes to CA's intent to benefit from a favorable result of the litigation. ***HN11***[] Under the subjective prong of "sham" analysis, "the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor,' through the 'use of the governmental process--as opposed to the *outcome* of that process--as **[**24]** an anticompetitive weapon.'" *Professional Real Estate Investors, 113 S. Ct. at 1928*. Thus, AFW has failed to bring

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[4] Moreover, even if the "work for hire" concept applies in trade secret misappropriation cases, these deposition excerpts do not conclusively establish whether the persons that SPO hired to do "grunt coding" and other programming were employees or independent contractors. *See* *Community for Creative Non-Violence, 490 U.S. at 751-52* (listing factors court must consider to determine whether a hired party is an employee). Assuming they were independent contractors, SPO does not necessarily lose all ownership in the SPO programs. *See* *id. at 738, 753* ***HN9***[] (employer of independent contractor owns copyright in specially commissioned work and joint copyright in work merged into inseparable parts of a unitary whole.)

[5] CA argues that the same provisions were contained in all of its agreements with other licensees, and that the licensees were required to treat the SPO programs as proprietary and confidential. CA fails to support this contention with reference to any facts of record.

forth any relevant evidence to satisfy the second, subjective prong of the "sham" exception to *Noerr-Pennington* immunity. Accordingly, CA's motion for summary judgment on AFW's unfair competition counterclaim is granted.

B. *Defendant AFW's Motion to Reconsider Minute Order Modifying Pretrial Order.*

On April 5, 1993, I granted CA's motion to amend the pretrial order to reflect that CA had located the SPO programs it had provided to SCS under the 1979 Agreement. AFW moved for reconsideration of this order on April 21, 1993, or in the alternative, for the reopening of discovery, since up to this point it had proceeded on the assumption that the SPO programs were not available. I granted the motion to reconsider, reaffirmed my order permitting amendment of the pretrial order and reopened discovery until July 1, 1993.

On July 15, 1993, AFW filed the instant motion, again requesting reconsideration of my order amending the pretrial order. AFW argues that CA still has not produced a copy of the original programs provided under the 1979 **[**25]** Agreement, only a tape produced three months after the delivery would have taken place. It contends that "CA has never been able to produce a copy of the computer programs licensed to AFW in 1979, or an exact copy of any updated programs, despite its allegations that it was these programs that AFW allegedly copied, an allegation AFW vigorously denies." (Mot. Recons. at 4.) Therefore, it argues that the pretrial order should not be amended because the SPO programs are still lost.

[*1526] CA's response to AFW's latest motion to reconsider is more precise. CA states that its predecessor, SPO, delivered the first version of the SPO programs, Version 1.0, in mid-1979. Thereafter, it delivered Versions 1.5, 2.0, 2.1 and 2.2, which were "bug fixes" and enhancements to the original software. CA acknowledges that it was unable to locate Version 1.0 during the original period of discovery in this case. It finally located this software in February 1993 and provided a copy to AFW. After AFW's expert analyzed the tape, he concluded that 79 of the 306 programs on the tape were in come way modified in October, 1979, after the original tape would have been supplied. CA argues that this fact should have no **[**26]** bearing on the case. CA seeks to put the blame on AFW, arguing that it did not save the original copies of the SPO programs either.

HN12[] Whether to allow amendment of the pretrial order is a matter in my discretion. *See* *Joseph Mfg. Co. v. Olympic Fire Corp., 986 F.2d 416, 418 (10th Cir. 1993)*. Modification should be permitted "when the danger of surprise is small and a failure to amend might result in an injustice to the moving party." 6A Charles A. Wright, *et. al., Federal Practice and Procedure,* § 1527 at 287 (1990); *see also* *Hull v. Chevron U.S.A., Inc., 812 F.2d 584, 588 (10th Cir. 1987)*.

In my mind, the dispute over CA's alleged loss of the SPO programs has grown out of proportion to its significance. To prove either of its claims, CA must show that AFW copied its software. It must make some comparison of its code and the code produced by AFW. If later versions of the SPO programs would indicate that copying took place, then CA has made out a prima facie case, regardless of Version 1.0. In fact, in the hearing on these motions, CA indicated this to be its strategy. To the extent CA may rely on Version 1.0 for some other **[**27]** purpose at trial, AFW has not been prejudiced. It has had an adequate opportunity to examine and conduct additional discovery on Version 1.0. Therefore, I deny AFW's most recent motion to reconsider.

C. *Plaintiff CA's Motion in Limine.*

1. *Evidence of the Parties' Financial Condition.*

CA's first contention in this motion in limine is that AFW should not be permitted to introduce evidence regarding either party's financial condition. Specifically, CA seeks disallowance of any reference to CA's size, wealth, or financial condition, including its Annual Report and Form 10-K. Likewise, with respect to AFW, CA argues that AFW should be prevented from introducing any evidence of its size, wealth or financial condition, including its income and financial statements. CA argues that this evidence would unfairly prejudice the jury under *Fed. R. Evid. 403*. AFW, not surprisingly, argues that evidence of both companies' financial condition is relevant to its counterclaim for unfair competition, CA's damages for breach of contract and misappropriation of trade secrets, its entitlement to punitive damages and its request for injunctive relief.

Since I grant summary judgment against AFW **[**28]** on its counterclaim for unfair competition, evidence of the parties' relative financial strength is no longer relevant to show CA's allegedly improper motives in bringing this litigation. Whether evidence of AFW's profits is relevant to the issue of CA's damages depends on the proper measure of damages in this case. AFW contends that CA's damages are measured by the profits AFW made in selling the PC-Fund and Fundware software allegedly containing CA's trade secrets. CA, on the other hand, asserts that AFW must be held responsible for the royalties provided for in the 1979 Agreement. CA has the better position.

HN13[] The proper measure of damages for misappropriation of trade secrets case can be elusive, and courts are encouraged to be "flexible" and "imaginative." *University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 530 (5th Cir. 1974)*.

> Because the primary concern in most cases is to measure the value to the defendant of what he actually obtained from the plaintiff, the proper measure is to calculate what the parties would have agreed to as a fair price for licensing the defendant to put **[*1527]** the trade secret to the use the defendant intended at **[**29]** the time the misappropriation took place.

Id. at 539; *see also* *Vitro Corp. of Am. v. Hall Chem. Co., 292 F.2d 678, 683 (6th Cir. 1961)*. This is, in essence, the "reasonable royalty" rule, which most courts now apply in trade secret cases. *See* *Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1128 (5th Cir. 1991)* ("trade secret cases typically embrace some form of royalty"), *aff'd*, *120 L. Ed. 2d 615, 112 S. Ct. 2753 (1992)*; *Metallurgical Indus., Inc. v. Fourtek, Inc., 790 F.2d 1195, 1208 (5th Cir. 1986)*.

HN14[] Determination of a reasonable royalty is simplified in cases where there is already a royalty agreement in place. Hence, "the first inquiry of the courts generally has been whether there is any factual basis, such as a royalty agreement . . . from which one might legitimately determine the value which the parties themselves actually assigned to the misappropriated information." Michael A. Rosenhouse, Annotation, *Proper Measure of Damages and Elements of Damages for Misappropriation of Trade Secrets,* 11 A.L.R.4th 12, **[**30]** § 2 at 20 (1982). If there is, the contractually established royalty will be the best measure of the parties' intent. *See* *University Computing, 504 F.2d at 538* (damages subject to exact measurement where parties have agreed on licensing price); *Biodynamic Technologies, Inc. v. Chattanooga Corp., 658 F. Supp. 266, 269-70 (S.D. Fla. 1987)* (royalty in agreement served as exact measure of damages in trade secret case); *cf.* *Water Technologies V. Calco, Ltd., 714 F. Supp. 899, 904 n. 2 (N.D. Ill. 1989)* (in patent case, established royalty best measure of reasonable royalty). At minimum, it provides the baseline for a damages award. *See* *Mineral Deposits, Ltd. v. Zigan, 773 P.2d 606, 608 (Colo. App. 1988)* ***HN15***[] (plaintiff in misappropriation of trade secrets case entitled to full measure of his loss, an amount no less than all profits the defendant realized from his tortious conduct); *cf.* *Nickson Indus., Inc. v. Rol Mfg. Co., 847 F.2d 795, 789 (Fed. Cir. 1988)* (reasonable royalty for patented equipment may be greater than an established royalty **[**31]** where widespread infringement makes established royalty artificially low).

Although there is no case law directly on point, two authorities support the application of the reasonable royalty rate under Colorado law. First, in *Management Recruiters of Boulder, Inc. v. Miller,* the court awarded damages in a trade secret claim based on a contractual liquidated damages provision, indicating Colorado courts would similarly enforce a contractual royalty provision governing trade secrets. *See* *762 P.2d 763, 766 (Colo. App. 1988)*. Second, under current Colorado law, ***HN16***[] "in lieu of damages measured by any other methods, the damages caused by a misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret." *Colo. Rev. Stat. § 7-74-104(1)* (1986). While this statute, Colorado's adoption of the Uniform Trade Secrets Act, does not apply because the misappropriation in this case occurred before the effective date of the Act, *see id.* § 7-74-101 editor's note, the Act nevertheless reflects "basic principles of common law trade secret protection" and "better reasoned cases **[**32]** concerning the remedies for trade secret misappropriation," and is persuasive evidence of the common law rule on damages in trade secret cases. *See* Uniform Trade Secrets Act, 14 U.L.A. 433, 434, 435 (1990) (prefatory note).

For these reasons, I agree with CA that the "reasonable royalty" measure of damages applies in this case. ***HN17***[] Under this rule, the amount of royalties is determined on the basis of the volume of the defendant's actual sales of trade secret product. Michael A. Rosenhouse, *supra,* § 34. The defendant need not have actually turned a profit on that product. *See Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp., 401 F. Supp. 1102, 1119 (E.D. Mich. 1985)*; 1 Melvin F. Jager, *supra,* § 7.03[2][a] at 7-59 ("The concept of 'use' of a trade secret by the misappropriator does not necessarily depend upon the generation of a dollar profit.") Here, if CA prevails on liability, it would be entitled to its contractual royalties measured by AFW's actual sales of the PC-Fund and Fundware software. Evidence of AFW's profits is therefore not relevant **[*1528]** to the calculation of CA's damages unless the contractual royalty is not **[**33]** a reasonable royalty because AFW's profits on these products were unusually high. CA does not claim this to be the case.

AFW further argues that Colorado law permits it to introduce evidence of its financial strength to aid the jury in assessing punitive damages, if any, relying on *Leidholt v. District Court, 619 P.2d 768, 770 (Colo. 1980)*. CA disputes this contention, arguing that the case law upon which AFW relies was abrogated by Colorado law adopted several months before this case was filed. CA refers to *§ 13-21-102*, which went into effect as to actions accruing on or after July 1, 1986. *See Colo. Rev. Stat. § 13-21-102* editor's note (1986 Supp.). ***HN18***[] Under this statute, "in any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages." [6] *Id.* Accordingly, evidence of AFW's financial condition is not relevant to the issue of punitive damages either.

[34]** Finally, AFW asserts that evidence of its financial condition is relevant to CA's claim for injunctive relief because this claim "must be evaluated on the economic consequence to AFW." (Def.'s Resp. Pl.'s Mot. Limine at 5.) Nevertheless, CA's ***HN20***[] claim for injunctive relief is a matter for my determination, not the jury's. Any financial data relevant to this claim will be presented to me after the jury reaches a verdict, not during trial. *Compare Nelson v. National Fund Raising Consultants, Inc., 64 Wash. App. 184, 823 P.2d 1165, 1169* (Wash. App.) (factors relevant to permanent injunction for trade secret misappropriation include the relative hardship likely to result to the defendant if injunction is granted), *aff'd in relevant part, 842 P.2d 473 (Wash. 1992) with Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.,* No. 84 C 6746, *1993 WL 286484* at *6 (N.D. Ill. July 29, 1993) (result that defendant might be put out of business if injunction issued would be due to defendant's unlawful actions, not the court's legitimate exercise of its discretion in awarding equitable relief). For these reasons, CA's request for the preclusion of evidence **[**35]** of either party's financial condition is granted.

2. *Evidence that CA Lost the SPO Programs.*

CA next requests that I limit AFW from presenting any evidence at trial regarding CA's alleged "loss" of the earliest version of the SPO programs, Version 1.0. As noted before, CA has recovered a copy of Version 1.0, but 79 of the 306 programs therein were dated October 1979, indicating that these programs were in some way modified after SPO would have provided the SPO programs to AFW's predecessor in the summer of 1979.

AFW responds that evidence that CA lost the original version of the SPO programs is central to its case. It explains that, since CA copyrighted Version 1.0 of the SPO programs, they "have been publicly disclosed and contain no trade secrets." (Def.'s Resp. Pl.'s Mot. in Limine at 7.) On this assumption, if the later versions of the SPO programs contain much of the same code, these versions would likewise not be protected as trade secrets. Therefore, AFW argues, it must be able to compare Version 1.0 with the later versions and should be able to note the fact that it is unable to do so. Additionally, it argues that it should be entitled to a presumption that the lost version **[**36]** of the SPO programs would have been favorable to its case.

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[6] AFW argues that this statute does not apply because CA's cause of action accrued before its effective date. ***HN19***[] Under the common law "discovery rule" and the statute codifying it, *see Colo. Rev. Stat. §§ 13-80-108(6)*, -108(8) (1987), CA's contract and tort claims accrued when it discovered or should have discovered through the exercise of reasonable diligence the breach of contract or tortious conduct giving rise to its claims. Applying the rule to this case, CA's cause of action accrued in the fall of 1986, when it was able to make an actual comparison of its and AFW's code, leading it to believe that plagiarism had occurred. AFW's contention that this rule was not adopted as to contract or tort cases until July 1, 1987, after this case was filed, is simply incorrect. *See Colo. Rev. Stat. § 13-80-108* (1986 Supp.).

First, in the hearing on this motion, counsel for CA represented on the record that the **[*1529]** tape used to copyright Version 1.0 was the same one provided to AFW for its inspection which contained the 79 updated programs. Therefore, AFW is simply not prejudiced by the alleged loss of earlier versions of these programs.

Second, because this issue is recurring, I note that CA's assertion that the SPO programs are trade secrets is not necessarily inconsistent with their registration under the copyright laws. ***HN21***[] Copyrighting intellectual property does not automatically vitiate its trade secret status. *See generally,* 2 Melvin F. Jager, *supra,* § 10.02. CA copyrighted the SPO programs under a procedure permitting the registration of a copyright by limited deposit to protect trade secrets. *See 37 C.F.R. § 202.20(c)(vii)(A)(2)*. Under this procedure, only a portion of the copyrighted code is actually on file with the Copyright Office. *Id.; see, e.g., Fonar Corp. v. Deccaid Servs., Inc., 983 F.2d 427, 428 (2d Cir. 1993)*; *Data Gen. Corp. v. Grumman Sys. Support Group,* No. 88-0033- S, 1993 WL 153739, **[**37]** at *15 (D. Mass. May 11, 1993)

HN22[] To prove that CA could no longer claim that the SPO programs were trade secrets, AFW would have to show that it or someone in the industry actually learned of CA's trade secrets by reviewing the limited information on file with the Copyright Office. *See Murray v. Bank One Columbus, N.A., 64 Ohio App. 3d 784, 582 N.E.2d 1124, 1130 (Ohio App. 1990)*. AFW has not preserved this issue in the pretrial order. It has argued only that CA's trade secret claim is preempted by the Copyright Act. *(See* Pretrial Order at 5.) That proposition fails as a matter of law. *See* 2 Melvin F. Jager, *supra,* § 10.02 at 10-12 ***HN23***[] (question of preemption of state trade secret law under Copyright Act moot after passage of 1980 revisions to Act); *cf. Gates Rubber Co. v. Bando Am., Inc., 798 F. Supp. 1499, 1520-22 (D. Colo. 1992)* (finding no preemption based on comparison of trade secret claims with copyright protection). Therefore, I grant CA's request that AFW be precluded from referring to CA's "loss" of Version 1.0. AFW shall be permitted, however, to note that 79 programs of Version 1.0 were updated in October 1987 to the extent **[**38]** this issue is otherwise relevant to AFW's defense.

3. *CA's Waiver of Copyright Claim.*

CA argues that AFW should be precluded from mentioning CA's waiver of its copyright claim, as it would only confuse the jury about the remaining claims in this case. CA waived its copyright claim because at that time it was unable to locate the original tape of Version 1.0 which it copyrighted. AFW argues evidence of CA's waiver of its copyright claim is relevant because CA may not seek trade secret protection of copyrighted programs. As I note above, this is a dubious proposition. For other reasons, however, AFW's reliance on CA's withdrawal of its copyright claim is misfocused.

Here, CA seeks to preclude evidence that it withdrew its copyright infringement claim, not evidence that it actually copyrighted the SPO programs. The two issues are distinct. Nothing prevents AFW from introducing evidence to show that CA copyrighted Version 1.0 of the SPO programs, so long as it is relevant to AFW's defense. Reference to CA's earlier complaint is unnecessary for this purpose and is improper. ***HN24***[] While inconsistent allegations in different lawsuits are admissible, such as where the plaintiff files separate **[**39]** lawsuits alleging different defendants were responsible for the same injuries, this rule does not apply to amended pleadings in the same lawsuit, as it interferes with the right to plead claims alternatively under *Rule 8(e)*. *See Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1431-34 (10th Cir. 1990)*; *Garman v. Griffin, 666 F.2d 1156, 1158-59 (8th Cir. 1981)*. Accordingly, CA's motion is granted as to evidence that it waived its copyright claim.

4. *AFW Equitably Estopped from Contesting that SPO Programs are CA's Trade Secrets.*

CA argues that AFW should be equitably estopped from contesting CA's claim that the SPO programs are trade secrets because AFW's predecessor acknowledged this in the 1979 Agreement. AFW responds that CA did not affirmatively plead equitable estoppel and has waived this defense. CA replies that **[*1530]** it was not required to plead this issue, since it arises in response to a defense raised by AFW. Disregarding CA's alleged failure to properly plead equitable estoppel, I find that the doctrine does not apply on these facts.

HN25[] Under Colorado law, the doctrine of equitable estoppel is employed to prevent manifest **[**40]** injustice. *Committee for Better Health Care v. Meyer, 830 P.2d 884, 891 (Colo. 1992)*. In order for the doctrine to apply, the party to be estopped must know the true facts and intend that its conduct be acted upon by the party asserting the defense. *Dove v. Delgado, 808 P.2d 1270, 1275 (Colo. 1991)*. Thus, it focuses on one party's conduct or representations which induce another party, who does not know the true facts, to rely on the conduct or misrepresentations. *Id.; In re Marriage of Dennin, 811 P.2d 449, 450 (Colo. App. 1991)*.

Here, AFW signed a contract containing CA's representation that the SPO programs were trade secrets. CA is the party in possession of the true facts regarding its trade secrets, not AFW. It may not estop AFW. Nevertheless, CA argues that "numerous cases" have invoked the doctrine in these circumstances to bar a party from denying the existence of trade secrets. *But see Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis. 2d 202, 267 N.W.2d 242, 249 (Wis. 1978)* (estoppel based on contractual acknowledgement of trade secret status not appropriate in restraint **[**41]** of trade case for public policy reasons). These cases are distinguishable. In two, the party estopped had actually developed the trade secrets sought to be protected. *See Ultra-Life Laboratories, Inc. v. Eames, 240 Mo. App. 851, 221 S.W.2d 224 (Mo. App. 1949)* (defendant's poultry culling method); *Germo Mfg. Co. v. Combs, 240 S.W.2d 872 (Mo. App. 1922)* (defendant's poultry tonic). Furthermore, in most of the cases upon which CA relies, *see also In re Uniservices, Inc., 517 F.2d 492 (7th Cir. 1975)*, the court focused primarily on the defendant's conduct over several years in acknowledging the proprietary nature of the product or process. CA is not in a similar position here. Therefore, I deny CA's motion that AFW be equitably estopped from contesting the trade secret status of the SPO programs based on language in the 1979 Agreement.

5. *Reference to Injunctive Relief.*

CA's final request in this motion in limine is that AFW be precluded from mentioning CA's claim for injunctive relief since it is an equitable one for the court's determination. AFW responds that the jury must determine what, if any, portion of **[**42]** AFW's software contains CA's proprietary information so that the court can fashion the scope of the injunction. Therefore, AFW posits, the jury must be told that CA desires injunctive relief.

I disagree with AFW's position. To assess damages, the jury will no doubt be required to decide whether either the PC-Fund or Fundware programs, or both, were copied from CA's code. Then I will determine, if necessary, whether to enjoin AFW's distribution of PC-Fund or Fundware based on the jury's conclusions. The jury need not be advised of CA's equitable claim. Therefore, I grant the motion in limine as to reference to CA's claim for injunctive relief. [7]

[43]** **[*1531]** D. *Defendant AFW's Motion in Limine.*

1. *Dayton Deposition Exhibit 231.*

AFW's first contention in this motion in limine is that CA should be precluded from introducing Exhibit 231 to the deposition of Jerome Dayton, AFW's managing agent. [8] Exhibit 231 is a letter dated August 18, 1998 from Dayton to attorney Gary Peterson containing allegedly privileged communications. AFW claims that it inadvertently provided Exhibit 231 to CA and that, as soon as this was discovered, AFW promptly asserted the privilege.

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[7] CA raised four additional issues in its motion for limine. First, CA requested that evidence of either party's violation of the protective order be disallowed. This request is moot in light of the stipulation regarding alleged violations of the protective order filed April 20, 1993.

Second, CA requested I limit AFW from asserting at trial that CA is not the owner of all right, title and interest of any assets transferred to it from SPO. At the hearing on these motions, AFW agreed that it will not challenge the "chain of title" of these assets. In other words, AFW concedes that CA received whatever assets SPO had.

Third, CA sought an order limiting evidence of its settlement with the individual defendants in this case. The parties indicated in their briefs and at the hearing that there is no disagreement that the terms of CA's settlement are not admissible.

Fourth, CA has withdrawn its request that it be entitled to a presumption that the versions of the PC-Fund and Fundware programs that AFW destroyed would have demonstrated that AFW copied CA's code and concedes that issue should be addressed at the jury instruction conference.

[8] AFW also sought to preclude CA's introduction of any charts prepared by its witness, James Schenck, included as Exhibits 292-295 to the deposition of John O'Brien. At the hearing on these motions, AFW withdrew this request.

While these contentions are true, CA promptly moved to compel production of this letter. In an order dated November 21, 1991, Magistrate Judge Borchers granted the motion to compel, concluding that AFW had waived the privilege by allowing its expert, Ronald Mums, to see the letter. **[**44]** *See Boring v. Keller, 97 F.R.D. 404, 406 (D. Colo. 1983)*. AFW putatively appealed this ruling in a motion in limine filed on December 3, 1991. That motion was mooted by Judge Carrigan's entry of the pretrial order on September 25, 1992, which lists Exhibit 231 as one of CA's trial exhibits. *(See* Pretrial Order, Ex. A at 18.) Accordingly, Judge Carrigan's ruling is the law of the case and the pretrial order is controlling. Therefore, I deny the motion in limine as to Exhibit 231.

2. *Financial or Other Evidence Provided During Settlement Negotiations.*

AFW's second request in this motion in limine is that CA not be allowed to introduce certain financial information provided by AFW during settlement negotiations, relying on *Fed. R. Evid. 408*. These negotiations took place after CA had obtained a default judgment against AFW on the issue of liability. AFW provided CA with documents containing revenue and related statistics for certain types of software. The titles on some of these documents (indicating figures for software incorporating "SPO code") could be construed as an admission that AFW copied CA's software. AFW requests that these documents, **[**45]** or at least their titles, be precluded from evidence. CA responds that AFW produced the same documents with the same titles during discovery *(see* Pl.'s Exs. 95-106), and therefore cannot claim the protection of *Rule 408*.

Rule 408 of the Federal Rules of Evidence ***HN26***[] limits the introduction of evidence regarding offers or acceptance of compromises or settlements and conduct or statements made in compromise negotiations. It does not, however, "require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." *Fed. R. Evid. 408*. *Rule 408* is a preclusionary rule, not a discovery rule. It is meant to limit the introduction of evidence of settlement negotiations at trial and is not a broad discovery privilege. *NAACP Legal Defense Fund v. United States Dept. of Justice, 612 F. Supp. 1143, 1146 (D.D.C. 1985)*. Information which may not be admissible at trial under the rule is still discoverable so long as that information may lead to the discovery of other admissible evidence. *See Manufacturing Sys., Inc. v. Computer Technology, Inc., 99 F.R.D. 335, 336 (E.D. Wis. 1983)*. **[**46]**

Here, AFW has not waived the protection of *Rule 408* by producing the same documents it used in the parties' settlement negotiations during discovery. The titles of the documents could be construed as an admission of liability and are protected under *Rule 408*. The tabular information contained in the documents, however, is evidence that is otherwise discoverable. Therefore, AFW's request for the exclusion of the documents containing prejudicial titles is granted in part and denied in part. CA shall be permitted to introduce these documents into evidence subject to the requirement that all prejudicial titles be redacted. The parties shall attempt to reach agreement on the redaction before trial. Any dispute shall be promptly submitted to me for a ruling. Accordingly,

IT IS ORDERED THAT Plaintiff's motion for summary judgment as to Defendant's **[*1532]** counterclaims is GRANTED as to the counterclaim for unfair competition and DENIED as to the request for the imposition of attorney fees under *Colo. Rev. Stat. §§ 13-17-101* to -103; and

IT IS FURTHER ORDERED THAT Defendant's most recent motion to reconsider my order granting Plaintiff's motion to amend pretrial order is DENIED; and

IT IS FURTHER **[**47]** ORDERED THAT Plaintiff's motion in limine is GRANTED as to (1) evidence of CA's size, wealth and financial condition, (2) evidence of AFW's size, wealth and financial condition, (3) evidence as to CA's loss of the SPO programs, except as to evidence that Version 1.0 contains 79 programs altered in October, 1979, (4) evidence of CA's waiver of its copyright claim, (5) reference to CA's claim for injunctive relief;

IT IS FURTHER ORDERED THAT Plaintiff's motion in limine is DENIED as to (1) CA's request that AFW be equitably estopped from contesting the trade secret status of the SPO programs; and

IT IS FURTHER ORDERED THAT Defendant's motion is limine is GRANTED in part as to Plaintiff's Exhibits 95-106 as further explained herein and DENIED as to Dayton Deposition Exhibit 231.

Dated this 26th day of August, 1993 at Denver, Colorado.

JOHN L. KANE, JR., U.S. SENIOR DISTRICT COURT JUDGE

Field v. First Nat'l Bank

Appellate Court of Illinois, Fifth District

August 26, 1993, Filed

NO. 5-91-0706

Reporter

249 Ill. App. 3d 822 *; 619 N.E.2d 1296 **; 1993 Ill. App. LEXIS 1305 ***; 189 Ill. Dec. 247 ****

ROBERT FIELD, Administrator of the Estate of Raymond Ewell Field, Deceased, Plaintiff-Appellant, v. THE FIRST NATIONAL BANK OF HARRISBURG, a National Banking Corporation, and PATSY FIELD WASSON, Defendants-Appellees

Subsequent History: **[***1]** Rehearing denied September 30, 1993.

Prior History: Appeal from the Circuit Court of Saline County. No. 88-L-21. Honorable Arlie O. Boswell, Judge Presiding.

Disposition: Reversed and remanded.

Core Terms

statute of limitations, checks, deposited, conversion, partial summary judgment, course of conduct, five-year, certified question, trial court, commencement, transactions, questions, cashed

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Types of Damages > Property Damages > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Torts > Intentional Torts > Conversion > Defenses

Torts > Procedural Matters > Statute of Limitations > General Overview

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN1[] **Statute of Limitations, Time Limitations**

Ill. Code Civ. P. § 13-205 provides for a five-year statute of limitations to recover the possession of personal property or damages for the detention or conversion thereof. Ill. Rev. Stat. ch. 110, para. 13-205 (1987). Where a tort involves a continued repeated injury, the limitation period does not begin until the date of the last injury or when the tortious act ceased.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

Where a continuing "conspiracy" is involved the statute of limitations under the appropriate ***antitrust law*** begins to run from the date of the last overt act in furtherance of the conspiracy which allegedly causes damage to the plaintiff.

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Governments > Courts > Judicial Precedent

Governments > Legislation > Statute of Limitations > General Overview

HN3[] **Courts, Authority to Adjudicate**

The court should not resolve a question merely for the sake of setting a precedent to govern subsequent cases.

Counsel: Ronald R. Eckiss, of Harris and Lambert, of Marion, for appellant.

Thomas J. Wolf, Jr., P.C., of Harrisburg, for appellee First National Bank of Harrisburg.

Judges: GOLDENHERSH, CHAPMAN, RARICK

Opinion by: GOLDENHERSH

Opinion

[*823] **[**1297]** **[****248]** JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiff, Robert Field, administrator of the estate of Raymond Ewell Field, deceased, appeals from an order of the circuit court of Saline County entering partial summary judgments in favor of defendants, The First National Bank of Harrisburg (hereinafter Bank) and Patsy Field Wasson (hereinafter Wasson). Plaintiff requested that the trial court certify three questions for interlocutory appeal, pursuant to *Supreme Court Rule 308* (134 Ill. 2d R. 308). The trial court granted plaintiff's motion, and the following three questions were certified for review by this court: (1) whether the alleged course of conduct was one transaction or numerous separate transactions for purposes of the commencement of the running of the applicable statute of limitations; (2) in respect to **[***2]** when the statute of limitations commenced running as to the alleged transactions, did the commencement of the running of the statute of limitations occur on the date of the alleged conversions or on the date of the actual discovery of the alleged conversions by the personal representative of the estate of Robert Ewell Field, deceased; and (3) is the appropriate determination of the issue of the statute of limitations in this case to bar the prosecution of any and all claims for alleged acts of conversion that occurred prior to March 23, 1983. We reverse and remand.

I

This is a family dispute involving plaintiff, son of Raymond Ewell Field, and Wasson, daughter of Raymond Ewell Field. Plaintiff filed a two-count complaint against defendants on March 23, 1988, seeking to recover funds that were allegedly improperly obtained by Wasson. Both counts allege that from January 1, 1980, until March 14, 1984, the date of the death of Raymond Ewell Field, Wasson deposited checks endorsed by her father which were restricted by the words "For Deposit Only" into her own account at the Bank. Raymond Ewell Field's name did not appear on the account. Field resided in a nursing home from the late 1970's **[***3]** until his death in 1984. Count I alleged that the actions on the part of defendants amounted to wilful and wanton misconduct, and count II alleged that the actions of defendants constituted conversion.

[1298]** **[****249]** The evidence deposition of Linda Watson, a vice president at the Bank, is included in the record. According to Watson, Wasson opened **[*824]** two accounts at the Bank. The first was account No. 67-2351, opened on July 5, 1974. Originally, account No. 67-2351 was in Wasson's name only. By January 27, 1981, the account was held in the names of Patsy Field Wasson, John F. Wasson, and John F. Wasson II. A second account, No. 67-2300, was also held in the name of Wasson at the Bank. Numerous checks made payable to Raymond E. Field were deposited into both accounts by Wasson. Most of Raymond E. Field's checks went into account No. 67-2351. Linda Watson testified about checks that were drawn on the account. For example, a check for $ 125 made payable to "Cash" was cashed by the Bank. Wasson also made payments out of that account on notes on her car and on a note held by her son. Linda Watson further testified that cancelled checks and deposit slips went to Wasson. None would have been sent to Raymond **[***4]** E. Field, as his name did not appear on the accounts. As far as Watson knew, Raymond E. Field never did any banking through her employer.

Plaintiff knew that his sister, Wasson, took care of their father's business affairs and had been doing so since his father entered a nursing home in the late 1970's. Between January 1, 1980, and March 14, 1984, plaintiff's father received monthly pension checks from the Veterans' Administration, the Social Security Administration, and the Black Lung Fund. These checks were delivered in his father's name to Wasson's mail box. Raymond E. Field did not have a post office box. Prior to his father's death, plaintiff did not know about the accounts at the defendant Bank and did not know that his father's name was not on the accounts to which his checks were deposited. Plaintiff agreed that his father was mentally sharp up until his death. Plaintiff and his father did not discuss financial affairs. Plaintiff did receive gifts out of the accounts in question from his father, which were signed by Wasson. Plaintiff never questioned why such checks were signed by Wasson but just accepted that this was the way it was done.

Both defendants filed motions for **[***5]** partial summary judgment, arguing that all alleged acts of conversion that arose prior to March 23, 1983, are barred pursuant to the applicable five-year statute of limitations. (Ill. Rev. Stat. 1987, ch. 110, par. 13-205.) The trial court agreed and granted partial summary judgments for both the Bank and Wasson. Plaintiff appeals from those orders of the trial court granting partial summary judgments for defendants, and we are asked to consider the three questions previously set forth.

II

The first question we are asked to address is whether the alleged **[*825]** course of conduct was one transaction or numerous separate transactions for purposes of commencement of the running of the applicable statute of limitations.

Plaintiff argues that the complaint filed herein clearly alleges a four-year course of conduct in which both defendants allowed restrictively endorsed pension checks for Raymond E. Field to be deposited into accounts that did not bear his name. According to plaintiff, the deposits were made on a monthly basis, in the same manner, to the same accounts over a four-year period, thus establishing an ongoing "scheme, plan, conspiracy or the like." Plaintiff discovered this course **[***6]** of conduct after his father's death on March 14, 1984. Plaintiff commenced this action on March 23, 1988, within five years of his father's death, thus within the applicable five-year statute of limitations.

(See Ill. Rev. Stat. 1987, ch. 110, par. 13-205.) Defendants respond that each allegedly converted check constituted a separate cause of action and no facts were alleged or shown which would transform the deposits into anything more than a series of isolated transactions. We agree with plaintiff that the alleged course of conduct was one continuous transaction or scheme for purposes of the commencement of the statute of limitations.

HN1[] Section 13-205 of the Code of Civil Procedure provides for a five-year statute of **[**1299] [****250]** limitations to recover the possession of personal property or damages for the detention or conversion thereof. (Ill. Rev. Stat. 1987, ch. 110, par. 13-205.) While we are unable to find any cases in which a series of checks cashed is said to constitute a single transaction for purposes of the running of the statute of limitations, we have found some cases to give us guidance in this area. For example, the law is clear that where a tort involves a continued repeated injury, **[***7]** the limitation period does not begin until the date of the last injury or when the tortious act ceased. *(Gass v. Metro-East Sanitary District (1989), 186 Ill. App. 3d 1077, 1084, 542 N.E.2d 1229, 1234, 134 Ill. Dec. 722*; *Anderson v. Sutter (1983), 119 Ill. App. 3d 1070, 458 N.E.2d 39, 75 Ill. Dec. 871*; *City of Rock Falls v. Chicago Title & Trust Co. (1973), 13 Ill. App. 3d 359, 300 N.E.2d 331*.) Moreover, a somewhat similar situation to the one presented here is found in *Sommer v. United Savings Life Insurance Co. (1984), 128 Ill. App. 3d 808, 471 N.E.2d 606, 84 Ill. Dec. 77*. In that case, the plaintiffs in count I of their complaint alleged a scheme by their insurance company to defraud. The scheme consisted of a series of misrepresentations which occurred from September 1974, when the first policy was issued, to at least November 1975. The plaintiffs' complaint alleged misrepresentations which induced reliance and injury as late as December 1975. *(Sommer, 128 Ill. App. 3d at 817, 471 N.E.2d at* ***[*826]*** *613*.) The *Sommer* **[***8]** court determined that under this alleged scheme, the applicable five-year statute of limitations did not begin to run until December 1975, and thus the complaint filed in October 1979 was not barred. *(Sommer, 128 Ill. App. 3d at 817, 471 N.E.2d at 613-14*.) Likewise, under Federal antitrust laws it is well settled that *HN2*[] where a continuing "conspiracy" is involved the statute of limitations under the appropriate ***antitrust law*** begins to run from the date of the last overt act in furtherance of the conspiracy which allegedly causes damage to the plaintiff. See, *e.g., Garelick v. Goerlich's, Inc. (6th Cir. 1963), 323 F.2d 854*; *Saunders v. National Basketball Association (N.D. Ill. 1972), 348 F. Supp. 649*.

We have reviewed plaintiff's two-count complaint herein. Contrary to the trial court's determination, we believe plaintiff alleged facts sufficient to show an ongoing "scheme, plan, conspiracy, or the like" which would transform the deposits into what could be considered a single transaction. The checks were cashed by Wasson over a continuous four-year period, but every one was made **[***9]** payable to her father, Raymond E. Field. Furthermore, all the checks were restrictively endorsed with the words "For Deposit Only." Nevertheless, the accounts into which these checks were deposited did not bear Raymond E. Field's name, and he received no information concerning the accounts from the defendant Bank. Therefore, in answer to the first certified question, we hold that the alleged course of conduct is one transaction and that the statute of limitations did not begin to run until the date on which the last pension check was cashed by Wasson.

III

Our determination of the first certified question also determines our answer to the third certified question, namely, that it is not appropriate to bar any and all claims for alleged acts of conversion that occurred prior to March 23, 1983. The trial court ruled that because plaintiff's complaint was not filed until March 23, 1988, all banking transactions that occurred prior to March 23, 1983, were barred by the five-year statute of limitations. (Ill. Rev. Stat. 1987, ch. 110, par. 13-205.) Because we have determined that defendants' actions constituted one ongoing transaction, we believe the statute of limitations did not commence **[***10]** running until the last of Raymond E. Field's pension checks was cashed by Wasson. Plaintiff, therefore, filed his complaint well within the five-year statute of limitations, and none of it should be barred. Accordingly, the trial court erred in granting partial summary judgments for defendants.

[*827] [1300] [****251]** IV

Because of our determination as to certified questions (1) and (3), we need not answer the second certified question. When it becomes apparent that an opinion on a question of law cannot affect the result as to the parties or controversy in the case before it, *HN3*[] the court should not resolve the question merely for the sake of setting a precedent to govern subsequent cases. *(Bluthardt v. Breslin (1979), 74 Ill. 2d 246, 251, 384 N.E.2d 1309, 1311, 24 Ill. Dec. 151*.) Here, it does not matter when the alleged wrong was discovered by plaintiff because we do not believe there is a statute of limitations problem. We therefore decline to answer certified question number (2).

For the foregoing reasons, the order of the circuit court of Saline County granting partial summary judgments for defendants is reversed, and the cause is remanded for proceedings not inconsistent with **[***11]** this opinion.

Reversed and remanded.

CHAPMAN, P.J., and RARICK, J., concur.

Houston Mercantile Exch. Corp. v. Dailey Petroleum Servs. Corp.

Court of Appeals of Texas, Fourteenth District, Houston

August 26, 1993, Rendered ; August 26, 1993, Filed

No. B14-92-00818-CV

Reporter

1993 Tex. App. LEXIS 2358 *; 1993 WL 322901

HOUSTON MERCANTILE EXCHANGE CORPORATION, D/B/A HOUMEX OILFIELD SUPPLY, GARY A. BOYD, STEVE GREEN, LEONARD WOOD, JOSEPH . BOND AND P & T SERVICIOS PETROLEROS, S.A., Appellants V. DAILEY PETROLEUM SERVICES CORP., Appellee

Notice: [*1] PURSUANT TO RULE 90(i) OF THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

Prior History: On Appeal from the 334th District Court. Harris County, Texas. Trial Court Cause No. 90-21130-C.

Disposition: Affirmed

Core Terms

summary judgment, unfair competition, antitrust, appellants', trade secret, counterclaims, drilling, lawsuit, antitrust claim, cause of action, jars, malicious prosecution, matter of law, trial court, sham, probable cause, drawing

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review

HN1[] **Judgments, Summary Judgment**

The standard to be followed in review of a summary judgment is well established: 1) the movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; 2) in deciding whether or not there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; 3) every reasonable inference must be indulged in favor of the non-movants and any doubts resolved in their favor. The movant must establish its entitlement to summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of its cause of action or defense as a matter of law. When a non-movant has pled a counterclaim, the movant has the burden to show that no material fact issues exists to at least one element of the counterclaim and that it is entitled to judgment as a matter of law.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Antitrust & Trade Law, Sherman Act**

The Texas Free Enterprise and Antitrust Act of 1983, *Tex. Bus. & Com. Code Ann. § 15.01-15.51* (1987) (the Texas Antitrust Act), creates a cause of action for any person whose business or property has been injured by conduct declared unlawful by the Act. *Tex. Bus. & Com. Code Ann. § 15.21(a)* (1987). The Texas Antitrust Act is modeled on both the Sherman Antitrust Act and the Clayton Act. The Texas Antitrust Act provides that it is to be interpreted in harmony with federal judicial decisions of comparable laws. *Tex. Bus. & Com. Code Ann. § 15.04* (1987).

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN3[] **Regulated Practices, Intellectual Property**

Antitrust injury is a necessary requirement to show standing. Legal fees may constitute an antitrust injury if a plaintiff brings a claim in bad faith, i.e., knowing it did not possess trade secrets.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN4[] Noerr-Pennington Doctrine, Sham Exception

Those who petition the government for redress are generally immune from antitrust liability, under the right of petition guaranteed by *U.S. Const. amend. I*; *Tex. Const. art. I, § 27*. However, this immunity does not apply to a "sham" activity. This principle, known as the Noerr-Pennington doctrine, has been extended to apply to the right of access to the courts, and is protected as one aspect of the right to petition. To base an antitrust claim upon litigation, a party must show that the lawsuit is not protected petitioning, but instead is sham litigation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN5[] Exemptions & Immunities, Noerr-Pennington Doctrine

The "sham" exception to antitrust immunity under the Noerr-Pennington doctrine has been defined as follows. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect to succeed on the merits. Then, only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. In this subjective review, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the process rather than the outcome of that process. Thus, if a plaintiff has probable cause to institute legal proceedings, then a finding of sham litigation is precluded. Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Personal Knowledge

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN6[] Supporting Materials, Affidavits

Conclusory affidavits are insufficient to raise a fact issue for the purposes of summary judgment.

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

Trademark Law > ... > Eligibility for Trademark Protection > Evidence of Secondary Meaning > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > Special Marks > General Overview

Trademark Law > Special Marks > Trade Names > General Overview

HN7[] **Sales of Goods, Remedies**

Unfair competition is a form of unlawful business injury which consists essentially, in the passing off or attempting to pass off on the public, the goods or business of one person as and for the business of another. In Texas, unfair competition has been defined as consisting of the simulation by one person, for the purpose of deceiving the public, of the names, symbols, labels or devices employed by a business rival in order to induce the purchasing public to buy his products in the belief that they are those of his rival. Texas courts have generally recognized two elements which must be established to sustain a cause of action for unfair competition: (1) plaintiff's use of its trade name has acquired a secondary meaning; and (2) the similarity of the name used by the defendant's place of business, or product, would be likely to confuse the public.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN8[] **Pleadings, Amendment of Pleadings**

Generally, pleading deficiencies will not be grounds for summary judgment unless the defect could not be cured by amendment.

Torts > ... > Malicious Prosecution > Elements > General Overview

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN9[] **Malicious Prosecution, Elements**

To maintain an action for malicious prosecution, an appellant must prove: (1) a civil judicial proceeding was previously filed; (2) appellee caused the original suit to be filed; (3) the commencement of the original proceeding was malicious; (4) no probable cause existed for the filing of the original proceeding; (5) the original suit terminated in favor of appellants; and (6) appellants incurred damages conforming to the legal standards under Texas law.

Judges: Panel consists of Justices Murphy, Sears and Draughn.

Opinion by: PAUL C. MURPHY

Opinion

OPINION

Appellants, Houston Mercantile Exchange Corp., d/b/a Houmex Oilfield Supply, Gary A. Bond, Steve Green, Leonard Wood, Joseph A. Bond, and P & T Servicios Petroleros, S.A., each filed substantially the same counterclaims against appellee, Dailey Petroleum Services Corporation. Appellee claims appellants participated in activities that assisted in misappropriation of its trade secrets. Appellants' counterclaims assert antitrust violations, unfair competition, malicious prosecution and abuse of process. The trial court granted summary judgment in favor of appellee on all the counterclaims, except abuse of process. Appellants bring four points of error, and we affirm.

In an earlier suit, appellee sought relief from Kenjer, Inc., Kenneth R. Mills and Jerry A. Coker for theft of appellee's trade secrets in connection with the **[*2]** design and sale of drilling jars, a type of equipment used in drilling oil wells. This suit (the "overseas drawing suit") was based upon the claimed use of appellee's engineering drawings for its drilling jar. Mills and Coker are former employees of appellee who executed an agreement not to use or disclose appellee's trade secrets, and appellee claimed these contracts were breached. Kenjer, Inc. is a corporation which manufactures a drilling jar called the Sup-R-Jar, and was formed by Mills and Coker after they left appellee's employ. Appellee obtained a preliminary injunction against Mills, Coker and Kenjer prohibiting them from in any way using certain drawings and documents related to appellee's drilling jars. The parties then entered a settlement agreement where Mills, Coker and Kenjer acknowledged that the design of appellee's drilling jars was a trade secret and agreed to cease marketing drilling jars incorporating appellee's trade secrets. During discovery conducted during the overseas drawing suit and later during the suit on which this appeal is based, appellee learned of other parties who participated in marketing and other activities that appellee believes involve misappropriation **[*3]** of their trade secrets.

On April 26, 1990, appellee filed this action against appellants, who appellee claims are agents and employees of Kenjer. Appellee alleges that appellants conspired to participate, and did participate, in the misappropriation of their trade secrets by providing facilities, capital, markets, and other encouragement and assistance in their sales of Kenjer's drilling jar. Appellee has also filed suit in federal court asserting federal Lanham Act claims and claims of unfair competition and trademark infringement against Kenjer and others based on Kenjer's use of advertising brochures and manuals that allegedly copy appellee's materials.

In this action, appellants filed counterclaims alleging: (1) antitrust claims of monopolization and attempt to monopolize; (2) unfair competition; (3) malicious prosecution; and (4) abuse of process. Appellee moved for summary judgment on appellants' counterclaims. The trial court granted summary judgment in favor of appellee on the counterclaims alleging antitrust violations, unfair competition and malicious prosecution. The court then severed those claims, making the summary judgment final, and appellants now bring this **[*4]** appeal.

HN1[] The standard to be followed in review of a summary judgment is well established:

1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

2. In deciding whether or not there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

3. Every reasonable inference must be indulged in favor of the non-movants and any doubts resolved in their favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985).

The movant must establish its entitlement to summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of its cause of action or defense as a matter of law. *City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979)*. When a non-movant has pled a counterclaim, the movant has the burden to show that no material fact issues exists to at least one element of the counterclaim and that it is entitled to judgment as a matter of law. *Adams v. Tri-Continental Leasing Corp., 713 S.W.2d 152, 153* ***[*5]*** *(Tex. App.--Dallas 1986, no writ)*.

In appellants' first point of error, they allege that summary judgment was in error because they have standing to raise antitrust claims under Texas' antitrust laws, and that appellee's lawsuit constitutes an antitrust violation. ***HN2***[] The Texas Free Enterprise and Antitrust Act of 1983, *Tex. Bus. & Com. Code Ann. 15.01*-15.51 (the Texas Antitrust Act), creates a cause of action for any person whose business or property has been injured by conduct declared unlawful by the act. *Tex. Bus. & Com. Code Ann. 15.21(a)* (Vernon 1987). The Texas Antitrust Act is modeled on both the *Sherman Antitrust Act and the Clayton Act. Caller-Times Publishing Co. v. Triad Communications, Inc., 826 S.W.2d 576, 580 (Tex. 1992)*. The act provides that it is to be interpreted in harmony with federal judicial decisions of comparable laws. *Tex. Bus. & Com. Code Ann. 15.04* (Vernon 1987); *Caller-Times, 826 S.W.2d at 580*; *DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 687 (Tex. 1990)*, *cert. denied, 498 U.S. 1048, 111 S. Ct. 755, 112 L. Ed. 2d 775 (1991)*.

Appellee responds that appellants have not suffered an antitrust violation. Appellee contends, and we agree, that appellants **[*6]** must first prove an antitrust injury to have standing to bring their antitrust claims. ***HN3***[] Antitrust injury is a necessary requirement to show standing. *Bell v. Dow Chemical Co., 847 F.2d 1179, 1182 (5th Cir. 1988)*. Appellants' antitrust claim is based upon being sued and incurring legal expenses. Legal fees may constitute an antitrust injury if a plaintiff brings a claim in bad faith, i.e., knowing it did not possess trade secrets. *CVD, Inc. v. Raytheon Co., 769 F.2d 842, 858 (1st Cir. 1985)*, *cert. denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986)*. However, we note that the cases cited by appellants concern a claim for attorney's fees among several allegations of restraint of trade, and not a claim for attorney's fees alone. See *CVD, Inc. v. Raytheon Co., 769 F.2d 842*; *Colorado Petroleum Marketers Ass'n v. Southland Corp., 476 F. Supp. 373 (D. Colo. 1979)*; *Technicon Medical Information Systems Corp. v. Green Bay Packaging, Inc., 480 F. Supp. 124 (E.D. Wisc. 1979)*.

HN4[] Those who petition the government for redress are generally immune from antitrust liability, under the right of petition guaranteed by the Bill of Rights and the Texas constitution. *U.S. Const. amend.* ***[*7]*** *I*; *Tex. Const. art. I, 27*. However, this immunity does not apply to a "sham" activity. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; see also *United Mine Workers v. Pennington, 381 U.S. 657, 669-671, 85 S. Ct. 1585, 1592-94, 14 L. Ed. 2d 626 (1965)*. This principle, known as the Noerr-Pennington doctrine, has been extended to apply to the right of access to the courts, and is protected as one aspect of the right to petition. *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 612, 30 L. Ed. 2d 642 (1972)*.

To base an antitrust claim upon litigation, a party must show that the lawsuit is not protected petitioning, but instead is sham litigation. *In re Burlington Northern, Inc., 822 F.2d 518, 533 (5th Cir. 1987)*. Appellants contend in their fourth point of error that there is a fact issue as to whether the lawsuit in this case is a sham. Recently, the United States Supreme Court defined ***HN5***[] the "sham" exception to antitrust immunity under the Noerr-Pennington doctrine in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 123 L. Ed. 2d 611,* ***[*8]*** *113 S. Ct. 1920 (1993)*. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect to succeed on the merits. *Id. at 1928*. Then, only if the challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Id. In this subjective review, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor through the use of the process rather than the outcome of that process. Id. Thus, if a plaintiff has "probable cause" to institute legal proceedings, then a finding of sham litigation is precluded. *Id. at 1929*. Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication. Id.

We find that appellee's suit is not baseless. Viewed objectively, it is reasonable to conclude that appellee has a chance to receive a favorable outcome based upon its success thus far in this suit and the related litigation. Appellee obtained a temporary injunction in the original suit and obtained settlement agreements with several defendants **[*9]** in the federal suit, where the parties agreed to cease acts of unfair competition. Appellee has also settled with two defendants in this suit. Authenticated copies of the judgment in the overseas drawing suit, the injunction, and the settlement agreements are attached to appellee's summary judgment motion. In addition to deposition testimony and interrogatories, appellee also supported its summary judgment motion with affidavits from James Farr, appellee's president, and Stephen H. Cagle, appellee's attorney. Farr's affidavit recites the success appellee has achieved thus far in the various litigation, including prevailing on motions for summary judgment by Mills, Coker, and Kenjer in the federal suit. Appellants' only proof in response is an affidavit furnished by Kenneth Mills contending that appellee had no probable cause to institute suit. While his affidavit does contain facts of which he claims to have personal knowledge, in our opinion, these facts do not support his conclusion that appellee had no probable cause to sue. ***HN6***[] Conclusory affidavits are insufficient to raise a fact issue. *Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984)*. We find that appellee established it **[*10]** had probable cause to institute its suit.

Finding appellee could realistically expect success on the merits, we must conclude that the litigation is not a sham. Thus, it is protected from antitrust claims by the Noerr-Pennington doctrine. Appellants therefore have no viable antitrust claim. [1] The existence of probable cause eliminates any genuine issue as to any material fact, and appellee is entitled to summary judgment on this cause of action as a matter of law. See *Professional Real Estate Investors, 113 S. Ct. at 1931*. We overrule appellants' first and fourth points of error.

In their second point of error, appellants claim the trial court erred in granting summary judgment against **[*11]** them on their unfair competition claim. Appellee contends that appellants failed to raise a claim of unfair competition. ***HN7***[] Unfair competition is "a form of unlawful business injury which consists essentially, in the passing off or attempting to pass off on the public, the goods or business of one person as and for the business of another." *King-Size, Inc. v. Frank's King Size Clothes, Inc., 547 F. Supp. 1138, 1165 (S.D. Tex. 1982)*.

In Texas, unfair competition has been defined as "consist[ing of] the simulation by one person, for the purpose of deceiving the public, of the names, symbols, labels or devices employed by a business rival in order to induce [the] purchasing public to buy his products in the belief that they are those of his rival." *Avnet v. Texas Centennial Central Exposition, 96 S.W.2d 685, 687 (Tex. Civ. App.--Dallas 1936, writ dism'd w.o.j.)*. Texas courts have generally recognized two elements which must be established to sustain a cause of action for unfair competition: (1) plaintiff's use of its trade name has acquired a secondary meaning; and (2) the similarity of the name used by the defendant's place of business, or product, would be likely to confuse **[*12]** the public. *Hudgens v. Goen, 673 S.W.2d 420, 423 (Tex. App.--Fort Worth 1984, writ ref'd n.r.e.)*; *Harrelson v. Wright, 339 S.W.2d 712, 714 (Tex. Civ. App.--Eastland 1960, writ ref'd)*.

Appellants alleged no facts constituting unfair competition. They contend that appellee attempted to harass and intimidate them and their potential customers by filing these lawsuits and threatening further litigation. Appellants assert that the lawsuits constitute a form of unfair competition. We disagree and find no support for appellants' position. We find that appellants have failed to plead a cause of action for unfair competition. ***HN8***[] Generally, pleading deficiencies will not be grounds for summary judgment unless the defect could not be cured by amendment. *Trunkline LNG Co. v. Trane Thermal Co., 722 S.W.2d 722, 724 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.)*. Under the facts presented here, appellants could not cure their pleadings by amendment. The trial court correctly determined that appellee is entitled to summary judgment as a matter of law on appellants' claim of unfair competition. We overrule appellants' second point of error.

In their third point of error, appellants **[*13]** contend that summary judgment on their malicious prosecution claim was erroneous. ***HN9***[] To maintain an action for malicious prosecution, appellants must prove:

(1) a civil judicial proceeding was previously filed;

(2) appellee caused the original suit to be filed;

(3) the commencement of the original proceeding was malicious;

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[1] Thus, because appellee has immunity from the antitrust cause of action alleged by appellants, we need not address the other factors which determine antitrust standing. See *Associated Gen. Contractors, Inc. v. California State Counsel of Carpenters, 459 U.S. 519, 529, 103 S. Ct. 897, 903, 74 L. Ed. 2d 723 (1983)*.

(4) no probable cause existed for the filing of the original proceeding;

(5) the original suit terminated in favor of appellants; and

(6) appellants incurred damages conforming to the legal standards under Texas law.

Oak Crest Civic Club v. Lowe, 678 S.W.2d 93, 94, (Tex. App.--Houston [14th Dist.] 1984, writ dism'd); *Martin v. Trevino, 578 S.W.2d 763, 766 (Tex. Civ. App.--Corpus Christi 1978, writ ref'd n.r.e.)*. Clearly, appellants have not met these elements. The original suit was not filed before this case; appellants' malicious prosecution claim is based upon this case, which obviously has not terminated in favor of appellants. Appellants ask this court, in the interest of judicial economy, to extend the cause of action for malicious prosecution to allow it to be alleged as part of the underlying lawsuit on which the claim is **[*14]** based. This we decline to do. We hold that a cause of action for malicious prosecution may not be brought until the underlying suit on which the claim is based has terminated. See *Oak Crest Civic Club, 678 S.W.2d at 94*. We agree with the court below that appellee is entitled to summary judgment on the malicious prosecution claim as a matter of law.

We overrule appellants' third point of error and affirm the judgment of the trial court.

Paul C. Murphy

Justice

Judgment rendered and Opinion filed August 26, 1993.

Panel consists of Justices Murphy, Sears and Draughn.

Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc.

Appellate Court of Illinois, Fifth District

September 3, 1993, Filed

NO. 5-91-0746

Reporter

251 Ill. App. 3d 17 *; 620 N.E.2d 1349 **; 1993 Ill. App. LEXIS 1356 ***; 190 Ill. Dec. 88 ****; 1993-2 Trade Cas. (CCH) P70,429

GILBERT'S ETHAN ALLEN GALLERY, Plaintiff-Appellee and Cross-Appellant, v. ETHAN ALLEN, INC., Defendant-Appellant and Cross-Appellee, and BLY & SONS, INC., Defendant-Cross-Appellee.

Prior History: **[***1]** Appeal from the Circuit Court of Madison County. No. 85-L-868. Honorable Paul E. Riley, Judge Presiding.

Disposition: Affirmed in part; reversed and remanded in part.

Core Terms

Illinois Act, commerce, Sherman Act, trial court, monopoly, monopolize, construing, cases, furniture, substantial part, words, manufacturer, antitrust, dealer, prices, monopoly power, federal law, violation of section, competitors, conspiracy, attorney's fees, relevant market, trial judge, conspire, products, termination, excluding, acquire, damages, fix prices

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN1[] **Attempts to Monopolize, State Regulation**

See Ill. Rev. Stat. ch. 38, para. 60-3(3) (1985).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

See Ill. Rev. Stat. ch. 38, para. 60-11 (1985).

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > Sentencing > Fines

HN3[] **Antitrust & Trade Law, Sherman Act**

See the Sherman Act, *15 U.S.C.S. § 2 (1993)*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Regulated Practices, Trade Practices & Unfair Competition**

Per se rules are appropriate only for conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output. Agreements are per se illegal only if their nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Higher Education & Professional Associations, Colleges & Universities**

The Federal antitrust experience under the Sherman Act, *15 U.S.C.S. § 2*, is applicable to questions arising under the Illinois Antitrust Act, Ill. Rev. Stat. ch. 38, para. 60-1 et seq. (1985), and can serve as a useful guide.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN6[] **Sherman Act, Claims**

To say that Illinois courts should be guided by the federal cases does not mean that they are bound to strictly apply the federal courts' interpretation of the Sherman Act, *15 U.S.C.S. § 2 (1993)*. The Illinois Antitrust Act, Ill. Rev. Stat. ch. 38, para. 60-1 et seq. (1985), requires more proof than *section 2* of the Sherman Act for a court to find that a defendant violated section 3(3) of the Illinois Antitrust Act. Not only must the plaintiff prove that defendant established, maintained, used, or attempted to acquire monopoly power over any substantial part of trade or commerce but, in addition, plaintiff must prove that defendant did so for the purpose of excluding competition or controlling, fixing, or maintaining prices in that trade or market. Proof of purpose is not required for a violation of *section 2* of the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN7[] **Regulated Practices, Monopolies & Monopolization**

There is no question that when competitors conspire to fix prices, production, or services, a violation of section 3(1) of the Illinois Antitrust Act, Ill. Rev. Stat. ch. 38, para. 60-3(1) (1985), occurs and it is a per se violation requiring only proof that the competitors conspired. No market analysis is needed for a section 3(1) violation, because the agreement in and of itself is a violation. There is also no question that when persons contract, combine, or conspire to unreasonably restrain trade or commerce such can be a violation of section 3(2) of the Illinois Antitrust Act. However, violations of sections 3(2) and 3(4) of the Illinois Antitrust Act require, in addition to proof of the conspiracy, a determination of a geographic market that corresponds to commercial realities and is economically significant. The fact that section 3(3) requires the proof of a monopoly over any substantial part of trade or commerce indicates even more specifically than sections 3(2) and 3(4) do that a market analysis is a necessity.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

"Trade or commerce" is defined as including all economic activity involving or relating to any commodity or service, and "commodity" means any kind of real or personal property. Ill. Rev. Stat. ch. 38, para. 60-4 (1985). "Commodity" is not limited to a specific brand, nor is "trade and commerce" limited to a specific brand.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN9[] **Regulated Practices, Monopolies & Monopolization**

When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN10[] **Vertical Restraints, Price Fixing**

Independent action is not proscribed. A manufacturer of course has the right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. The manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply.

Civil Procedure > Trials > Bench Trials

HN11[] Trials, Bench Trials

In reviewing a bench trial, an appellate court will not disturb the trial court's finding unless the trial court's holding is manifestly against the weight of the evidence. Where testimony is contradictory, the trial judge as the trier of fact is in a superior position to observe the conduct of testifying witnesses, to determine their credibility, and to weigh the evidence.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN12[] Relief From Judgments, Motions for New Trials

Normally when a case is tried under an incorrect theory of law, the appropriate action is to reverse and remand for a new trial.

Judges: LEWIS, RARICK, GOLDENHERSH

Opinion by: LEWIS

Opinion

[*19] [1350] [****89]** JUSTICE LEWIS delivered the opinion of the court:

Defendant Ethan Allen, Inc. (Ethan Allen), appeals from a judgment of the circuit court of Madison County in favor of plaintiff, Gilbert's Ethan Allen Gallery, on plaintiff's claim that Ethan Allen violated the Illinois Antitrust Act (the Illinois Act) (Ill. Rev. Stat. 1985, ch. 38, par. 60-1 *et seq.).* Plaintiff cross-appeals a judgment in favor of defendant Bly & Sons, Inc. (Bly), on plaintiff's claim that Bly violated the Illinois Act. The issues on appeal are: (1) whether the trial court applied the correct legal test in finding that Ethan Allen violated section 3(3) of the Illinois Act (Ill. Rev. Stat. 1985, ch. 38, par. 60-3(3)); (2) whether the trial court erred in computing damages for plaintiff; (3) whether the trial court erred in finding that **[***2]** Bly did not violate the Illinois Act; and (4) whether the trial court erred in refusing to order attorney fees to plaintiff. We reverse on issue (1) and affirm on issue (3). Issues (2) and (4) need not be discussed.

I

Ethan Allen is a manufacturer and distributor of furniture whose products are distributed to the consumer through a network of authorized dealers. Plaintiff was an Ethan Allen dealer from 1956 to 1972 and an exclusive Ethan Allen dealer from 1972 to 1985. Plaintiff's store was located in Alton, but plaintiff advertised throughout the metropolitan St. Louis area and made most of its sales to residents from Missouri. Ethan Allen's share of the metropolitan St. Louis furniture market was more than 1% but less than 2%. In 1985, Ethan Allen terminated its relationship with plaintiff and informed plaintiff that it would no longer recognize plaintiff as an authorized dealer. As a result of that termination, Bly became the sole authorized dealer of Ethan Allen furniture in the St. Louis metropolitan area. Bly has one store located in Fairview Heights, Illinois, and one in Chesterfield, Missouri. Plaintiff, meanwhile, became a competitor of Bly and Ethan Allen by becoming a Drexel **[***3]** furniture dealer.

Plaintiff brought this action alleging its termination was a result of a conspiracy between Ethan Allen and Bly to fix prices in violation of the Illinois Act. (Ill. Rev. Stat. 1985, ch. 38, pars. 60-3(2), (3).) At a bench trial, the court heard evidence that it is Ethan Allen's practice to publish suggested retail prices, and it prefers its dealers to set their resale prices accordingly. **[**1351]** **[****90]** Former Ethan Allen sales representative Jack Tripp testified that he serviced plaintiff's account with Ethan Allen. Tripp further stated that an Ethan Allen executive told him in 1984 that plaintiff would not be an Ethan Allen dealer much **[*20]** longer because it was a discounter and sold furniture for less than the suggested price.

Lewis Gilbert testified that Nathan Ancell, chairman of the board of Ethan Allen, informed him that Ethan Allen strongly disapproved of plaintiff's discounting policy. Gilbert further testified that he lost $ 126,000 as a result of the termination by Ethan Allen. After Ethan Allen's termination, plaintiff became a Drexel furniture dealer. The $ 126,000 sum represented the cost to change the furniture displays Ethan Allen required him to maintain. He stated **[***4]** that the changeover required him to close down the store for a period of time and operate at a reduced level for an additional period of time, resulting in additional losses of $ 226,000 in 1987 and $ 140,000 in 1988.

At the close of evidence, the court entered judgment in favor of plaintiff on its claim against Ethan Allen and against plaintiff on its claim against Bly. The court concluded that Ethan Allen's actions forcing plaintiff from the marketplace constituted a violation of section 3(3) of the Illinois Act (Ill. Rev. Stat. 1985, ch. 38, par. 60-3(3)). The court awarded plaintiff $ 492,000 in damages plus costs of suit, but not attorney fees.

Ethan Allen appeals the judgment against it, and plaintiff cross-appeals the judgment in favor of Bly. Plaintiff does not argue or contend on appeal that Ethan Allen violated section 3(2) of the Illinois Act, which section prohibits conspiracies to restrain trade or commerce. We reverse as to the judgment against Ethan Allen in favor of plaintiff and affirm as to the judgment against plaintiff in favor of Bly.

II

The first issue we are asked to address by Ethan Allen is whether the trial court correctly applied the law in finding that Ethan **[***5]** Allen violated section 3(3) of the Illinois Act, which provides that every person shall be deemed to have committed a violation of the Illinois Act if they:

> ***HN1***[] "(3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce." (Ill. Rev. Stat. 1985, ch. 38, par. 60-3(3).)

Section 11 of the Illinois Act provides, in pertinent ***HN2***[] part:

> "When the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide **[*21]** in construing this Act." (Ill. Rev. Stat. 1985, ch. 38, par. 60-11.)

Ethan Allen argues that the wording of section 3(3) of the Illinois Act is similar to that of *section 2* of the Sherman Antitrust Act (Sherman Act) (*15 U.S.C.A. sec. 2 (West Supp. 1993)*) and that the trial court should have followed Federal precedent in this case. The Federal case law addressing *section 2* of the Sherman Act requires that a market-share analysis be made to determine **[***6]** if competition is sufficiently injured so that the monopolizing activities constitute a violation of the Illinois Act. *Eastman Kodak Co. v. Image Technical Services, Inc. (1992), 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072*; *Wigod v. Chicago Mercantile Exchange (7th Cir. 1992), 981 F.2d 1510*.

In the case before us, the trial court found that while there was a dearth of Illinois cases construing section 3(3) of the Illinois Act, *MBL (USA) Corp. v. Diekman (1985), 137 Ill. App. 3d 238, 484 N.E.2d 371, 91 Ill. Dec. 812*, indicated that violation of section 3(3) of the Illinois Act is a "per se" violation which makes a market-share analysis or a rule-of-reason analysis unnecessary. The trial court further noted that section 3(3) of the Illinois Act and *section 2* of the Sherman Act are different. *Section 2* of the Sherman Act provides:

> ***HN3***[] "Every person who shall monopolize, or attempt to monopolize, or combine or **[**1352]** **[****91]** conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty **[***7]** of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." (*15 U.S.C.A. sec. 2 (West Supp. 1993)*.)

Comparing the two statutes, the trial court reasoned that *section 2* of the Sherman Act prohibits monopolizing, attempts to monopolize, and conspiracy to monopolize trade or commerce, while section 3(3) of the Illinois Act prohibits monopolizing only when it is done for the purpose of excluding competition or of controlling, fixing, or maintaining prices. After concluding that section 3(3) of the Illinois Act differs from the Federal antitrust statute because the Illinois Act is narrower in scope, the trial court stated that it had "to determine [from the evidence] whether or not a monopoly existed and whether the monopoly existed for the purpose of excluding competition or fixing prices.".

As we will attempt to make clear, the trial judge correctly stated the issues in the case but he did not set the issue out completely. The trial court had to determine **[***8]** from the evidence whether Ethan Allen **[*22]** had *monopoly power over any substantial part of trade or commerce.* It may have been that the failure to add the underlined words caused the trial judge to overlook the necessity of proof that Ethan Allen had monopoly power over a substantial part of trade or commerce in furniture. The trial judge did state in his order:

> "Where there are two viable entities doing the same thing in the same general area, and the supplier to the two entities runs one of the entities out of business and turns it all over to the other attempting to control the prices in the marketplace---that is the abuse referred to by the drafters of the statutes."

This statement and the disregarding of the deficiency in evidence as to relevant market and market share by the trial judge lead us to the conclusion that the trial judge was considering Ethan Allen furniture, a single brand, to be the relevant market. The court's reasoning does have a certain logic in that it follows that Ethan Allen would have a monopoly power over a substantial part of trade or commerce in Ethan Allen products. Similarly, Ethan Allen ceased doing business with plaintiff, one of two outlets **[***9]** for Ethan Allen products was eliminated, and thus, competition was eliminated as to Ethan Allen products.

It is not clear from the trial court's ruling as to whether the trial court applied the construction of Federal law by the Federal courts as a guide in construing the Illinois Act. The trial judge seemed to have used the "*per se"* violation concept developed by the Federal courts in reaching his decision. ***HN4***[] *"Per se* rules are appropriate only for 'conduct that is manifestly anticompetitive,' [citation], that is, conduct 'that would always or almost always tend to restrict competition and decrease output,' [citations]. See also * * * *National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978)* (agreements are *per se* illegal only if their 'nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality')." *Business Electronics Corp. v. Sharp Electronics Corp. (1988), 485 U.S. 717, 723-24, 99 L. Ed. 2d 808, 816, 108 S. Ct. 1515, 1519*. **[***10]**

Plaintiff argues, however, that the wording of the Illinois Act is different from the wording of the Sherman Act and, therefore, the trial judge was correct in not using the principles developed by the Federal courts in construing *section 2* of the Sherman Act as a guide in construing the Illinois Act. It is ironic that plaintiff then spends the remainder of his argument maintaining that the Federal courts' concept of the *"per se"* rule should apply to this case.

[*23] It is quite clear that the Federal law should be used as a guide in construing section 3(3) of the Illinois Act. Our colleagues in the first and second district appellate **[**1353]** **[****92]** courts have specifically ruled that *section 2* of the Sherman Act is analogous to section 3(3) of the Illinois Act. (See *Maywood Sportservice, Inc. v. Maywood Park Trotting Association, Inc. (1973), 14 Ill. App. 3d 141, 302 N.E.2d 79*; *Ray Dancer, Inc. v. D M C*

Corp. (1992), 230 Ill. App. 3d 40, 594 N.E.2d 1344, 171 Ill. Dec. 824.) The "Bar Committee Comments-1967" to section 3(3) (*740 ILCS 10/3*, Bar Committee Comments-1967, at 18 (Smith-Hurd 1992)) have indicated for years that while **[***11]** section 3(3) is narrower in scope than *section 2* of the Sherman Act, *section 2* of the Sherman Act should be used in construing section 3(3). The "Historical and Practice Notes-1970" by Phillip W. Tone and John G. Stiffler in Smith-Hurd Illinois Annotated Statutes also indicate that the scope of section 3(3) is essentially that of *section 2* of the Sherman Act, but somewhat more restricted. (Ill. Ann. Stat., ch. 38, par. 60-3, Historical and Practice Notes-1970, at 463 (Smith-Hurd 1977).) In *People v. Crawford Distributing Co. (1972), 53 Ill. 2d 332, 291 N.E.2d 648*, our supreme court stated that ***HN5***[] "the Federal antitrust experience under the Sherman Act is applicable to questions arising under the Illinois Antitrust Act and can serve as a useful guide." *(Crawford Distributing Co., 53 Ill. 2d at 339, 291 N.E.2d at 652*.) In *People ex rel. Scott v. College Hills Corp. (1982), 91 Ill. 2d 138, 435 N.E.2d 463, 61 Ill. Dec. 766*, our supreme court once again stated that in construing the Illinois Act, they were guided by analogous provisions of Federal legislation. The Federal **[***12]** district and appellate courts used *section 2* of the Sherman Act in construing the Illinois Act. See *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co. (C.D. Ill. 1990), 730 F. Supp. 826*, *aff'd* (7th Cir. 1991), *935 F.2d 1469*.

The point to this short and admittedly incomplete history of the Illinois Act is that our legislature, the supreme court, the first and second district appellate courts, the Federal district and appellate courts, and legal scholars all believe that Federal court cases construing the Sherman Act should be used as a guide in construing the Illinois Act. Thus, in determining what proof is needed in order to establish the presence of a "monopoly" or what is "trade or commerce," we should be guided by *section 2* of the Sherman Act and the Federal cases construing such. We cannot simply say the words are not similar or identical when in fact the words and concepts are similar and identical. Both Acts deal with monopolies, unfair trade practices, and the attempt to monopolize trade or commerce.

[*24] Admittedly, section 3(3) of the Illinois Act does not pertain to interstate commerce or a conspiracy **[***13]** to monopolize. There are also a growing number of Illinois cases construing section 3 of the Illinois Act, so that reference to Federal cases are not as necessary as they were in the past. Saying we should be guided by the Federal cases does not mean that we are bound to strictly apply the Federal court's interpretation of the Sherman Act to the Illinois Act. We recognize that ***HN6***[] the Illinois Act requires more proof than *section 2* of the Sherman Act for a court to find that a defendant violated section 3(3) of the Illinois Act, in that not only must the plaintiff prove that defendant established, maintained, used, or attempted to acquire monopoly power over any substantial part of trade or commerce but, in addition, plaintiff must prove that defendant did so for the purpose of excluding competition or controlling, fixing, or maintaining prices in that trade or market. Whereas, under the Sherman Act, proof of the purpose is not required for a violation of *section 2* of the Sherman Act. The fact that the Illinois Act requires more proof against a defendant in most instances does not mean that we should totally ignore the Federal law as a guide.

The trial court cited *MBL (USA) Corp. v. Diekman (1985), 137 Ill. App. 3d 238, 484 N.E.2d 371, 91 Ill. Dec. 812*, **[***14]** for the proposition that a violation of section 3(3) is a *per se* violation, thereby making a market-share analysis unnecessary. It is not clear from the reading of *Diekman* that *Diekman* holds such. In *Diekman,* the parties were at the pleading stage when the trial court dismissed Diekman's amended counterclaim as not stating a cause of action **[**1354]** **[****93]** under the Illinois Act. The counterclaim used the words of section 3(3) in alleging a monopoly power over a substantial part of trade or commerce in the sale and distribution of urethane timing belts. But the counterclaim also used the words contained in section 3(2) of the Illinois Act by alleging that counterdefendants conspired and combined to establish this monopoly over the sale or distribution of urethane timing belts by MBL (USA), a counterdefendant, purchasing from Meeder, a counterdefendant (who appears to have been a former competitor of MBL (USA)), covenants not to compete that were given by counterplaintiff and agreeing between themselves to threaten and file baseless litigation against counterplaintiff, a potential competitor. *Diekman* cited, as its authority for reversing the dismissal of the counterclaim and in **[***15]** saying that the allegations were "*per se"* violations of the Illinois Antitrust Act, *People ex rel. Fahner v. Carriage Way West, Inc. (1981), 88 Ill. 2d 300, 430 N.E.2d 1005, 58 Ill. Dec. 754*, which case concerned the dismissal of a complaint **[*25]** that alleged a conspiracy by competitors to fix prices as prohibited by section 3(1) of the Illinois Act.

HN7[] There is no question that when competitors conspire to fix prices, production, or services, a violation of section 3(1) of the Illinois Act occurs and it is a "*per se"* violation requiring only proof that the competitors conspired. (See Carriage Way West, Inc., 88 Ill. 2d at 309, 430 N.E.2d at (for a discussion of such).) Keep in mind that "*per se"* violations are normally agreements between competitors or agreements that would restrict competition and decrease output. No market analysis is needed for a section 3(1) violation, because the agreement in and of itself is a violation. There is also no question that when persons contract, combine, or conspire to unreasonably restrain trade or commerce such can be a violation of section 3(2) of the Illinois Act. **[***16]** However, the supreme court pointed out in People ex rel. Scott v. College Hills Corp. (1982), 91 Ill. 2d 138, 435 N.E.2d 463, 61 Ill. Dec. 766, that violations of sections 3(2) and 3(4) require, in addition to proof of the conspiracy, a determination of a geographic market that corresponds to commercial realities and is economically significant. The reason the market analysis is needed to prove a violation of sections 3(2) and 3(4) is that section 3(2) requires a showing that defendant's acts unreasonably restrained *trade or commerce* and section 3(4) requires a showing that competition was substantially lessened or a monopoly was created in any line of *commerce.* The fact that section 3(3) requires the proof of a monopoly over *any substantial part of trade or commerce* indicates even more specifically than sections 3(2) and 3(4) do that a market analysis is a necessity.

Diekman, therefore, does not stand for the proposition that proof of a violation of section 3(3) is a "*per se"* violation so that no further proof is required under section 3(3) as to a monopoly by a defendant over a substantial part of trade or commerce. *Diekman* stands **[***17]** for the proposition that, if a complaint alleges a monopoly by defendants and a conspiracy by defendants to exclude another competitor from competition, such a complaint will withstand a motion to dismiss, as all pleaded facts are presumed to be true for purposes of the motion to dismiss. *Diekman* does not relieve the plaintiff from the necessity of proving the allegations contained in the complaint at the trial.

The plaintiff did not present any proof of a relevant market for furniture or a market analysis showing the percent of the furniture market held by defendant. Ethan Allen presented uncontradicted testimony that the relevant market was the metropolitan St. Louis area and that it held not more than 2% of the relevant market. The trial judge, even though he stated in his order that he had to determine **[*26]** from the evidence whether a monopoly existed, did not make a determination of the relevant market or the market share held by defendant. Nor did he ever find that Ethan Allen had a monopoly over a substantial part of the furniture trade or commerce. It is difficult to conceive, nor does plaintiff suggest, how one could prove a "monopoly power over a substantial part of trade **[***18]** or commerce" without some showing as to what the trade **[**1355]** **[****94]** and commerce was in the merchandise in question and what part of the trade or commerce that Ethan Allen controlled. We cannot presume that a defendant has monopoly powers simply because plaintiff alleges such. We cannot presume that Ethan Allen violated the criminal laws of this State merely because it did business in Illinois. We cannot presume that Ethan Allen furniture is the only furniture sold in the trade or commerce of Illinois or the metropolitan St. Louis area.

Turning now to plaintiff's argument, and the trial judge's apparent interpretation of section 3(3), that since Ethan Allen is the sole manufacturer and supplier in Ethan Allen products to retailers, there was a monopoly over a substantial part of trade and commerce in Ethan Allen products. If we were to adopt plaintiff's argument, all one would have to do in order to prove a violation of the criminal law (Ill. Rev. Stat. 1989, ch. 38, par. 60-3(3)) by a defendant would be to show that defendant manufactured a product or sold franchises for a copyrighted name, talked and disagreed with plaintiff about prices for its product, and caused plaintiff a loss by discharging **[***19]** or terminating plaintiff's relationship with defendant. Plaintiff is arguing that all attempts by a manufacturer or franchisor to control, maintain, or fix prices the dealer or franchisee charges the consumers are illegal under section 3(3). Therefore, if plaintiff were correct, the hamburger franchisor, whose franchisee may have 15 fast food competitors within three blocks and who did not want to cooperate in a national campaign for 99-cent hamburgers, could not terminate the franchise of a franchisee for fear of being held to have violated the antitrust laws of Illinois. It may even be that under the plaintiff's theory a car dealer, who had the only agency in the town or county, could not fire his employee who sold a car at less than what the dealer set as a minimum price for fear that he would be violating the restraint of trade laws. We would be upsetting business practices developed over the centuries, even though they do not substantially affect or restrain trade or commerce.

HN8[] "Trade or commerce" is defined as including "all economic activity involving or relating to any commodity or service," and "commodity" means "any kind of real or personal property." (Ill. Rev. Stat. **[*27]** 1985, **[***20]** ch. 38, par. 60-4.) "Commodity" is not limited to a specific brand, nor is "trade and commerce" limited to a specific brand.

If we were to construe section 3(3) of the Illinois Act to mean monopoly over a specific brand of merchandise, then the word "monopoly" would be superfluous as every manufacturer has a monopoly over its product or brand name. Even in those cases where the manufacturer had a 100% share of a relevant market, the plaintiff would not pay for an expensive market analysis to prove such, as such analysis would be unnecessary and apparently irrelevant. The words "establish, maintain, use, or attempt to acquire" would be superfluous, because every manufacturer establishes, maintains, uses, and attempts to acquire complete control over its product. In fact, some manufacturers attempt to obtain patents and copyrights over products and names. Surely, they are not violating Illinois law. The words "over a substantial part" would be even more superfluous, because every manufacturer has a monopoly over 100% of its product. The words "trade or commerce" would be superfluous, because the only trade or commerce we would be discussing would be trade and commerce in the manufacturer's **[***21]** product. Applying the plaintiff's construction to section 3(3) without the superfluous language, it would read: "Every person shall be deemed to have committed a violation of this Act who shall: control, fix, or maintain prices of that person's product." Such a law would make every businessperson in Illinois, no matter if the business has only 1/100th of 1% of the market and has 100 competitors, guilty of restraint of trade.

When we review the Federal cases as to whether there can be a monopoly in a particular commodity, the leading case of *United States v. E. I. Du Pont de Nemours & Co. (1956), 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994*, sets out:

> **[**1356]** **[****95]** "The ultimate consideration in such a determination is whether the defendants control the price and competition in the market for such trade or commerce as they are charged with monopolizing. Every manufacturer is the sole producer of the particular commodity it makes but its control in the above sense of the relevant market depends upon the availability of alternative commodities for buyers: i. e., whether there is a cross-elasticity of demand between cellophane and the other **[***22]** wrappings. This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities." *(E. I. Du Pont, 351 U.S. at 380-381, 100 L. Ed. at 1272-73, 76 S. Ct. at 999*.)

[*28] We must ask whether there were competing products to Ethan Allen furniture? *HN9*[] "'When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.'" *(National Collegiate Athletic Association v. Board of Regents (1984), 468 U.S. 85, 112, 82 L. Ed. 2d 70, 91, 104 S. Ct. 2948, 2966* (quoting *E. I. Du Pont,* 351 U.S. at 394, 100 L. Ed. 2d at , 76 S. Ct. 1006).) The burden was on plaintiff to prove that there were no substitutes available in the market for Ethan Allen furniture. Ethan Allen maintains that not only were there substitutes available for its furniture, but those substitutes controlled 98% of the relevant market. Plaintiff never denied or disputed this claim.

Plaintiff, and apparently **[***23]** the trial court, used the concepts in Federal cases involving vertical price fixing. (See *Business Electronics Corp. v. Sharp Electronics Corp. (1988), 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515*; *Monsanto Co. v. Spray-Rite Service Corp. (1984), 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464*.) Vertical price fixing in those cases was in violation of *section 1* of the Sherman Act. (*15 U.S.C.A. sec. 1 (West Supp. 1993)*.) Plaintiff argues that Federal law should not apply at all as a guide to interpreting section 3(3) of the Illinois Act, but plaintiff is really being inconsistent if he wishes now to use the concepts under *section 1* of the Sherman Act to interpret section 3(3) of the Illinois Act. There is no authority anywhere to support this argument. Suffice it to say that those cases and the authorities cited therein discuss the illegality of conspiracies and agreements to fix prices. There is no evidence of an agreement or conspiracy to vertically fix prices in this case, as we will discuss later in relation to the denial of the **[***24]** claim against Bly. *HN10*[] "Independent action is not proscribed. A manufacturer of course has the right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. [Citations.] Under *Colgate,* the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply." *Monsanto, 465 U.S. at 761, 79 L. Ed. 2d at 775, 104 S. Ct. at 1467*.

Even assuming *arguendo* that there was an attempted vertical price agreement or restraint in this case, the threshold requirement under section 3(3), that plaintiff prove that defendant established, maintained, used, or attempted to acquire a monopoly over any substantial part of trade or commerce, was not met. The lowest percentage of the market share that we could find in cases before the Supreme Court of the United States that constituted a monopoly by a defendant or defendants was 66.6%. *(American Tobacco Co. v. United States (1946), 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125*.) Ethan **[*29]** Allen with its 2% or less of the market in the metropolitan St. Louis area did not even **[***25]** begin to approach the market control or power necessary to constitute a substantial part of trade or commerce. The law need not concern itself with nonmonopolists raising prices, as the free market will regulate and punish those who needlessly raise prices. Thus, the trial court erred in applying the law and in presuming that Ethan Allen had a monopoly power which constituted a violation of the Illinois Act.

In plaintiff's cross-appeal, it first argues that the court erred in finding that Bly did not conspire to force it out of the market place. Plaintiff submits that the trial court's judgment in favor of Bly was **[**1357]** **[****96]** against the manifest weight of the evidence. ***HN11***[] In reviewing a bench trial, we will not disturb the trial court's finding unless the trial court's holding is manifestly against the weight of the evidence. *(Schulenburg v. Signatrol, Inc. (1967), 37 Ill. 2d 352, 226 N.E.2d 624*; *Orchard Shopping Center, Inc. v. Campo (1985), 138 Ill. App. 3d 656, 485 N.E.2d 1248, 93 Ill. Dec. 38*.) Where testimony is contradictory, the trial judge as the trier of fact is in a superior position to observe the conduct of testifying **[***26]** witnesses, to determine their credibility, and to weigh the evidence. *(Schulenburg, 37 Ill. 2d at 356, 226 N.E.2d at 626*.) A careful review of the record shows that the trial court's judgment in favor of Bly was not against the manifest weight of the evidence. There was testimony by Jack Tripp, the former Ethan Allen employee, that he knew of no agreements between Ethan Allen and Bly to terminate plaintiff. Moreover, plaintiff does not present any conflicting evidence that there was, in fact, such an agreement between Bly and Ethan Allen or that Bly conspired with Ethan Allen. Although plaintiff cites the trial court's statement that Bly would probably benefit from plaintiff's demise as an Ethan Allen dealer, plaintiff does not offer any proof that Bly conspired to achieve that status. Clearly, the fact that Bly benefits from plaintiff's loss does not, in and of itself, constitute an antitrust violation. The circumstantial evidence that plaintiff would have us scrutinize simply does not warrant a reversal of the trial court's judgment.

For all of the foregoing reasons, we reverse the judgment against Ethan Allen and affirm the judgment **[***27]** in favor of Bly.

Defendant Ethan Allen requested in its prayer for relief that the judgment be reversed and a judgment be entered in Ethan Allen's favor. In the alternative, Ethan Allen requested that this case be remanded for a new trial. The parties did not discuss or brief what a proper disposition should be if this court reversed the judgment. ***HN12***[] Normally, the appropriate action, when a case is tried under an incorrect **[*30]** theory of law, is to reverse and remand for a new trial *(Sparling v. Peabody Coal Co. (1974), 59 Ill. 2d 491, 322 N.E.2d 5*.) We accordingly are granting Ethan Allen's alternative request by remanding this cause for a new trial.

Affirmed in part; reversed and remanded in part.

RARICK, J., concurs.

Dissent by: GOLDENHERSH

Dissent

JUSTICE GOLDENHERSH, dissenting:

I respectfully dissent from the majority's reversal on issue (1). In affirming the judgment concerning Bly, I concur.

In my belief the majority mistakenly construes, and assumes, that section 3-3 of the Illinois Antitrust Act (the Illinois Act) (Ill. Rev. Stat. 1985, ch. 38, par. 60-3(3)) is sufficiently similar to *section 2* of the Sherman Antitrust Act (Sherman Act) (*15 U.S.C.A. sec. 2 **[***28]** (West Supp. 1993)*) so that Federal precedents are controlling in the interpretation of the Illinois Act. A closer examination of the language of the two statutes shows they are not sufficiently similar, as the trial court correctly found. The historical notes and bar committee comments also support this.

The trial court correctly applied the law in finding that Ethan Allen violated section 3(3) of the Illinois Act, which provides that every person shall be deemed to have committed a violation of the Illinois Act if they:

> "(3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce." (Ill. Rev. Stat. 1985, ch. 38, par. 60-3(3).)

Section 11 of the Illinois Act provides, in pertinent part:

> "When the wording of this Act is identical or similar to that of a federal ***antitrust law***, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." Ill. Rev. Stat. 1985, ch. 38, par. 60-11.

[1358]** **[****97]** In the case before us, the trial court found that **[***29]** section 3(3) of the Illinois Act is worded differently than *section 2* of the Sherman Act, which reads:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty **[*31]** of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." *15 U.S.C.A. sec. 2 (West Supp. 1993)*.

Upon comparing the two statutes, the trial court correctly reasoned that *section 2* of the Sherman Act prohibits monopolizing, attempts to monopolize, and conspiracy to monopolize trade or commerce, while section 3(3) of the Illinois Act prohibits monopolizing only when it is done for the purpose of excluding competition or of controlling, fixing, or maintaining prices. After concluding that section 3(3) of the Illinois Act differs significantly from the Sherman Act, the trial court found little value in Federal precedent **[***30]** and declined to use the construction of the Federal law by Federal courts in resolving this case.

Ethan Allen argues that the trial court erred in declining to apply Federal law to the case at bar. In support of this argument, Ethan Allen cites *Maywood Sportservice, Inc. v. Maywood Park Trotting Association (1973), 14 Ill. App. 3d 141, 302 N.E.2d 79*, where our colleagues on the first district appellate court held that *section 2* of the Sherman Act is substantially the same as that of section 3(3) of the Illinois Act. *(Maywood Sportservice, Inc., 14 Ill. App. 3d at 151, 302 N.E.2d at 86*; see also *Ray Dancer, Inc. v. D M C Corp. (1992), 230 Ill. App. 3d 40, 594 N.E.2d 1344, 171 Ill. Dec. 824*.) I would decline to adopt that position, and I agree with the trial court that the two statutes are not identical or similar. The language of the two statutes, as well as the comments to the Illinois Act, stand contrary to the position of both cases. The lack of analysis in depth of the two statutes in *Maywood* and *Ray Dancer* suggests that this was not at issue in either **[***31]** case. We are free, however, to conduct a more extensive statutory analysis, which I think leads to a conclusion contrary to the majority's position. Further, the General Assembly's enactment of section 11 indicates an intent that Illinois ***antitrust law*** not be in total lockstep with the Federal Acts; the majority's position renders section 11 useless. Both the language and the intent of the State and Federal Acts are different. Therefore, section 11 of the Illinois Act does not apply, and we should not consider Federal precedent as binding.

The comments to the statute further support this conclusion. As noted in the historical and practice notes concerning subsection 3(3):

> "Subsection (3) prohibits establishing, maintaining, acquiring, or attempting to acquire monopoly power in order to exclude competition or fix prices. Its scope, essentially that of *Section 2* **[*32]** of the Sherman Act, is somewhat more restricted than the federal law.
> * * *
>
> Subsection 3(3) of the Illinois Act is narrower than its federal counterpart. It not only adopts the 'abuse' theory, but it covers only two types of abuses, albeit the two which are important from a practical standpoint. It prohibits monopolizing only **[***32]** when it is done for the purpose of excluding competition or fixing prices." Ill. Ann. Stat., ch. 38, par. 60-3, Historical and Practice Notes - 1970, at 463 (Smith-Hurd 1977).

Similarly, the bar committee comments to subsection 3(3) state:

> "This section would penalize the monopolist only when he acted for the forbidden purposes of excluding competition or of fixing prices. It is, therefore, directed only to abuses and attempted abuses of monopoly power rather than to its mere existence. To that extent the prohibition is somewhat narrower than that applied to *Section 2* of the Sherman **[**1359]** **[****98]** Act and is also somewhat more specific." (Ill. Ann. Stat., ch. 38, par. 60-3(3), Bar Committee Comments - 1967, at 454 (Smith-Hurd 1977).)

Again, the cases cited by the majority for the proposition that section 3(3) and the Federal Act are identical do not go into any appreciable depth of analysis of the two Acts. When we analyze the comments as well as the statutory language, we must conclude that the Acts are different and therefore, pursuant to legislative intent, should be construed differently as section 11 allows.

Similarly, the trial court was not inconsistent in using Federal *per se* **[***33]** violation cases for guidance in determining that issue while stating that Federal cases are not binding on the court, as noted by the majority. As noted by the majority, our supreme court has indicated that the Federal precedents can be useful guidance; they do not, however, necessarily fall under section 11 and become binding precedent.

As the trial court correctly points out, there is a dearth of Illinois cases addressing section 3(3) of the Illinois Act. *MBL (USA) Corp. v. Diekman (1985), 137 Ill. App. 3d 238, 484 N.E.2d 371, 91 Ill. Dec. 812*, holds that a violation of section 3(3) of the Illinois Act is a "*per se"* violation of the Act, which makes a market-share analysis or rule-of-reason analysis unnecessary. Accordingly, we should hold that the trial court applied the correct principles of law in finding that Ethan Allen violated section 3(3) of the Illinois Act.

Although Ethan Allen does not dispute the existence or amount of plaintiff's actual damages, Ethan Allen claims that the damages are not recoverable as a matter of law. In support of this argument, **[*33]** Ethan Allen asserts that Federal law precludes the type of damages plaintiff received in **[***34]** this case. We should properly hold that Federal law is not controlling on this case, however. Section 7(2) of the Illinois Act provides, in pertinent part:

> "(2) Any person who has been injured in his business or property, or is threatened with such injury, by a violation of Section 3 of this Act may maintain an action in the Circuit Court for damages, or for an injunction, or both, against any person who has committed such violation. * * * In an action for damages, if injury is found to be due to a violation of * * * subsections (2) or (3) of Section 3 of this Act, the person injured shall recover the actual damages caused by the violation, together with costs and reasonable attorney's fees * * *." (Ill. Rev. Stat. 1991, ch. 38, par. 60-7(2).)

Ethan Allen's argument and supporting cases are inapplicable to the case at bar, and the language of the Illinois Act clearly allows for actual damages and attorney fees. Since Ethan Allen did not dispute plaintiff's evidence at trial on the issue of damages and does not claim on appeal that plaintiff did not sustain actual damages, we need not further discuss this issue.

As stated earlier, section 7(2) of the Illinois Act provides that **[***35]** persons injured by violations of section 3(3) "shall recover the actual damages caused by this violation, together with costs and reasonable attorney's fees." (Ill. Rev. Stat. 1991, ch. 38, par. 60-7(2).) In *Fumarolo v. Chicago Board of Education (1990), 142 Ill. 2d 54, 566 N.E.2d 1283, 153 Ill. Dec. 177*, our supreme court held:

> "The fundamental of statutory construction is to ascertain and give effect to the intent of the legislature. [Citation.] In construing statutory provisions as being mandatory or directory, the word 'shall' is regarded as

> indicative of a mandatory legislative intent. [Citations.] This court has recognized, however, that, while 'shall' ordinarily indicates a mandatory legislative intention, it may be construed as permissive if the context so indicates. [Citations.]
>
> Legislative intent can be ascertained from a consideration of the entire Act, its nature, its object and the consequences that would result from construing it one way or the other." *Fumarolo, 142 Ill. 2d at 96, 566 N.E.2d at 1301-02*.

Here, the language of section 7(2) indicates a mandatory construction. In that **[**1360]** **[****99]** same section, **[***36]** the statute directs the court to use discretion in awarding treble damages. An examination of the General Assembly's omission of that directive to use discretion with regard to **[*34]** attorney fees and its use of the word "shall" indicates that the General Assembly intended that the award of attorney fees be mandatory in a case such as this. I would therefore reverse the trial court's order denying plaintiff attorney fees and remand the case for determination of plaintiff's reasonable attorney fees.

For the foregoing reasons, I respectfully dissent.

Harris Custom Builders v. Hoffmeyer

United States District Court for the Northern District of Illinois, Eastern Division

September 7, 1993, Decided ; September 8, 1993, Docketed

No. 90 C 0741

Reporter

834 F. Supp. 256 *; 1993 U.S. Dist. LEXIS 12432 **; Copy. L. Rep. (CCH) P27,164; 1993-2 Trade Cas. (CCH) P70,376

HARRIS CUSTOM BUILDERS, INC., Plaintiff, v. RICHARD HOFFMEYER, Defendant and Third-Party Plaintiff, v. EVAN A. HARRIS, Third-Party Defendant.

Core Terms

third-party, allegations, drawings, monopolization, sham, counterclaim, antitrust, discovery, lawsuit, copyright infringement, unfair competition, counter, hire, infringement, racketeering, registration, continuity, predicate act, sanctions, default, invalid, parties, courts, independent contractor, malicious prosecution, antitrust claim, anti-competitive, proceedings, immunity, motions

LexisNexis® Headnotes

Copyright Law > Copyright Infringement Actions > Criminal Offenses > Application Fraud

Copyright Law > Copyright Infringement Actions > Criminal Offenses > General Overview

Copyright Law > ... > Criminal Offenses > Criminal Infringement > General Overview

Copyright Law > ... > Formalities > Deposit & Registration Requirements > General Overview

Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements

HN1[] **Criminal Offenses, Application Fraud**

See *17 U.S.C.S. § 506(e)*.

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN2[] **Crimes Against Persons, Coercion & Harassment**

In order to succeed on a Racketeer Influenced and Corrupt Organization Act (RICO), *18 U.S.C.S. § 1961 et seq.*, claim, a plaintiff must prove that defendant conducted the affairs of an enterprise through a pattern of racketeering activity. The RICO statute defines pattern as consisting of at least two predicate acts of racketeering activity committed within a ten-year period. *18 U.S.C.S. § 1961(5)*. The alleged predicate acts must be related to one another and pose a threat of continued criminal activity. The required "continuity" is both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that, by its nature, projects into the future with a threat of repetition.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN3[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

To establish continued criminal activity requisite to a Racketeer Influenced and Corrupt Organization Act (RICO), *18 U.S.C.S. § 1961 et seq.*, claim, the predicate acts themselves can involve the threat of ongoing criminal conduct. Alternatively, continuity appears where the racketeering activity is shown to be part of a legitimate or illegitimate entity's regular way doing business.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The United States Seventh Circuit Court of Appeals applies a multi-factor test to determine the existence of continued criminal activity requisite to a Racketeer Influenced and Corrupt Organization Act (RICO), *18 U.S.C.S. § 1961 et seq.*, claim. Factors relevant to the continuity inquiry are: (1) the duration of time over which the predicate acts were committed; (2) the number and variety of the predicate acts; (3) the number of victims; (4) the presence of separate schemes; and (5) the occurrence of distinct injuries.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

A single scheme directed at a single victim to inflict one injury does not threaten the type of continued criminal activity that is the focus of the Racketeer Influenced and Corrupt Organization Act (RICO), *18 U.S.C.S. § 1961 et seq.*

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN6[] Exemptions & Immunities, Noerr-Pennington Doctrine

Under the Noerr-Pennington doctrine, parties that use the court system are generally immune from antitrust liability for any anti-competitive effects their litigation efforts might have. An exception to this principle exists if the antitrust defendant has engaged in "sham" litigation--litigation that is ostensibly directed at the legitimate goal of vindicating legal rights, but is actually a mere "sham" to cover an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN7[] Exemptions & Immunities, Noerr-Pennington Doctrine

In order to qualify as a sham for purposes of falling within the exception to antitrust immunity under the Noerr-Pennington doctrine, a lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Additionally, the baseless lawsuit must conceal an attempt to interfere directly with the business relationships of a competitor, through the use of governmental process-as opposed to the outcome of that process-as an anti-competitive weapon.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN8[] Motions to Dismiss, Failure to State Claim

When evaluating a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court focuses on the complaint, but may also take into account matters of public record, orders, and items appearing in the record of the case.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Copyright Law > ... > Statutory Copyright & Fixation > Protected Subject Matter > Architectural Works

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN9[] **Antitrust & Trade Law, Exemptions & Immunities**

An action that is well enough grounded, factually and legally, to survive a motion for summary judgment is sufficiently meritorious to lead a reasonable litigant to conclude that they had some chance of success on the merits. Such an action is not considered a "sham" lawsuit for purposes of determining whether an action should be accorded immunity from antitrust action under the Noerr-Pennington doctrine.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN10[] **Antitrust & Trade Law, Sherman Act**

To establish an attempt to monopolize under *Section 2* of the Sherman Act, a plaintiff must show: (1) specific intent to achieve monopoly power; (2) predatory or anticompetitive conduct directed at achieving this unlawful end; and (3) a dangerous probability that the attempt to monopolize will be successful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

A successful attempt to monopolize results in the acquisition of monopoly power in a given market. Monopoly power is defined as "power over price" in the sense that a monopolist possesses the ability to cut back the market's total output and so raise price. In certain cases, market share is an indicator of this market power. The ultimate inquiry in an attempted monopolization case is whether the defendant has or reasonably might come close to having the ability to control market output and prices.

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN12[] **Intentional Torts, Malicious Prosecution**

Courts applying Illinois law conclude that the only causes of action that can arise from the wrongful filing of a lawsuit are malicious prosecution and abuse of process.

Torts > Intentional Torts > Abuse of Process > Elements

Torts > Intentional Torts > Malicious Prosecution > General Overview

Torts > ... > Malicious Prosecution > Elements > General Overview

Torts > ... > Malicious Prosecution > Elements > Favorable Termination

HN13[] **Abuse of Process, Elements**

In order to state a claim for malicious prosecution, a plaintiff must prove: (1) that the defendant brought judicial proceedings against the plaintiff; (2) that there was a lack of probable cause for those proceedings; (3) that the defendant demonstrated malice in instituting the proceedings; (4) that the cause of action was terminated in the plaintiff's favor; and (5) that the plaintiff was injured.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Torts > Intentional Torts > Abuse of Process > Elements

Torts > Intentional Torts > Malicious Prosecution > General Overview

HN14[] **Copyright Infringement Actions, Civil Infringement Actions**

To state a claim for abuse of process, a plaintiff must allege an ulterior purpose and an act in the use of legal process not proper in the regular prosecution of the proceedings.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN15[] **Sanctions, Baseless Filings**

Under *Fed. R. Civ. P. 11*, an award of an amount less than full attorney fees can be appropriately imposed for deterrence purposes.

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

HN16[] **Default & Default Judgments, Default Judgments**

A default judgment can be an appropriate sanction for the loss or destruction of relevant evidence. Because default is a "drastic" sanction, the United States Seventh Circuit Court of Appeals recommends that courts consider lesser sanctions before imposing default judgments as punishment for improper behavior during discovery.

Judges: [1]** HOLDERMAN

Opinion by: JAMES F. HOLDERMAN

Opinion

[*258] *MEMORANDUM OPINION AND ORDER*

JAMES F. HOLDERMAN, District Judge:

Plaintiff Harris Custom Builders, Inc. ("Harris Builders") initially filed this action against defendant Richard Hoffmeyer, claiming copyright infringement. Defendant Hoffmeyer then brought a counterclaim against defendant Harris Builders and a third-party complaint against third-party defendant Evan A. Harris, Harris Builders' president, alleging violations of federal antitrust and racketeering laws and asserting a claim for unfair competition.

Harris and Harris Builders (collectively "Harris") have filed a motion, under *Fed. R. Civ. P. 12(b)(6)*, to dismiss Hoffmeyer's counterclaim and third-party complaint. Harris has also filed a motion for sanctions under *Fed. R. Civ. P. 11*. Additionally, the parties have advanced a number of motions relating to discovery disputes. For the reasons stated in this memorandum opinion and order, Harris' motion to dismiss and motion for sanctions are granted. The motions relating to discovery are granted in part and denied in part.

FACTUAL BACKGROUND

Harris Builders' underlying copyright infringement claim is based on allegations that Hoffmeyer copied **[**2]** Harris Builders' copyrighted architectural drawings for use in the construction of a residence. This claim has been the subject of two motions for summary judgment filed by defendant Hoffmeyer, both of which this court has denied. (See Minute Orders of February 27, 1992 and October 9, 1992.)

In his counterclaim and third-party complaint, Hoffmeyer alleges that Harris committed racketeering and antitrust violations and engaged in unfair competition by seeking, in this lawsuit, to enforce a copyright which Harris allegedly knew was invalid. According to Hoffmeyer, the reason for the copyright's invalidity is the fact that Harris Builders committed fraud on the copyright office when it procured the copyright. The fraud allegedly occurred when Harris Builders, on the application for registration for a copyright, listed itself as the author of the drawings without mentioning Maxwin Heimann, who for the most part created the drawings "except for minor revisions." (See Third Party Complaint, P 29.) Hoffmeyer characterizes as fraud: 1) Harris Builders' failure to name Heimann as author; and/or 2) Harris Builders' failure to identify Heimann's original drawings, of which the copyrighted drawings **[**3]** were a slightly altered version, as preexisting works upon which the copyrighted drawings were based.

DISCUSSION

I. *MOTION TO STRIKE AND DISMISS*

Harris argues that Hoffmeyer's counterclaim and third-party complaint should be dismissed. The court agrees. Hoffmeyer has not pleaded facts sufficient to support its claim that Harris fraudulently obtained the copyright. Further, Hoffmeyer has not adequately stated claims under federal racketeering and ***antitrust law***, or under state **[*259]** unfair competition law. The reasons underlying these conclusions are discussed below.

A. *Fraud on the Copyright Office*

Hoffmeyer alleges that Harris engaged in a criminal violation of the Copyright Act under *17 U.S.C. § 506(e)* for failure to comply with *17 U.S.C. § 409*. *17 U.S.C. § 506(e)* provides:

> ***HN1***[] Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by *section 409*, or in any written statement filed in connection with the application, shall be fined not more than $ 2,500.

The claim that Harris knowingly misrepresented **[**4]** facts on the copyright application is the linchpin of Hoffmeyer's counterclaim and third-party complaint. According to Hoffmeyer, Harris, knowing that the copyright had been obtained through misrepresentation and was therefore invalid, used this infringement action based on the copyright to illegally harass its competitor Hoffmeyer.

This key link of Hoffmeyer's theory must, however, fail. Hoffmeyer's factual allegations do not support his assertion that Harris materially misrepresented facts on the copyright application or that Harris intended to deceive the Copyright Office. The facts averred by counter/third party plaintiff show only that Harris failed to correctly anticipate the evolution of copyright law.

Hoffmeyer alleges that Heimann was "an independent contractor" at the time he prepared the drawings. (See Third Party Complaint at P 7.) According to Hoffmeyer, Harris Builders' designation of itself as author of the drawing as a "work made for hire" under *17 U.S.C. § 101* was fraudulent because, as the Supreme Court held in *Community for Creative Non-Violence v. Reid, 490 U.S. 730, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989)*, the work made for hire **[**5]** provision generally applies only to works produced by employees of an entity, not to those created by independent contractors such as Heimann.

The *Reid* case was issued, however, in June 1989, more than four months after Harris Builders completed the copyright registration. Before the *Reid* case, the case law was unclear and conflicting as to whether a work produced by an independent contractor could be claimed and copyrighted by the hiring party as "a work made for hire." For example, in *Evans Newton, Inc. v. Chicago Systems Software, 793 F.2d 889 (7th Cir. 1986)*, the Seventh Circuit ruled that an independent contractor could produce a "work made for hire" as to which the hiring party would be the author, if the hiring party exercised a sufficient degree of control or supervision over the independent contractor's creation of the work. *Id. at 894*.

In representing itself as the author of a "work made for hire" on the basis that the drawings had been done for it by an independent contractor, Harris Builders took a position that several courts of appeal had endorsed as, at least, potentially viable. *See* *Reid, 490 U.S. at 736 n. 2* **[**6]** (detailing holdings of various courts of appeal). The fact that the Supreme Court's interpretation of the law later undercut Harris' stance does not convert Harris' conduct, which was supported by the law as it existed at the time, into fraud.

Hoffmeyer's allegations relative to Harris' failure to identify "preexisting works" on the copyright registration also do not support a claim of fraud. Counter/third-party plaintiff Hoffmeyer faults Harris for leaving blank Space 6 of the Form VA (visual arts) copyright registration, which calls for the identification of preexisting work upon which the work sought to be copyrighted is based. The Copyright Office's instructions for filing out Space 6 of the Form VA state:

> General Instructions: Complete space 6 if this work is a "changed version," "compilation" or "derivative work" *and* if it incorporates one or more earlier works that *have already been published or registered for copyright or that have fallen into the public domain.* (Emphasis added.)

See Nimmer on Copyright § 21.04.

Under these instructions, Harris had no duty to report unpublished works. Hoffmeyer does not allege that the "preexisting" Heimann drawings were **[**7]** ever published or entered the public domain. Consequently, the alleged facts do not support the claim **[*260]** that Harris misled the Copyright Office on the application. In this respect, the facts of this case differ from the situation in *Qad., Inc. v. ALN Assoc., Inc., 770 F. Supp. 1261 (N.D. Ill. 1991)*, which Hoffmeyer has cited. In *Qad.,* the prior work which was not disclosed on the copyright application was a computer program which had been marketed by a company other than the copyright claimant and which therefore was in the public domain. *Id. at 1263-66*.

The conclusion that Hoffmeyer has not sufficiently stated a claim of fraud is further supported by Hoffmeyer's failure to allege any facts indicating that Harris intended to mislead the Copyright Office in any way. Hoffmeyer has not alleged that Heimann did not expect Harris to own the copyright on the drawings he made. Thus, there is no indication that Harris "stole" the work or committed a truly material misrepresentation of fact, as opposed to a possibly erroneous application of law, on the copyright registration.

B. *RICO Claim*

Hoffmeyer alleges that Harris' **[**8]** procurement of the allegedly invalid copyright and the subsequent infringement action against Hoffmeyer violated the Racketeer Influenced and Corrupt Organization Act ("RICO"), *18 U.S.C. § 1961 et seq.* Counter/third-party defendants argue that Hoffmeyer has not pleaded facts sufficient to support the "pattern" element of this RICO claim.

HN2[] In order to succeed on a RICO claim, a plaintiff must prove that defendant conducted the affairs of an enterprise through a pattern of racketeering activity. *See* *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491-93, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)*. The RICO statute defines pattern as consisting of at least two predicate acts of racketeering activity committed within a ten year period. *18 U.S.C. § 1961(5)*.

Courts have elaborated on what must be pleaded and proved in order to establish the existence of a RICO pattern. The alleged predicate acts must be related to one another and pose a threat of continued criminal activity. *Sedima, 473 U.S. at 496 n. 14*. The required "continuity" is both "a closed and open ended concept, referring either to **[**9]** a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *See* *H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 241, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989)*.

In *H.J. Inc.,* the Supreme Court enumerated a number of ways in which continuity could be shown. *Id. at 242-43*. ***HN3***[] The predicate acts themselves could involve the threat of ongoing criminal conduct. *Id.* Alternatively, continuity appears where the racketeering activity is shown to be part of a legitimate or illegitimate entity's regular way doing business. *Id.*

Additionally, ***HN4***[] the Seventh Circuit has articulated a multi-factor test for evaluating continuity. *See* *Morgan v. Bank of Waukegan, 804 F.2d 970, 975 (7th Cir. 1986)*. Under *Morgan,* factors relevant to the continuity inquiry are; 1) the duration of time over which the predicate acts were committed; 2) the number and variety of the predicate acts; 3) the number of victims; 4) the presence of separate schemes; 5) the occurrence of distinct injuries. *Id.*

Applying these standards, the court must conclude that counter/third-party **[**10]** plaintiff Hoffmeyer has not adequately alleged facts supporting the continuity element of the pattern requirement. Hoffmeyer's allegations as to the number, nature and timing of the predicate acts are vague and do not significantly bolster his showing on the first two *Morgan* factors. Moreover, application of the other factors point to a lack of continuity. Hoffmeyer has alleged only a single scheme (the pursuit of the lawsuit based on the allegedly invalid patent); a single victim (Hoffmeyer); and a single injury (the damage done to Hoffmeyer's competitive position).

The existence of only one scheme, one victim and one injury shows that Hoffmeyer has attempted to base a RICO claim on a "one-shot" episode of alleged criminal activity. As explained in *Sutherland v. O'Malley, 882 F.2d 1196, 1204-05 (7th Cir. 1989)*, such a **[*261]** claim will not support RICO liability. ***HN5***[] A single scheme directed at a single victim to inflict one injury simply does not threaten the type of continued criminal activity that is the focus of the RICO statute. The RICO claim must consequently be dismissed.

C. *Antitrust Claim*

In asserting his antitrust claim, apparently under the **[**11]** anti-monopoly provision of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, Hoffmeyer focuses on the alleged anti-competitive intent behind and effect of the filing of Harris' copyright infringement lawsuit. Since Hoffmeyer's claim is based upon Harris' litigation activity, it implicates the *Noerr-Pennington* doctrine of immunity for activities, including access to the courts, that are aspects of the *first amendment* right to petition the government for redress of grievances. *See* *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 123 L. Ed. 2d 611, 113 S. Ct. 1920, 1926 (1993)* discussing *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* and *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*.

HN6[] Under the *Noerr-Pennington* doctrine, those that resort to the courts are generally immune from antitrust liability for any anti-competitive effects their litigation efforts might have. An exception to this principle exists if the antitrust defendant has engaged in "sham" litigation--litigation that is ostensibly directed **[**12]** at the legitimate goal of vindicating legal rights, but is actually a mere "sham" to cover an attempt to interfere directly with the business relationships of a competitor. *See* Professional Real Estate Investors, 113 S. Ct. at 1926.

The Supreme Court has recently addressed the issue of what an antitrust plaintiff must show in order to demonstrate that a defendant has engaged in "sham" litigation and is therefore not entitled to *Noerr-Pennington* immunity. In Professional Real Estate Investors, 113 S. Ct. at 1928, the Court stated that, **HN7**[] in order to qualify as a sham, a lawsuit must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Secondly, the baseless lawsuit must conceal an attempt to interfere directly with the business relationships of a competitor, through the use of governmental process-as opposed to the outcome of that process-as an anti-competitive weapon. *Id.*

Before the Supreme Court's decision in *Professional Real Estate Investors,* the courts of appeals had differed on the question of whether litigation which was objectively reasonable **[**13]** but was motivated by anti-competitive considerations could constitute a sham. *Professional Real Estate Investors,* which like this case involved the evaluation of a copyright infringement suit as a "sham," answered the question in the negative. Professional Real Estate Investors, 113 S. Ct. at 1926. Consequently, Hoffmeyer, in order to prevail on his antitrust claim, must establish that Harris Builders' copyright infringement suit is a sham in the sense that no reasonable litigant could expect success on the merits. Id., 113 S. Ct. at 1928.

HN8[] When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court focuses on the complaint, but may also take into account matters of public record, orders and items appearing in the record of the case. *See* Wright and Miller, *Federal Practice and Procedure: Civil 2d* § 1357 (citing cases). Pursuant to this principle, the court, in determining whether Hoffmeyer is entitled to proceed on its claim that Harris Builders' infringement suit is a sham, may consider the evidence submitted on the two prior summary judgment motions that have been decided in this case.

This **[**14]** inquiry leads to the conclusion that, according to the objective standard endorsed in *Professional Real Estate Investors,* the infringement suit is not a sham. As the court stated in its February 27, 1992 order, plaintiff Harris Builders has presented sufficient evidence to raise a genuine issue of material fact as to whether defendant Hoffmeyer copied its copyrighted architectural plans. **HN9**[] An action that is well enough grounded, factually and legally, to survive a motion for summary judgment is sufficiently meritorious **[*262]** to lead a reasonable litigant to conclude that they had some chance of success on the merits. Consequently, plaintiffs' infringement action is not a sham and, under *Noerr-Pennington,* cannot subject Harris to antitrust liability.

Additionally, even if *Noerr-Pennington* immunity were not available, Hoffmeyer's antitrust claim would have to be dismissed because he has not satisfactorily alleged a claim of attempted monopolization. **HN10**[] To establish an attempt to monopolize under Section 2 of the Sherman Act, a plaintiff must show 1) specific intent to achieve monopoly power; 2) predatory or anticompetitive conduct directed at achieving this unlawful end; and 3) a dangerous **[**15]** probability that the attempt to monopolize will be successful. *See* Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413 (7th Cir. 1989).

HN11[] A successful attempt to monopolize would result in the acquisition of monopoly power in a given market. Monopoly power has been defined as "power over price" in the sense that a monopolist possesses the ability to "cut back the market's total output and so raise price." Id. at 1414. In certain cases, market share is an indicator of this market power. *Id.* The ultimate inquiry in an attempted monopolization case is whether the defendant has or reasonably might come close to having the ability to control market output and prices. *Id.*

Viewed in the light of these principles, Hoffmeyer's attempted monopolization claim is markedly lacking. Hoffmeyer has alleged no facts indicating that Harris Builders possesses or could potentially possess monopoly power in any relevant market. The counterclaim and third-party complaint contain no allegations as to Harris' ability to control prices or its market share. No real attempt is made to identify or describe the relevant market. **[**16]** Since counter/third-party plaintiff's pleading contains no facts that would support a claim that Harris Builders has monopolized or might potentially monopolize the relevant market, the claim must be dismissed.

D. *Unfair Competition*

Hoffmeyer has asserted a claim of "unfair competition" which is based on the same allegations as his other claims, *i.e.,* that Harris has wrongfully pursued an infringement action to enforce an invalid copyright. It is unclear under what law Hoffmeyer brings this claim. The only case which his brief cites in support of the claim, *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)* is a federal antitrust case. As previously discussed, Hoffmeyer has failed to state a claim for antitrust violations. Hoffmeyer has not suggested, nor can the court identify, any other federal statute that would give rise to a cause of action on these facts.

Hoffmeyer's unfair competition claim fares little better under Illinois law. Hoffmeyer has not cited an Illinois case in which an unfair competition claim was successfully asserted on the basis that the defendant had improperly used litigation as **[**17]** a means of competition. In fact, ***HN12***[] courts applying Illinois law have concluded that the only causes of action that can arise from the wrongful filing of a lawsuit (a category that encompasses Hoffmeyer's claim) are malicious prosecution and abuse of process. *See* *Havoco of America, Ltd. v. Hollobow, 702 F.2d 643, 647 (7th Cir. 1983)*, citing *Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685, 14 Ill. Dec. 489 (2d Dist. 1978)*.

Hoffmeyer's allegations, however, cannot sustain claims of either malicious prosecution or abuse of process. ***HN13***[] The elements of malicious prosecution are 1) that the defendant brought judicial proceedings against the plaintiff; 2) that there was a lack of probable cause for those proceedings; 3) that the defendant demonstrated malice in instituting the proceedings; 4) that the cause of action was terminated in the plaintiff's favor; 5) that the plaintiff was injured. *See e.g.,* *Korbelik v. Staschke, 232 Ill. App. 3d 114, 596 N.E.2d 805, 807, 173 Ill. Dec. 181 (1st Dist. 1992)*. In this case, counter/third-party plaintiff cannot allege an action for malicious prosecution because the **[**18]** underlying lawsuit has not yet terminated in his favor. Moreover, as discussed in the context of *Noerr-Pennington* **[*263]** immunity, Harris has already presented significant evidence in support of his claim. This evidence adequately demonstrates that plaintiff had probable cause to file its lawsuit.

HN14[] To state a claim for abuse of process, a plaintiff must allege an ulterior purpose and an act in the use of legal process not proper in the regular prosecution of the proceedings. *See* *Erlich v. Lopin-Erlich, 195 Ill. App. 3d 537, 553 N.E.2d 21, 22, 142 Ill. Dec. 671 (1st Dist. 1990)*. Although Hoffmeyer has asserted the existence of an ulterior motivation for Harris' copyright infringement action, he has not alleged any act in the use of the legal process that was not proper in the regular prosecution of the proceedings. Since Hoffmeyer has not alleged a claim for either abuse of process or malicious prosecution, any state law claim based on the Harris' maintenance of the copyright infringement lawsuit must fail.

E. *Rule 11*

Contending that Hoffmeyer's counter and third-party claims were not warranted by existing law and were interposed for an improper purpose, **[**19]** Harris has requested sanctions under *Fed. R. Civ. P. 11*. An unsuccessful claim is not necessarily sanctionable under *Rule 11* and, in this case, some factors militate against the imposition of sanctions. Hoffmeyer's claims touched on somewhat unsettled areas of law. The *Professional Real Estate Investors* case relied upon by this court was decided by the Supreme Court after the motions before the court were fully briefed, and the pattern requirement of the RICO statute has historically presented interpretative difficulties for both courts and parties. *See generally* *N.J. Inc., 492 U.S. at 236*. Further, the Harris Builders copyright registration which is the focus of the claim, while not fraudulent, is not a model of legal propriety; Hoffmeyer was justified in devoting attention to it and questioning its validity.

Nevertheless, having reviewed Hoffmeyer's submissions, the court must conclude that *Rule 11* sanctions are appropriate. In bringing RICO and Sherman Act claims, both of which involve a possible award of treble damages, Hoffmeyer asserted very serious allegations. The papers filed by Hoffmeyer do not, however, evidence the type of reasonable **[**20]** legal inquiry that should provide the foundation for claims of this gravity.

In his response brief to Harris' motion, Hoffmeyer made no effort to define his antitrust claim in relation to the established legal standards for monopolization or attempted monopolization. Likewise, in defending his RICO claim, Hoffmeyer did not attempt to establish the existence of a pattern by reference to *N.J. Inc., Sedima, Morgan* or any other authority. The unfair competition claim was similarly vaguely defined and ill-supported. Further, the context in which the claims were brought points to an intention to harass and delay Harris in the prosecution of its copyright infringement suit. In light of these circumstances, the court must conclude that, in violation of *Rule 11*, Hoffmeyer's claims were not advanced after a reasonable inquiry into whether they were warranted by existing law and were interposed for an improper purpose. As a sanction, Attorney Summer, who signed the counterclaim and the third-party complaint, is directed to pay $ 500 to Harris Builders and $ 500 to Evan Harris. This sanction is commensurate with the magnitude of the violation and is imposed for the purpose of deterrence. **[**21]** *See Brown v. Federation of State Medical Boards of the U.S., 830 F.2d 1429, 1439 (7th Cir. 1987)* ***HN15***[] (*Rule 11* award of amount less than full attorney fees can be appropriately imposed for deterrence purposes).

II. *DISCOVERY DISPUTES*

The parties have brought a number of discovery disputes to the attention of the court. Harris' Motion for an Order Compelling Discovery and Award of Appropriate Sanction relates to evidentiary materials requested in connection with Hoffmeyer's counterclaim and third-party complaint. Since these claims have been dismissed, Harris' motion is moot. Likewise, to the extent that Hoffmeyer's Combined Motion Under Rule 37 To Compel Harris to Comply With Discovery Requests is directed at information **[*264]** allegedly relevant to the counter and third-party claims, it is also moot.

Hoffmeyer's "Combined Motion Under Rule 37" also requests production of the tax returns of Evan Harris and businesses with which he is affiliated. The court determines that the purposes advanced by Hoffmeyer for disclosure of the tax returns should be satisfied by production of returns from 1988 to 1992. Harris is directed to disclose tax returns from that period **[**22]** for himself and his associated businesses. Since Harris' opposition to this motion was partially successful and was substantially justified, the parties are to bear their own expenses. Fed. R. Civ. P 37(a)(4). The parties are also to bear their own expenses as to the mooted motions, because neither side prevailed on the merits.

Additionally, plaintiff Harris has filed a Motion to Enter a Default Judgment or Appropriate Sanction Based on the Destruction of Evidence. The "destroyed evidence" consists of documents relating to the design and construction of the house which is the subject of the allegedly infringing drawings. These documents were in the control of Hoffmeyer, who subsequently lost or destroyed them. Some, but apparently not all, of the allegedly "lost or destroyed" documents were subsequently found and provided to plaintiff.

HN16[] A default judgment can be an appropriate sanction for the loss or destruction of relevant evidence. *See Marrocco v. General Motors Corp., 966 F.2d 220, 225 (7th Cir. 1992)*. Because default is a "drastic" sanction, the Seventh Circuit has recommended that courts consider lesser sanctions before imposing default judgments **[**23]** as punishment for improper behavior during discovery. *Poulos v. Naas Foods, Inc., 959 F.2d 69, 75 (7th Cir. 1992)*.

The circumstances presented in this case may not warrant the extreme sanction of default. The court, however, leaves open the possibility of such a sanction or a lesser sanction. The issue of an appropriate sanction is held in abeyance until the question of Hoffmeyer's destruction or loss of the documents which have not been provided during discovery, and the prejudice caused thereby, can be evaluated in the context of the preparation and presentation of evidence at trial, if this case is not settled.

CONCLUSION

For the reasons stated in this memorandum opinion and order, Evan Harris and Harris Builders' motion to dismiss the counterclaim and third-party complaint is GRANTED. Their motion for an order compelling discovery is DENIED as moot and their motion for a default judgment is DENIED. Hoffmeyer's Combined Motion Under Rule 37 is DENIED in part as moot and is GRANTED in part.

The parties are again strongly urged to discuss the settlement of this case. The case is set for status on September 21, 1993 at 10:00 a.m.

ENTER:

JAMES F. **[**24]** HOLDERMAN

United States District Judge

DATED: September 7, 1993

Howerton v. Grace Hosp.

United States District Court for the Western District of North Carolina, Shelby Division

September 13, 1993, Decided ; September 13, 1993, FILED

4:90cv187

Reporter

1993 U.S. Dist. LEXIS 21042 *

PHILIP T. HOWERTON, M.D.; RAY M. ANTLEY, M.D.; and BLUE RIDGE RADIOLOGY ASSOCIATES, P.A., Plaintiffs, Vs. GRACE HOSPITAL, INC.; and PIEDMONT MEDICAL IMAGING, P.C., Defendants.

Subsequent History: [*1] Adopting Order of July 7, 1995, Reported at: 1995 U.S. Dist. LEXIS 21123.

Disposition: Defendants' motions for summary judgment ALLOWED.

Core Terms

radiology, outpatient, plaintiffs', inpatient, radiologists, patients, monopolization, antitrust, technical service, market share, opening, exclusive contract, no evidence, referring physician, summary judgment, monopoly power, terminate, causal, summary judgment motion, percent, staff, leveraging, referrals, charges, RECOMMENDATION, disparagement, free-standing, defendants', facilities, predatory

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Judges: J. TOLIVER DAVIS, UNITED STATES MAGISTRATE JUDGE

Opinion by: J. TOLIVER DAVIS

Opinion

MEMORANDUM AND RECOMMENDATION

PURSUANT TO 28, UNITED STATES CODE, SECTION 636(b) and the standing orders of designation entered by the district court, the undersigned magistrate judge has reviewed defendants' motions for summary judgment. Having carefully considered such motions, reviewed the pleadings, and conducted a hearing, the court enters **[*2]** the following findings, conclusions, and recommendation.

FINDINGS AND CONCLUSIONS

I. Introduction

The underlying lawsuit raises antitrust challenges to an April 4, 1990, contract between defendants Grace Hospital, Inc. ("Grace" or the "Hospital") and Piedmont Medical Imaging, P.C. ("PMI"), under which PMI became the exclusive provider of professional radiology services at Grace. The implementation of the PMI contract ended the longstanding tenure of plaintiffs Dr. Howerton, Dr. Antley, and their professional association, Blue Ridge Radiology Associates, P.A. (collectively "Blue Ridge"), as the sole radiologists at Grace.

In this lawsuit, which was filed October 1, 1990, and which seeks monetary and injunctive relief, plaintiffs contend that by entering into and implementing the PMI contract, the defendants have violated *Sections 1* and *2* of the Sherman Act. *15 U.S.C. 1*, *2*. plaintiffs allege (1) that Grace violated *Section 2* by monopolizing and attempting to monopolize the market for outpatient technical radiology services; (2) that Grace has violated *Section 2* by using its monopoly power in the market for inpatient technical radiology services to gain an unwarranted advantage **[*3]** in the outpatient technical services market ("monopoly leveraging"); (3) that Grace and PMI have violated *Section 2* by conspiring to monopolize the market for outpatient radiology services; (4) that Grace has violated *Section 1* by illegally tying the provision of inpatient technical radiology services to the purchase of inpatient and outpatient professional radiology services; (5) that Grace and PMI have violated *Section 1* by entering into an illegal exclusive dealing arrangement; and (6) that Grace and PMI violated *Section 1* by unreasonably restraining trade in the inpatient and outpatient radiology markets. See generally, Plaintiff's Memorandum In Opposition to defendants Grace Hospital, Inc.'s and Piedmont Medical Imaging, P.C.'s Motions for Summary Judgment (hereinafter "Plaintiff's Memorandum in Opposition"). [1]

[*4] On October 15, 1990, the district court denied plaintiffs' Motion for Temporary Restraining Order, and, on March 14, 1991, the district court denied plaintiffs' Motion for preliminary Injunction, finding that plaintiffs had "only a minimal likelihood of success on the merits." Memorandum of Opinion and Order at 6. At that same time, the district court denied defendants' Motion to Dismiss. Since that time, the parties have engaged in extensive and protracted discovery, following which the defendants filed the summary judgment motions currently before the court. For the reasons discussed below, the undersigned will recommend that defendants' Motions for Summary Judgment be granted.

II. Findings of Fact [2]

[*5] 1. Plaintiff Dr. Philip T. Howerton, M.D. ("Dr. Howerton") and Dr. Ray M. Antley, M.D. ("Dr. Antley") are physicians engaged in the practice of radiology in the City of Morganton, Burke County, North Carolina (hereinafter "Morganton") through a North Carolina professional association, Blue Ridge Radiology Associates, P.A., in which Drs. Howerton and Antley are the sole shareholders (collectively "Blue Ridge"). Complaint 7; Howerton Aff. 1; Antley Decl 1.

2. Grace Hospital, Inc. is a North Carolina private non-profit corporation, formed in 1908. Grace Hospital, Inc. owns Grace Hospital, a 204-bed acute care hospital (currently using 149 beds) located in Morganton. Wilson Aff. 2.

3. Defendant Piedmont Medical Imaging, P.C. ("PMI") is a professional corporation organized and existing under the laws of the State of North Carolina, through which Dr. Richard Theodore Mull, M.D. ("Dr. Mull") and four other physicians provide radiology services in Morganton and neighboring communities. Mull Aff. 1-3; Mull Depo. (8/20/92) at 4; Mull Depo. (11/10/92) at 57. During the time relevant to this case, Dr. Mull has been the president and sole shareholder of PMI. Mull Depo. (11/20/92) at 75; Mull **[*6]** Aff. 1.

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[1] Plaintiffs originally alleged pendent state law claims alleging due process violations, breach of contract, and, in their *First Amendment* to Complaint, tortious interference with business relationships. Plaintiffs voluntarily dismissed these claims in a Stipulation of Voluntary Dismissal, dated January 25, 1993.

[2] Defendants implicitly concede that a dispute of fact exists with respect to a number of issues, such as the relevant geographic and product markets and the connection of the challenged conduct with interstate commerce. Therefore, for purposes of the instant motion, and viewing the evidence in the light most favorable to Plaintiffs, the Court accepts as correct Plaintiffs' assertions with respect to these issues. Nevertheless, because of the lack of any dispute of material fact on the dispositive issues discussed below, Defendants are entitled to summary judgment.

4. Among its departments, the Hospital operates a Radiology Department in which inpatients, outpatients, and emergency room patients may receive various radiology services twenty-four (24) hours per day, seven (7) days per week. Wilson Aff. 3; Howerton Aff. 2; Shull Depo. (11/19/92) at 35; Antley Depo. (5/4/92) at 48-49. The Hospital owns or leases the radiology equipment, employs technicians and non-medical personnel to staff the Department, and charges radiology patients a "technical fee" associated with the operation of the Department's equipment. Wilson Aff. 3; Antley Decl. 5. The Hospital is the only provider of inpatient technical radiology procedures in Morganton. Wilson Aff. 3. [3]

[*7] 5. Patients receiving radiology services at the Hospital receive professional services from physician radiologists who perform or interpret the radiology procedures. Wilson Aff. 4. These physicians charge radiology patients a "professional fee" associated with their services. Id.; Antley Decl. 5.

6. Dr. Howerton has been in the practice of radiology in Morganton, and a member of the Grace Hospital medical staff, since 1966. Howerton Aff. 1. In 1966, Dr. Howerton joined the predecessor group to Blue Ridge, which, at that time, was already providing the professional radiology services at Grace Hospital, Valdese General Hospital, and Caldwell Memorial Hospitals, and which included three other radiologists. Howerton Depo. (7/15/92) at 5-8. Blue Ridge was formed from this group in 1970, after one of the radiologists had withdrawn, and has been providing radiology services in Morganton continuously since that time. Id. at 6, 13; Howerton Aff. 1.

7. Dr. Antley was admitted to the medical staff of Grace Hospital in February 1985, at which time he began practicing radiology with Blue Ridge. Antley Decl. 1. At that time, Blue Ridge included Dr. Howerton and one other radiologist **[*8]** who later retired in early 1986. Id.

8. Although several physicians had limited radiology privileges during this time, Howerton Aff. 6, plaintiffs state that they had no competition from any other radiologists at the time they were practicing in the Grace Hospital Radiology Department. Antley Depo. (5/4/92) at 281-82. With respect to referring physicians, Dr. Antley testified that "they … more or less had to do business with us for inpatients." Antley Depo. (7/13/92) at 91. [4]

9. Effective September 1, 1984, Blue Ridge's professional radiology services were provided pursuant to a written Agreement for Radiology Services with the Hospital ("Blue Ridge contract" or "1984 contract"). Meals Aff., Ex. 24; Howerton Depo. (7/15/92) **[*9]** at 28-29. This contract was renewed annually, until the Hospital terminated the contract with 90 days notice by letter dated June 29, 1990. Meals Aff., Ex. 39; Wilson Aff. 5. The contract did not require Blue Ridge to pay the Hospital at any time for the use of the Hospital's equipment, facilities, or personnel. Antley Depo. (7/13/92) at 223.

10. The Hospital treated the Blue Ridge contract as effectively exclusive. When Dr. Mull inquired about obtaining radiology privileges prior to 1989, he was told that the radiology department was effectively closed because of the contract with Blue Ridge and that he could not come to the Hospital and compete with Blue Ridge. Mull Depo. (8/20/92) at 130-31.

11. At all times when Blue Ridge was providing radiology services at Grace Hospital, Blue Ridge billed separately for its professional services. Antley Depo. (5/4/92) at 28, 38. When setting professional fees, Blue Ridge never considered the possibility that other radiologists might be brought into the hospital to compete. Howerton Depo. (12/18/92 P.M.) at 30-31. Blue Ridge did not share in the revenue from Grace Hospital's technical services, for which Grace billed. Antley Depo. (5/4/92) **[*10]** at 42. Likewise, Grace Hospital did not share in the revenue from professional charges billed by Blue Ridge. Wilson Aff. 5.

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[3] Plaintiff's allege that the relevant geographic market is the three zip code area encompassing Morganton, Glen Alpine, and Drexel. Because the parties have not suggested any changes in the radiology market in Glen Alpine and Drexel, the remainder of this opinion generally refers only to Morganton for the sake of simplicity.

[4] During the tenures of both Blue Ridge and PMI, other radiologists occasionally provided radiology services at the Hospital on a temporary "locum tenens" basis when necessary to cover for the full-time radiologists. Antley Depo. (7/13/92) at 221; Mull Depo. (8/20/92) at 79.

12. Sometime in 1984, Dr. Howerton suggested to Grace for the first time that a free-standing outpatient radiology facility was needed in Morganton. Howerton Aff. 8.

13. In a letter dated October 27, 1986, Dr. Howerton informed the Executive Committee of the Grace Hospital Board of Directors, the Hospital Administrator, and the Medical Staff Director, of Blue Ridge's intention to establish an outpatient radiology practice. Meals Aff., Ex. 28.

14. Dr. Howerton presented Blue Ridge's plans to the Hospital Board at the Board's October 30, 1986, meeting. Meals Aff., Ex. 29. As part of his presentation, Dr. Howerton distributed copies of his October 27, 1986, letter, as well as copies of a March 4, 1986, letter to a member of the Hospital Board, in which he suggested that Blue Ridge provide the Hospital Radiology Department with administrative services not provided under the 1984 contract. Id. Following the presentation, and after Dr. Howerton's departure from the meeting, the Hospital Board adopted resolutions (1) expressing its willingness to consider a joint **[*11]** venture in a free-standing diagnostic imaging clinic, (2) expressing its willingness to meet with Blue Ridge in an effort to renegotiate a mutually more satisfactory contract, subject to Blue Ridge's willingness to postpone its plans to open a free-standing radiology facility, (3) directing that an ad-hoc committee be appointed to meet with Dr. Howerton to discuss these issues, and (4) stating that if Blue Ridge proceeded to establish a free-standing diagnostic imaging clinic, the Hospital would terminate the 1984 Blue Ridge contract by serving 90-day written notice, as provided in the 1984 contract. Id. Blue Ridge was later informed of the passage of these resolutions. Howerton Aff. 10; Meals Aff., Ex. 2 at 102.

15. During the next year-and-a-half, Dr. Howerton and the Hospital exchanged numerous drafts of a new radiology contract proposal. Howerton Aff. 12.

16. In May 1988, believing the Hospital was unwilling to enter into a joint venture, and believing contract negotiations to be at an end, Dr. Howerton asked personnel with the American College of Radiology's Center for Economics and Quality Assurance to study and determine whether an outpatient facility established by Blue **[*12]** Ridge would be feasible in the Morganton area. Howerton Aff. 13. In August 1988, Mr. Richard Dorson of the American College of Radiology prepared a written report concluding that the outpatient facility would appear to be financially viable. Id.; Meals Aff., Ex. at 7. Although noting that changes over the past four years had made predictions more difficult, Mr. Dorson estimated that a Blue Ridge free-standing imaging facility would capture 60% of the referred outpatient procedures then performed at the Hospital (a predicted loss to the Hospital of 10,500 procedures a year). Meals Aff., Ex. 35 at 1, 2, 7; Howerton Depo. (8/17-19/92) at 68; Dorson Depo. (5/28/92) at 46. Mr. Dorson also noted that interviewed physicians had made "many comments … that one [Blue Ridge] radiologist was difficult to deal with and that his reports should be more specific," and that "the relationship between the administration and the members of the [Blue Ridge] group is poor." Meals Aff., Ex. 35 at 6. Mr. Dorson concluded that there was no way to predict how the hospital would react to the opening of the facility, and that he thought it "best to assume that [the Hospital] will not be pleased and **[*13]** will attempt to take some action to show their concern." Id.

17. In early 1989, in reliance on Mr. Dorson's report, Blue Ridge proceeded with its plans to establish a freestanding radiology facility. Howerton Aff. 14; Howerton Depo. (8/17-19/92) at 68. In addition to relying on Mr. Dorson's report, plaintiffs also were concerned that if they did not proceed, others would open a facility before them resulting in a loss of all of their hospital-based outpatient business. Howerton Depo. (8/17-19/92) at 20-28; Antley Depo. (7/13/92) at 172.

18. In proceeding with its plans, Blue Ridge assumed that it would continue to have access to or the right of use of the facilities, equipment, personnel and records utilized in the operation and function of the Radiology Department at Grace. Howerton Aff. 15.

19. In July 1989, the Hospital learned of Blue Ridge's plans to proceed with construction of the outpatient radiology facility. Keir Depo. (2/10/92) at 3-8. Dr. Antley, when approached by Douglas C. Keir, then the Assistant Administrator of the Hospital, confirmed that Blue Ridge was proceeding with its plans and indicated that Blue Ridge was no longer discussing the issue with the Hospital. **[*14]** Id.

20. Blue Ridge's plans concerned Grace Hospital because of the inherent problems and conflict of interest it perceived in allowing access to business records and facilities to an entity concerned entirely with its own center. Keir Depo. (10/25-26/91) at 165, 264. Other concerns included hours and days of coverage, on-call time, quality of care, and administrative responsibility. Keir Depo. (10/25/91) at 62-63, 165.

21. Based upon the authority of the October 30, 1986, resolution of the Hospital Board, the Hospital began a search, in July 1989, for other radiologists to provide coverage in the Hospital Radiology Department. Keir Depo. (2/10/92) at 9-10. Mr. Keir conducted the search on behalf of the Hospital in order to present alternative coverage options before the next meeting of the Executive Committee. Id. Mr. Keir contacted the Chief Executive Officers and radiologists at Valdese General Hospital, in Valdese, North Carolina, Catawba Memorial Hospital in Hickory, North Carolina, and Caldwell Memorial Hospital, in Lenoir, North Carolina. Id. at 10-20.

22. In late July or early August 1989, Mr. Keir contacted and met with Dr. Mull, who was then practicing alone, **[*15]** under the PMI name, at Catawba Memorial Hospital. Keir Depo. (2/10/92) at 16-20; Keir Depo. (10/25/91) at 90-94; Mull Aff. 3. At this meeting, and in subsequent contacts with Dr. Mull and his attorney, it was Mr. Keir who proposed that any contract with PMI provide that PMI be the exclusive provider of radiology services at the Hospital. Keir Depo. (10/25/91) at 94; Mull Aff. 5; plaintiffs' Memorandum in Opposition at 93.

23. At the August 18, 1989, meeting of the Hospital Board's Executive Committee, Mr. Keir reported on his search for alternative providers of radiology services. Meals Aff., Ex. 2, at 104-07. Mr. Keir reported that of the radiologists whom he had contacted, Dr. Mull had expressed the most interest and a willingness to sign an exclusive contract. Id. at 106.

24. Blue Ridge began construction of the facility at a site less than one mile from Grace Hospital, in March 1990. Howerton Aff. 16.

25. On April 4, 1990, the Hospital and PMI executed an Agreement For Radiology Services, with an effective date of October 9, 1990 (the "PMI contract"). Meals Aff., Ex. 23. Because of Hospital concern that Blue Ridge might withdraw from the Hospital prior to the expiration **[*16]** of the ninety (90) day notice period, the Hospital and PMI also executed an Interim Services Agreement on April 4, 1990, under which PMI committed itself to providing radiologist services to the Hospital on short notice between July 9, 1990, and October 9, 1990. Id.

26. Exclusive contracts for professional radiology services are common; as of 1989, approximately sixty (60) percent of all radiologists across the country had an exclusive contract with their hospitals, and only approximately ten (10) percent of hospitals had open radiology staffs. Dorson Aff. 7.

27. By letter dated June 22, 1990, the Hospital notified Blue Ridge that it was invoking the ninety (90) day termination clause in the Blue Ridge contract. Meals Aff., Ex. 39; Wilson Aff. 5.

28. In August 1, 1990, Blue Ridge opened its free-standing outpatient radiology facility. Howerton Aff. 18. Until this date, the Hospital and Blue Ridge had never been in competition with each other in any market; since then, the Hospital and Blue Ridge have competed only in the market for outpatient technical services. Antley Depo. (5/4/92) at 283; Leffler Decl. 11, 15.

29. At its opening, the Blue Ridge facility had eight employees, **[*17]** offered state-of-the art x-ray, fluoroscopy, mammography, computerized axial tomography ("CAT scans"), color vascular, and ultrasound equipment (including color doppler ultrasound which Grace Hospital did not have), and provided convenient parking, modern examining rooms, and easy registration for patients. Howerton Aff. 18; Antley Depo. (5/4/92), Ex. 55. [5] The facility did not offer Magnetic Resonance Imaging ("MRI") and Nuclear Medicine services which are available at Grace Hospital.

[5] When Blue Ridge opened its outpatient radiology center, it employed at least one technologist who had previously been employed by Grace Hospital. Antley Depo. (5/4/92) at 236-37.

Howerton Decl. 27. [6] The Blue Ridge facility is open Monday through Friday, and closes each day at 5:30 P.M. Antley Depo. (12/12/92) at 3-4.

[*18] 30. For a transition period of several weeks or a month before the September 27, 1990, effective termination date of the Blue Ridge contract, both Blue Ridge and PMI simultaneously provided professional radiology services at the Hospital. Hord Depo. (10/8/92) at 91; Howerton Aff. 21.

31. Several physicians on the Grace Hospital medical staff met with PMI, in September 1990, in an unsuccessful attempt to have PMI agree to modify the exclusive provision to allow Drs. Howerton and Antley to continue to provide radiology services in the Hospital. Dellinger Decl. 3.

32. On September 28, 1990, PMI replaced Blue Ridge as the sole provider of professional radiology services at Grace Hospital pursuant to its exclusive contract. Wilson Aff. 6; Mull Aff. 8.

33. In accordance with the PMI contract, and as was the case when Blue Ridge provided radiology services at the Hospital, PMI bills separately for its professional services and does not share in the revenue from Hospital technical services. Mull Depo. (8/20/92) at 6; Wilson Aff. 6; Meals Aff., Ex. 23. [7] similarly, the Hospital does not share in the revenue from PMI's professional services. Mull Depo. (8/20/92) at 6; Wilson Aff.

[*19] 6. The PMI contract does, however, list as "cause" for termination, PMI's charging of excessive professional radiology fees. Meals Aff., Ex. 23 11, 17.

34. Previous to the arrival of PMI and the opening of the Blue Ridge facility, Grace Hospital was the only significant supplier of outpatient technical services and Blue Ridge was the only significant supplier of outpatient professional radiology services in Morganton. Antley Depo. (5/4/92) at 281-82; Leffler Decl. at 11. Since then, patients have been able to obtain such radiology services at either Grace Hospital or the Blue Ridge facility, and from either PMI or Blue Ridge physicians. Howerton Depo. (8/17-19/92) at 89, 109; Leffler Depo. (12/2-4/92) at 255, 278. [8]

[*20] 35. The average outpatient technical radiology charges at Grace Hospital are approximately 47% higher than those at Blue Ridge. Kennedy Aff. 3. The higher charges at Grace Hospital reflect the fact that Grace Hospital has significantly higher overhead costs -- principally attributable to the fact that it is open 7 days per week, 24 hours per day and handles emergency room patients. Shull Depo. (11/19/92) at 35.

36. The Blue Ridge facility has significantly and steadily increased its business since plaintiffs lost access to the Hospital. Antley Depo. (5/4/92) at 247, 254-55; Howerton Depo. (12/18/92 P.M.) at 11-24; Howerton Depo. (8/17-19/92) at 234-43.

37. Since the facility opened in August 1990, Dr. Howerton has made several efforts to market the facility's radiology services, including the sending of promotional letters to at least one physician in January 1991, and to a number of physicians in the summer of 1992. Howerton Aff. 33; Howerton Depo. (12/18/92 P.M.) at 11-17.

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[6] Beginning in late February 1993, the Blue Ridge facility began to offer MRI on a one-day-per-week basis to patients in Morganton pursuant to an arrangement with a mobile MRI company. Howerton Decl. 27.

[7] Until January 1992, patients receiving mammography screens were charged one fee which was divided between the Hospital and the physicians. Hord Depo. (10/8/91) at 37. Since that time, the Hospital and PMI have billed separately for their respective services. Wilson Aff. at 6.

[8] There are also a number of other providers of outpatient technical and professional radiology services in Burke County, specifically: Morganton Family Practice, Dr. Anderson, two orthopedists (Drs. Glugover and Saunders), Dr. Shah-Khan, and the radiology group at Valdese General Hospital. Antley Depo. (5/4/92) at 263-64; Howerton Depo. (8/17-19/92) at 202-06. Two years after the opening of the Blue Ridge outpatient facility, all of these providers still supplied outpatient radiology services. Antley Depo. (5/4/92) at 264. In addition, after the opening of the Blue Ridge outpatient facility, two other physicians have obtained radiology equipment and now provide technical radiology services. Id.

38. After initiating those marketing efforts, the Blue Ridge facility has steadily increased its business and competitive standing, drawing patients away from Hospital's outpatient department. Howerton Depo. **[*21]** (12/18/92 P.M.) at 11-24; Howerton Depo. (8/17-19/92) at 234-43.

39. Grace Hospital staff physicians have increased their referrals to the Blue Ridge outpatient facility since it opened, including many who initially made no referrals there. Howerton Depo. (12/18/92 P.M.) at 11-25; Howerton Depo. (8/17-19/92) at 234-43.

40. Initially, the plaintiffs performed approximately 25 procedures per day at the facility. Antley Depo. (5/4/92) at 247. By May 1992, the plaintiffs were performing approximately 30 to 35 procedures per day at the facility. Id. at 254-55. The total number of procedures performed at the Blue Ridge facility have continuously increased since its opening, from 7,553 in 1991 to 9,156 in 1992. Antley Decl. 12-13.

41. In 1991, Blue Ridge had total charges of $ 1,237,210 for procedures performed at the outpatient facility, and Blue Ridge collected $ 913,857 of these charges. Antley Decl. 12. In 1992, Blue Ridge had total charges of $ 1,432,695 for procedures performed at the outpatient facility, and Blue Ridge collected $ 954,731 of these charges. Id. 13.

42. Blue Ridge has had revenue in excess of expenses each year since the outpatient facility was opened. Antley **[*22]** Decl. 12-13. Blue Ridge has not missed any scheduled payment for rent, mortgage, salaries or other expenses since opening its outpatient facility in August, 1990. Antley Depo. (12/12/92) at 22.

43. Calculating market share as a percent of the total number of radiology procedures performed, Blue Ridge's market share in the outpatient technical services market has steadily increased -- from 0% prior to the opening of the Blue Ridge facility, to 49% in October of 1992. Eisenstadt Depo., Ex. 1, Ex. IV. Grace Hospital's market share has correspondingly decreased from 100% to 51%. Id. [9]

44. Calculating market shares as a percent of total revenue, Blue Ridge's market share in the outpatient technical services market has increased from 0% prior to the opening of the Blue Ridge facility to 30% in 1991 and 27% in 1992. Kennedy Decl. at **[*23]** 4.

45. Numerous physicians attribute various improvements in the Hospital radiology department to competition from Blue Ridge. Croft Decl. 7; Salisbury Decl. 6; Seagle Decl. 6; Smith Decl. 6; Melton Decl. 8; Lindquist Decl. 6.

46. There is no plausible evidence of any causal link between Blue Ridge's lack of access to the Grace Hospital inpatient department and any harm to Blue Ridge in the outpatient technical services market.

47. There is no evidence that Grace Hospital required or directed staff physicians to refer outpatients to the Hospital's radiology department, rather than to Blue Ridge. Physicians are free to choose to use the Blue Ridge facility rather than the Hospital's outpatient department. Leffler Depo. at 215; Leffler Decl. 25; Giles Decl. 6; Howerton Depo. (12/18/92) at 11-25. Dr. Giles for example, states that: "Despite the fact that I have been forced to use one of the various PMI radiologists for all inpatient and some outpatient examinations performed at the hospital … I have referred a number of my outpatients to Blue Ridge." Giles Decl. 6.

48. Blue Ridge has received referrals from physicians who have joined the medical staff since 1990 and had no previous **[*24]** experience with the plaintiffs at Grace Hospital. See Howerton Depo. (12/18/92 P.M.) at 21-26. In addition, no physicians remaining in practice in Morganton (including new physicians) have decreased their referrals to Blue Ridge. Howerton Depo. (12/18/92 P.M.) at 25.

49. Although Drs. Howerton and Antley "used to have almost daily contact with the referring physicians," and although they "seldom see them at all these days," Antley Decl. 9, Drs. Howerton and Antley have the opportunity

[9] This calculation does not include the procedures performed by the office-based providers of radiology services, which, if included, would further reduce Grace's market share.

to make such contacts, as is evidenced by their promotional visits to approximately a dozen physicians' offices. Howerton Depo. (8/17-19/92) at 261.

50. In December 1992, a total of thirty-two physicians, who constitute a majority of the physicians on the medical staff at Grace Hospital, and who also collectively account for over fifty percent the radiology business referred in Morganton, signed a declaration stating that, if Drs. Howerton and Antley were permitted access to the Grace Hospital Radiology Department, they would refer at least some of their patients to Drs. Howerton and Antley for radiology services. Howerton Aff. 31 & Ex. A; Antley Decl. 7.

51. In support of their Opposition to defendants' **[*25]** Motions for Summary Judgment, Plaintiffs attach declarations of nineteen physicians on the staff of Grace Hospital which express varying degrees of support for Drs. Howerton's and Antley's access to the Grace Hospital Radiology Department.

52. As evidenced by the above, plaintiffs have established a good working relationship with referring physicians.

53. None of the physician declarations supports the proposition that physician choice of outpatient radiologists has been influenced by the exclusion of Blue Ridge from the Hospital radiology department. Two physicians mention the Hospital's outpatient services, but they state only that if there were no exclusive contract, "I would have an alternative from which to choose a radiologist … with respect to … outpatient examinations, which I sometimes <u>prefer</u> to have done at the hospital." Dellinger Decl. 8 (emphasis added); Deekens Decl. 6.

54. There is no evidence that any referring physicians at Grace feel pressure to refer their patients to the Hospital despite the advantages offered by Blue Ridge. Dr. Ellison, one of the two physicians upon whose testimony plaintiffs rely in support of this proposition, stated in his deposition **[*26]** testimony that he has never felt any express or implied pressure from Grace Hospital or anybody connected with Grace Hospital to use Blue Ridge Radiology less and use Grace Hospital radiology more for outpatient radiology services. Ellison Depo. at 40. Rather, Dr. Ellison's patients make the choice. <u>Id.</u> The other physician, Dr. Madison, who, contrary to plaintiffs' characterization, was not one of the "physicians at Grace," testified "there is really nothing that anyone from Grace has said that would lead me to believe that" Grace pressured Western Carolina Center to refer patients to Grace. Madison Depo. at 20. Any efforts by the Hospital to solicit business from Western Carolina Center merely amounted to a willingness to compete with Blue Ridge. <u>Id.</u> at 33-34.

55. There is evidence in one physician declaration that the Hospital's Administrator and attorney justified the exclusion of plaintiffs from the Hospital Radiology Department by disparaging plaintiffs' skills and provision of services to Hospital patients. Melton Aff. 7. There is no evidence that the alleged disparagement of Blue Ridge by the Hospital caused injury to Blue Ridge in the outpatient technical radiology **[*27]** services market, or that any physician has, as a result, referred fewer outpatients to Blue Ridge.

56. There is some evidence suggesting that Grace may have been aware that the Blue Ridge facility might have "a difficult time" without access to the inpatient facilities and plaintiffs have submitted evidence which they believe show that defendants, in terminating their contract with plaintiffs, intended to destroy competition or build monopoly. <u>See</u> "Evidence Regarding Causation" and "Evidence Showing Concerted Action of Mull/PMI and Grace" (and citations to affidavits and depositions contained therein); <u>c.f.</u> Keir Depo. (2/10/92), at 108. <u>See also</u> Note 31, <u>infra.</u>

57. No patient or referring physician is forced to purchase outpatient professional radiology services from PMI as a condition of obtaining inpatient technical radiology services. Leffler Depo. at 215.

58. There is no evidence of record that access to the inpatient facilities of Grace Hospital is essential to the maintenance of plaintiffs' practices or their outpatient radiology facility. Plaintiffs state not only that they have been able to duplicate the equipment and service of the Hospital (with the exception **[*28]** of nuclear medicine), but also that they have been able to provide <u>superior</u> quality equipment and service than the Hospital. Howerton Decl. 18; Antley Decl. 6.

59. The employment market for radiologists is nationwide, as evidenced by Blue Ridge's national advertising for a radiologist in the placement service of the American College of Radiology, by Dr. Antley's receipt of employment

inquiries from radiologists from around the country, by Dr. Antley recruitment from out-of-state, and by the concessions of Plaintiff's economic expert. Antley Depo. (7/13/92) at 31-32, 39; Antley Depo. Ex. 1; Leffler Depo. (12/2-4/92) at 302.

III. Summary Judgment

A. Plaintiffs' Claims and Defendants' Motions

Plaintiffs claim that Defendant Grace Hospital, by terminating its radiology contract with Blue Ridge, and by entering into an exclusive radiology contract with PMI, attempted to eliminate competition from Blue Ridge's free-standing radiology facility in violation of *Sections 1* and *2* of the Sherman Act. *15 U.S.C. 1*, *2*. Plaintiffs further claim that Defendant PMI violated these antitrust laws by cooperating with Grace Hospital in these alleged efforts. However, as noted in detail below, **[*29]** defendants' summary judgment motions must be granted because the evidence raises no genuine issue of material fact which could give rise to any such antitrust liability.

B. Standard For Summary Judgment

Under *Rule 56 of the Federal Rules of Civil procedure*, summary judgment must be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. In opposing summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but … must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*.

As the nonmoving party which will bear the burden of proof at trial, Blue Ridge is entitled to have its "evidence … believed, and all reasonable inferences … drawn in its favor." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. However, a motion for summary judgment may not be defeated by evidence that is "merely colorable" or "is **[*30]** not sufficiently probative." *Id. at 249-50*.

The Court of Appeals for the Fourth Circuit has recognized that "summary judgment is an important tool for dealing with antitrust cases." *Oksanen v. Page Memorial Hosp., 945 F.2d 696, 708 (4th Cir. 1991)*, cert. denied, *502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992)*. Although noting that antitrust plaintiffs do not face any "special burden" in facing summary judgment, the Supreme Court recently reiterated that summary judgment is appropriate where plaintiffs' antitrust theories are "speculative," "not 'reasonable,'" "economically senseless," or "make[] no practical sense." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265, 284-85 (1992)* (discussing and quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986))*. In Matsushita, the Court noted that "if the factual context renders [plaintiffs' antitrust] claim implausible -- if the claim is one that simply makes no economic sense -- [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." **[*31]** *475 U.S. at 587*.

C. Federal Antitrust Claims

Plaintiffs' antitrust claims cannot survive summary judgment both because there is no evidence of any causal antitrust injury, and because, even if there were such evidence of antitrust injury, there is no evidence to support plaintiffs' substantive claims under *Sections 1* and *2* of the Sherman Act. These issues will be addressed in order.

1. Antitrust Injury

The existence of causal antitrust injury is a threshold question in any antitrust suit. *Drs. Steuer & Latham, P.A. v. National Medical Enterprises, Inc., 672 F. Supp. 1489, 1501 (D.S.C. 1987)*, aff'd, *846 F.2d 70 (4th Cir. 1988)* (table) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. [10]

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[10] "Antitrust standing to sue is at the center of all ***antitrust law*** and policy. It is not a mere technicality." *HyPoint Technology, Inc. v. Hewlett-Packard Co., 949 F.2d 874, 877 (6th Cir. 1991)*.

In order to state a viable antitrust claim, "a plaintiff must show a reasonably probable causal link between the antitrust violation and a business loss of the sort the antitrust laws were designed to prevent." *Advanced Health-Care Services, Inc. v. Radford Community Hosp., 910 F.2d 139, 149 (4th Cir. 1990)*. In order to meet this burden, a plaintiff must produce sufficient evidence to demonstrate that the alleged violation **[*32]** is a "material cause" of the alleged injury. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)* (emphasis added).

Thus, in order to demonstrate antitrust injury, a plaintiff must make two showings -- first, that the defendant's conduct caused an injury to the plaintiff, and second, that the resulting injury was of the sort that the antitrust laws were designed to prevent. In the instant case, plaintiffs have failed to make these showings in any market.

a. Injury in the Inpatient Radiology Market

In the inpatient market, plaintiffs have shown no injury of the type intended to be prevented by the antitrust laws, which were enacted "for the protection of competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, **[*33]** 82 S. Ct. 1502 (1962)*. Although Plaintiffs can arguably show causal injury to themselves as competitors, given that they are no longer able to generate revenue from inpatient professional radiology services, this injury is insufficient to constitute antitrust injury. In cases involving physicians displaced from hospitals -- whether because of a loss of privileges or because of the hospitals' entry into exclusive contracts with other physicians -- the courts in the Fourth Circuit and elsewhere have consistently held that "the fact that a hospital's decision caused a disappointed physician to practice elsewhere does not of itself constitute an antitrust injury." *Oksanen, 945 F.2d at 709* (loss of privileges); *Harron v. United Hosp. Ctr., Inc., 522 F.2d 1133, 1134 (4th Cir. 1975)*, cert. denied, *424 U.S. 916, 47 L. Ed. 2d 321, 96 S. Ct. 1116 (1976)* ("it is frivolous to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act"); *Steuer, 672 F. Supp. at 1502* (table) ("merely changing exclusive contractors … cannot constitute a violation of the antitrust laws"); *Shafi v. St. Francis Hosp., 1991-1 **[*34]** Trade Cas. (CCH) 69,500, at 66,135 (4th Cir. 1991)* (citing Steuer for same proposition in exclusive anesthesiology contract case).

b. Injury in the Outpatient Technical Services Market

In the outpatient market, plaintiffs have failed to produce any plausible evidence of any causal injury to their business, let alone injury of the type the antitrust laws were designed to prevent. Since opening their outpatient facility in August 1990, and since their exclusion from the Grace Hospital Radiology Department, plaintiffs have performed a continuously increasing number of outpatient radiology procedures at their facility. Antley Decl. at 12-13. After plaintiffs initiated marketing efforts, Grace Hospital staff physicians, including many who did not previously refer to the facility, have increased their referrals to the Blue Ridge outpatient facility, thereby drawing patients away from the Hospital's outpatient department. Howerton Depo. (12/18/92 P.M.) at 11-25; Howerton Depo. (8/17-19/92) at 234-43. No physicians remaining in practice in Morganton, including physicians who have arrived since the exclusion of plaintiffs from the Hospital, have decreased their referrals to Blue Ridge. **[*35]** Howerton Depo. (12/18/92 P.M.) at 25.

As a result, plaintiffs' share of the outpatient technical services market, measured as a percent of the total number of procedures performed, has increased from 0% immediately prior to the opening of the facility, to 49% in October of 1992. Eisenstadt Depo., Ex. 1, Ex. IV. When market share is measured as a percent of total revenue, plaintiffs' market share has increased from 0% immediately before the opening of the facility to 27% in 1992. Kennedy Decl. at 4.

Nevertheless, plaintiffs offer evidence that the Blue Ridge facility's market share, when measured as a percent of total revenue, has declined from 30% in 1991 to 27% in 1992, and expert testimony that Blue Ridge's revenues are such that the facility is not likely to survive. Kennedy Decl. 4; Andrews Decl. at 4-11. Plaintiffs have failed, however, to produce any plausible evidence that any such injury was caused by the conduct of defendants. As noted above, an antitrust claim must fail where plaintiffs, although able to prove injury, cannot offer plausible evidence that the injury was caused by the defendants. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters, **[*36]** 459 U.S. 519, 532 n.26, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* ("even if the injury was easily provable, there would be no recovery if the plaintiff could not sufficiently establish the causal connection."); *Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 931 (4th Cir. 1990)* (upholding summary judgment for the defendant under *Section 2* because, inter alia, "while [plaintiffs'] profit margin may have declined, the plaintiffs have failed to show a causal link to anti-competitive activity.").

It is undisputed that Grace Hospital has not required or directed staff physicians to refer outpatients to the Hospital Radiology Department, and staff physicians are free to choose to use the Blue Ridge facility instead. Leffler Depo. at 215; Leffler Decl. 25; Giles Decl. 6. Plaintiffs assert, however, that the Hospital has caused injury to Blue Ridge's outpatient business by pressuring referring physicians to refer outpatients to the Hospital rather than Blue Ridge, and by disparaging the skills of plaintiffs. The record does not support these contentions. The two allegedly pressured physicians have testified in depositions that no such pressure was imposed. Ellison Depo. at 40; Madison **[*37]** Depo. at 20, 33-34.

The only other evidence of such pressure offered by plaintiffs is Dr. Howerton's Affidavit statement that he has been told by unnamed referring physicians that they are "afraid" to refer outpatients to Blue Ridge because of the supposed threat of Hospital retaliation. Howerton Aff. 32. This statement is insufficient to raise a plausible inference of causation. *Ottensmeyer v. Chesapeake & Potomac Tel. Co., 756 F.2d 986, 992 (4th Cir. 1985)* (unsupported conclusory assertions by plaintiff are insufficient to defeat summary judgment on an antitrust claim). Not only is the statement hearsay, it says nothing to suggest that this supposed fear is based upon actual threats communicated to physicians by the Hospital or has any other rational basis. No physician corroborates Dr. Howerton's claim. Moreover, it is contradicted by the record evidence cited above which shows that large numbers of the medical staff do refer outpatients to Blue Ridge, and that numerous physicians obviously had no fear of the Hospital when they submitted declarations on behalf of plaintiffs.

Plaintiffs' allegation of causal injury from the alleged disparagement is similarly defective. Although **[*38]** one physician's affidavit states that the Hospital's Administrator and attorney justified plaintiffs' exclusion from the Hospital Radiology Department by disparaging plaintiffs' skills and services, there is no evidence that the alleged disparagement caused any physician to refer fewer outpatients to Blue Ridge. Without such proof of causation, plaintiffs disparagement allegations are insufficiently speculative and cannot form the basis of an antitrust action. [11]

[*39] The only other evidence of causation presented by plaintiffs is the opinion testimony of their economic expert, Dr. Keith B. Leffler. Dr. Leffler opines that, as a result of the exclusive contract between Grace and PMI, (1) plaintiffs' outpatient revenues will continue to decline, (2) defendants have increased their shares of the outpatient markets, (3) outpatients in Morganton pay higher prices, (4) the quality of radiology services received by outpatients in Morganton has been adversely affected, and (5) there has been anti-competitive impact in the outpatient market. Leffler Decl. 22, 25, 26, 27, 28. This opinion testimony, however, is based on "facts" which are unsupported and contradicted by the record, and, as such, is insufficient to defeat summary judgment. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict"); *Military Services Realty, Inc. v. Realty Consultants of Virginia, Ltd., 823* ***[*40]*** *F.2d 829, 832 (4th Cir. 1987)* (an expert affidavit must provide a "factual predicate for its theoretical conclusion…. [A party] cannot thwart the purposes of *Rule 56* by creating issues of fact through affidavits that contradict its own depositions").

Dr. Leffler's opinions concerning causation are based upon two types of factual assertions, each of which is unsupported by the record. First, Leffler relies upon a number of assertions suggesting that physicians are

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[11] See generally III P. Areeda & D. Turner, ***Antitrust Law*** 738a, 738c (1978) (because "the effects upon a rival would usually be very speculative," disparagement claims should "presumptively be ignored," and should be recognized only where there exists "cumulative proof that the representations were clearly false, clearly material, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter, continued for prolonged periods, and not readily susceptible of neutralization or other offset by rivals"); *Abcor, 916 F.2d at 931* (to allow federal antitrust claims based upon allegations of disparagement and other similar allegations of "unfair competition," would be contrary to the intent of the antitrust laws).

"required," or are "influenced" by the Hospital, to refer outpatients to the Hospital rather than to Blue Ridge. [12] **[*41]** However, even Dr. Leffler himself concedes that referring physicians are free to choose to refer outpatients to either provider. Leffler Decl. at 25; Leffler Depo. at 215. Moreover, as noted above, there is no evidence that any physicians, even those identified by plaintiffs and by Dr. Leffler, have been pressured or influenced to refer outpatients to the Grace Hospital Radiology Department. [13]

Second, Dr. Leffler's opinions rely upon the unsupported factual assertions that the Plaintiffs' inability to practice at the Hospital has indirectly injured Blue Ridge in the outpatient market. Specifically, Dr. Leffler opines that Blue Ridge has lost, and will continue to lose market share (as measured by percent of total **[*42]** revenue) because plaintiffs' exclusion from the Hospital has precluded them from establishing a good working relationship with referring physicians, particularly those arriving in Morganton subsequent to plaintiffs' exclusion. [14]

[*43] The record evidence shows, however, that plaintiffs have established a good working relationship with both long-established and newly arrived referring physicians. Plaintiffs have maintained contact with referring physicians not only by performing outpatient procedures, but also through promotional visits to approximately 12 physicians' offices. Howerton Depo. (8/17-19/92) at 261. Moreover, this continued good working relationship is evidenced by the fact that a majority of the Grace Hospital staff signed the petition in support of plaintiffs, and by the numerous physician affidavits attached to their Memo in Opposition. Howerton Aff. 31 Ex. A; Antley Decl. at 7. Accordingly, as noted above, not only is there no evidence of injury, but the evidence also shows (1) that the number of referrals from Grace physicians to Blue Ridge (and Blue Ridge revenues) have steadily increased, (2) that new physicians with no previous experience with plaintiffs at Grace have referred patients to Blue Ridge, and (3) that no Grace physician, whether long-established or newly arrived, has decreased referrals to Blue Ridge. Antley Aff. 12-13; Howerton Depo. (12/18/92 P.M.) at 21-26. [15]

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[12] See Leffler Decl. 26 (stating that a number of physician declarations "indicate that these doctors' choice of radiologist to read their outpatient films and their choice of outpatient center have been influenced by the exclusion of Blue Ridge from Grace"); Leffler Decl. 27 (stating that "the referring physicians' choice of outpatient radiology supplier has been influenced by the exclusionary contract"); Leffler Decl. 28 (stating that "where a consumer in a market, contrary to his preference is required to pay a higher price for a lower quality product, the presence of anti-competitive impact in the market is beyond doubt").

[13] Ellison Depo. at 40; Madison Depo. at 20, 33-34. With respect to the physician declarations cited in support of this proposition in paragraph 26 of Dr. Leffler's Declaration, only two even mention the Hospital's outpatient services, and these two merely state that if there were no exclusive contract, "I would have an alternative from which to choose a radiologist … with respect to … outpatient examinations, which I sometimes prefer to have done at the hospital." Dellinger Decl. 8 (emphasis added); Deekens Decl. 6. The declarations do not state that their choice to have occasional outpatient radiology work done at the Hospital has been influenced in any way by the exclusive contract for inpatient radiology services, or by any other conduct by the Hospital.

[14] See Leffler Decl. 22 ("According to Dr. Howerton, a differentially large portion of the clinic's referrals come from hospital colleagues with whom Blue Ridge has developed an ongoing relationship during Dr. Howerton's 27 year tenure at Grace…. Therefore, as physicians retire from the Grace staff and are replaced by new physicians who have no historical relationship with Blue Ridge, the revenues at the clinic will continue their decline"); Leffler Decl. 25 ("According to Richard Dorson of the American College of Radiology, referrals to freestanding outpatient center such as Blue Ridge will be reduced when the radiologists staffing the outpatient center 'are unable to establish a regular, full service relationship with referring doctors'"); Leffler Decl. 25 ("the ability to establish a working relationship and demonstrate one's skill by performing the complex radiology procedures frequently required of inpatients generates outpatient referrals").

[15] Dr. Howerton states that Blue Ridge "does not receive very many referrals from the newer members of the medical staff who have joined since 1990." Howerton Aff. 30. This statement, however, simply reflects the fact that 52 non-radiologist physicians were on the active staff prior to the termination of Plaintiffs' contract, and that only 9 non-radiologist physicians have since joined the active staff. Eisenstadt Depo., Ex. 5. Dr. Howerton does not state that he receives a higher percentage of the patients of long-established physicians than he does from newer physicians, and therefore, this testimony does not support Dr. Leffler's conclusion that Blue Ridge's revenues will "continue" to decline.

Mr. Dorson's affidavit, upon which Dr. Leffler also relies, states that where radiologists are unable to serve inpatients, he "would expect the number of referrals to the outpatient facility [operated by the radiologists] to decrease significantly because these radiologists would be unable to establish a regular, full service relationship with the referring physicians." Dorson Aff. at 5. As

[*44] All of Dr. Leffler's opinions addressing the alleged causal link between inpatient access and success in the outpatient technical services market are factually baseless. *Military Services Realty, 823 F.2d at 832*. As a result, plaintiffs' claims are indistinguishable from those of the above-cited cases which have consistently held that physicians' displacement from a hospital as a result of an exclusive contract does not constitute antitrust injury.

2. Monopolization and Attempted Monopolization

Even if plaintiffs had produced sufficient plausible evidence of antitrust injury, their claims would nevertheless not survive summary judgment because of their failure to meet their burden of proof with respect to their substantive claims. As noted above, plaintiffs have the burden of proving each element of each cause of action, and cannot defeat summary judgment with evidence that is "merely colorable" or "not sufficiently probative." *Anderson, 477 U.S. at 249-50*; *M & M Medical Supplies & Service, Inc. v. Pleasant Valley Hosp., 981 F.2d 160, 163 (4th Cir. 1992)*; *Advanced Health-Care, 910 F.2d at 147*. With respect to their monopolization claim, plaintiffs must demonstrate: **[*45]**

> (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265, 292-93 (1992). In order to succeed on their attempted monopolization claim, plaintiffs must prove:

> [1] a specific intent to monopolize a relevant market, [2] predatory or anti-competitive acts, and [3] a dangerous probability of successful monopolization.

Advanced Health-Care, 910 F.2d at 147; *M & M Medical Supplies, 981 F.2d at 160*. As plaintiffs recognize in their Memorandum in Opposition, both theories require plaintiffs to prove that defendants have engaged in conduct deemed to be "exclusionary," "anti-competitive," or "predatory." See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*; ABA Antitrust Section, ***Antitrust Law*** Developments 261 (3d ed. 1992). Before reaching this issue, however, the undersigned will examine the **[*46]** evidence concerning the Hospital's market power in the relevant markets.

a. Monopoly Power

Plaintiffs have failed to show that Grace Hospital possesses monopoly power in the allegedly monopolized market for outpatient technical radiology services. Despite finding that the Hospital possesses monopoly power in the market for inpatient technical radiology services, plaintiffs' economic expert apparently did not find sufficient evidence to justify a similar conclusion with respect to the outpatient technical radiology services. Leffler Decl. 6.d. Dr. Leffler merely concludes that "Grace has maintained market power in the outpatient technical radiology services market." Leffler Decl. 6.i (emphasis added).

Plaintiffs are not entitled to a presumption of monopoly power based upon their assertion that Grace Hospital possessed 70% of the outpatient technical services market in 1991 and 73% in 1992. Kennedy Aff. 4. [16] As noted above, there are significant price differences of approximately 47% between the technical services offered at Grace and Blue Ridge, and therefore the use of market shares calculated as a percentage of total revenue is inappropriate. See *Brown Shoe Co.,* ***[*47]*** *370 U.S. at 341 n.69*. [17] Calculating market share as a percent of the

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noted above, however, Dr. Dorson's expectations are contradicted by the record evidence that referrals have increased, and therefore, his testimony, like that of Dr. Leffler's, is insufficient to demonstrate causal antitrust injury.

[16] Throughout discovery, the experts of both Plaintiffs and Defendants experts calculated market shares based on the number of procedures performed at Blue Ridge. See, e.g., Kennedy Depo., Ex. 5, Ex. 32; Eisenstadt Depo. Ex. 1, Ex. IV. Only in his affidavit submitted with Plaintiffs' Memorandum in Opposition did Plaintiffs' expert change the basis of his calculations to total revenues.

[17] As noted in the Findings of Fact, the higher charges at Grace Hospital reflect the fact that Grace Hospital has significantly higher overhead costs -- principally attributable to the fact that it is open 7 days per week, 24 hours per day and handles

number of procedures performed, Grace Hospital's market share has steadily declined to 51% in October of 1992 -- a percentage which does not give rise to a presumption of monopoly power. Eisenstadt Depo., Ex. 1, Ex. IV.

[*48] Finally, plaintiffs have failed to produce sufficient evidence to support their assertion that Grace's monopoly power is evidenced by Grace's maintenance of market share despite its higher-priced and lower-quality outpatient radiology services. As noted above, the evidence actually shows that the proportion of outpatients seeking services at Blue Ridge has steadily increased, as would be expected if Grace's outpatient services were more expensive and of lesser quality. Eisenstadt Depo., Ex. 1, Ex. IV; Antley Decl. 12-13. The undersigned concludes that summary judgment should be granted for defendants on the monopolization claim, because there is no evidence to suggest that Grace Hospital has monopoly power in the market for outpatient technical radiology services.

b. Anti-competitive, Exclusionary or Predatory Acts

Even if plaintiffs had produced sufficient evidence to raise an inference of monopoly power, plaintiffs' monopolization claim would fail as a matter of law because of the lack of evidence of predatory or exclusionary acts. For this same reason, plaintiffs' attempted monopolization claims also cannot survive summary judgment.

Plaintiffs' assertion that the Hospital's **[*49]** exclusion of Blue Ridge from the Radiology Department constitutes predatory conduct under *Section 2* is incorrect as a matter of law. As the Fourth Circuit recently recognized, "'[a] firm with lawful monopoly power has no general duty to help its competitors.'" *North Carolina Electric Membership Corp. v. Carolina Power & Light Co., 1993 Trade Cas. (CCH) 70,264, at 70,320 (4th Cir. 1993)* (quoting *Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986)*, cert. denied, *480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574 (1987))*; *Abcor Corp., 916 F.2d at 929* (quoting Olympia Equip. for the same proposition). [18]

[*50] "The lone exception to this 'no-duty-to-help-competitors' rule is the 'essential facilities doctrine.'" *North Carolina Electric, at 70,320* (emphasis added). However, plaintiffs have stated that they are "not pursuing [an essential facilities claim] in this case." Plaintiffs' Memorandum in Opposition at 63, 82 n.92. Moreover, even if plaintiffs had asserted such a claim, the claim could not survive summary judgment simply because plaintiffs have been able to duplicate (and actually improve upon) the Hospital's radiology equipment and facilities. Howerton Aff. 18. [19] As a matter of law, therefore, Grace Hospital's refusal to assist its outpatient competitor by allowing inpatient access cannot constitute predatory conduct.

Plaintiffs' reliance on the Fourth Circuit's **[*51]** decisions Advanced Health-Care and M & M Medical Supplies for any different proposition is misplaced. Both cases involved allegations that the defendant hospitals had monopolized or attempted to monopolize the downstream market for durable medical equipment (DME) by directing or steering discharged hospital patients to DME suppliers either owned by, or affiliated with, the defendant hospitals. *Advanced Health-Care, 910 F.2d at 142*; *M & M Medical Supplies, 981 F.2d at 167*. In both cases, the plaintiffs were already established and successful DME suppliers at the time of the hospitals' alleged predatory conduct, and, again in both cases, the plaintiffs clearly suffered precipitous declines in market share as a direct

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emergency room patients. See Shull Depo. (11/19/92) at 35. Blue Ridge is open five days per week and closes at 5:30 p.m. See Antley Depo. (12/12/92) at 3-4.

[18] See also *Olympia Equip., 797 F.2d at 375* ("A monopolist has … no duty to extend a helping hand to new entrants;" "the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors"); *McKenzie v. Mercy Hosp. of Independence Kansas, 854 F.2d 365, 368 (10th Cir. 1988)* (holding that hospital not liable under *Section 2* for denying access to plaintiff physician because "a competitor in a market is free to choose the parties to whom it will offer its products or services"); *Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990)* (the antitrust laws do "not require one competitor to give another a break just because failing to do so offends notions of fair play").

[19] As one of the necessary elements of an essential facilities claim, a plaintiff must prove an "inability practically or reasonably to duplicate the essential facility." *Advanced Health-Care, 910 F.2d at 150* (citation omitted).

result of the hospitals' conduct. In Advanced Health-Care, the defendant hospitals began requiring that all of their patients receive discharge services and DME exclusively from the hospitals' affiliated DME companies. *910 F.2d at 142-43*. As a direct result of that conduct, the plaintiffs' sales were absolutely "prohibited" in one market and "diminished to virtually nothing" in another. Id. [20] Similarly, in M & M Medical Supplies, the defendant **[*52]** hospital opened a wholly owned DME subsidiary and proceeded to engage in a variety of objectionable conduct, including the direct ordering of DME from the subsidiary without even consulting with the discharged patients for whom the equipment was being ordered. *981 F.2d at 162, 167*. Subsequently, the plaintiff's gross revenues fell by 75%. *Id. at 162*.

Unlike the plaintiffs in Advanced Health-Care and M & M Medical Supplies, plaintiffs were new entrants in the market for outpatient technical radiology services, who were able, despite the alleged predatory conduct of the defendants, to steadily increase their physician referrals, their procedures performed, and their total market share from 0% to 49%. Howerton (12/18/92 P.M.) at 11-25; Howerton Depo. (8/17-19/92) **[*53]** at 234-43; Antley Decl. 12-13; Eisenstadt Depo., Ex. 1, Ex. IV. Even using plaintiffs somewhat misleading calculation of market share, Blue Ridge's share of total outpatient technical radiology revenue has increased from 0% to at least 27% during the relevant time period. Kennedy Aff. 4.

Moreover, unlike the defendant hospitals in the DME cases, Grace Hospital has never required or directed staff physicians or patients to use the Hospital's outpatient radiology services rather than those of Blue Ridge. Leffler Depo. at 215. Rather, physicians are free to choose where to refer their outpatients, and they frequently and increasingly have been choosing to refer to Blue Ridge. Leffler Decl. 25; Giles Decl. 6; Howerton Depo. (12/18/92 P.M.) at 11-25. As noted above, plaintiffs' assertions that the Hospital has pressured physicians to refer to the Hospital, and that the Hospital has harmed Blue Ridge by disparaging plaintiffs' skills, are not supported by the record. [21] Thus, Advanced Health-Care and M & M Medical are inapposite not only because plaintiffs have shown no exclusionary effect, but also because plaintiffs have shown no analogous evidence that defendants directed -- **[*54]** or even attempted indirectly to influence or direct -- outpatients away from Blue Ridge. [22]

3. Monopoly Leveraging Claim

The Fourth Circuit has not yet expressly recognized monopoly leveraging as **[*55]** an independent *Section 2* claim. *M & M Medical Supplies, 981 F.2d at 160* (reserving question until factual record more fully developed; *Advanced Health-Care, 910 F.2d at 149 n.17* (same). Because the theory would allow a plaintiff to recover under *Section 2* without a showing of monopolization or a dangerous probability of monopolization in the leveraged market, an increasing number of other circuits have explicitly concluded that monopoly leveraging is not a cognizable *Section 2* claim. [23]

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[20] In Advanced Health-Care, the court was ruling on the propriety of the District Court's dismissal under *Fed. R. Civ. P. 12(b)(6)*, and therefore, the court accepted the allegations of the plaintiff's complaint as true. *910 F.2d at 143*.

[21] As noted in the discussion of antitrust injury, there is not even any evidence that lack of access to the Hospital has adversely affected Blue Ridge in the outpatient market.

[22] Likewise inapposite is the decision in *Aspen Skiing Co., 472 U.S. at 585*, in which the defendant terminated a 16-year-old cooperative venture with plaintiff, a competing ski area operator, which was indispensable to competition. In the present case, there is no evidence that access to the Hospital is indispensable to outpatient competition. Moreover, the Hospital and Blue Ridge were not competitors prior to the opening of the Blue Ridge outpatient facility when plaintiffs had access to the Hospital, and therefore there was never any such longstanding cooperative agreement between competitors. Antley Depo. (5/4/92) at 283.

[23] See, e.g., ***Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992)***, cert. denied, ***61 U.S.L.W. 3523 (1993)***; *Alaska Airlines Inc. v. United Airlines, Inc., 948 F.2d 536, 547*, cert. denied, ***113 S. Ct. 814 (1992)***; see also *Fishman v. Estate of Wirtz, 807 F.2d 520, 541 n.18 (7th Cir. 1986)*; *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n, 236 U.S. App. D.C. 311, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984)*.

However, even if the Fourth Circuit **[*56]** were to recognize monopoly leveraging, the plaintiffs' claims under this theory would nevertheless not survive summary judgment. In order to recover under a monopoly leveraging claim, plaintiffs would have to prove:

> [1] that the defendant possessed monopoly power, [2] that it used that power to gain an unwarranted competitive advantage in a second district market, and [3] that there was causal antitrust injury to the leveraged market.

Advanced Health-Care, 910 F.2d at 149 (citation omitted). Plaintiffs allege that by excluding them from the only facility in which inpatient radiology services may be provided, Grace Hospital has leveraged its inpatient monopoly to gain an unwarranted advantage in the market for outpatient technical services. However, there is no evidence of any causal injury to Blue Ridge in that outpatient market. Moreover, as noted above, there is no duty under *Section 2*, absent evidence of an essential facility, for Grace Hospital to help its competitor by providing plaintiffs with access to the Radiology Department. *North Carolina Electric, supra, at 70,320*.

4. Conspiracy to Monopolize

Because the evidence establishes that Grace Hospital **[*57]** acted unilaterally in deciding to terminate the Blue Ridge contract and to enter into an exclusive contract with PMI, plaintiffs' conspiracy to monopolize claim cannot survive summary judgment. *White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 103 (4th Cir. 1987)* (where "the evidence conclusively establishes that the hospital's board acted unilaterally" in deciding that radiologists alone could provide official interpretations of CT scans); *Steuer, 672 F. Supp. at 1517, 1521* ("the record … unequivocally supports defendants' claim that they acted unilaterally in deciding not to renew the [plaintiffs'] Agreement, and in deciding to enter into the [defendant pathologist's] Contract").

As in these cases, the evidence shows that Grace Hospital acted unilaterally in deciding to terminate the Blue Ridge contract, and in deciding to contract with other radiologists. Keir Depo. (2/10/92) at 9-10. Indeed, the Board resolution stating that the Blue Ridge contract would be terminated if Blue Ridge proceeded with its plans for the outpatient facility was passed in 1986. Meals Aff., Ex. 29. Moreover, in the meetings with Dr. Mull which followed the decision to terminate the Blue **[*58]** Ridge contract, it was the Hospital which proposed that any contract with PMI would be exclusive. Keir Depo. (10/25/91) at 94; Mull Aff. 5; plaintiffs' Memorandum in Opposition at 93. The evidence that PMI refused to relinquish the exclusivity provision in its contract after several physicians so requested is insufficient to demonstrate conspiracy. *White, 820 F.2d at 101*.

5. Tying Arrangement

Neither of plaintiffs' tying claims is viable under *Section 1* of the Sherman Act. In the first tying claim, plaintiffs assert that the Hospital has tied the provision of inpatient technical services to the purchase of inpatient professional radiology services. This claim fails as a matter of law because the Hospital neither competes in the market for inpatient professional radiology services, nor receives any portion of the fee from the provision of these professional radiology services. Wilson Aff. 6; Mull Depo. (8/20/92) at 6; *White, 820 F.2d at 104* (tying claim failed where hospital did not compete in market for professional CT scan services, the allegedly tied product).

The second tying claim, in which plaintiffs allege Hospital tying of inpatient technical radiology services to **[*59]** outpatient professional services, similarly fails because the hospital does not compete in the market for the tied product. Moreover, this second claim also fails because no patient or referring physician is forced to purchase outpatient professional radiology services from PMI as a condition of obtaining inpatient technical radiology services. Leffler Depo. at 215; Jefferson Parish, 466 U.S. at 12 n.17. ("where the buyer is free to take either product by itself there is no tying problem").

6. Exclusive Dealing

Plaintiffs' assertion that the PMI contract constitutes an illegal exclusive dealing arrangement under *Section 1* fails because plaintiffs have not made the required showing, under the rule of reason, that the arrangement substantially and unreasonably foreclosed competition among producers or suppliers in the relevant market. *Jefferson Parish*

Hosp. District No. 2 v. Hyde, 466 U.S. 2, 44-45, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)(O'Connor, J., concurring); *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*; *Steuer, 672 F. Supp. at 1515*.

In the market in which radiologists compete for employment or hospital contracts, **[*60]** plaintiffs can show no harm to competition because the evidence suggests that this market is nationwide, [24] and therefore incapable of being affected by a single exclusive contract. *Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 479* (7th Cir.), cert. denied, *488 U.S. 852, 102 L. Ed. 2d 110, 109 S. Ct. 137 (1988)*; *Steuer, 672 F. Supp. at 1516*.

In the inpatient professional and outpatient technical radiology services markets, there is similarly no evidence of unreasonable harm to competition. First, in the inpatient professional services market, the mere switching of exclusive physician providers cannot constitute harm to competition -- even where the displaced physicians, like plaintiffs, did not technically have an exclusive contract, but effectively faced no competition in the hospital. *Steuer, 672 F. Supp. at 1502* & n.7, aff'd, No. 87-3753, slip op. at 3 n.5 ("Although the prior contracts **[*61]** between Steuer & Latham and the hospital included no exclusivity provisions, the doctors received all of the pathology work that the hospital generated"). [25]

Second, in the outpatient technical services market, as discussed above, plaintiffs have presented no plausible evidence that competition in this outpatient market has been adversely affected by the PMI contract. [26] There is no evidence **[*62]** that the exclusive contract has caused any physicians or patients to seek outpatient services from the Hospital rather than from Blue Ridge. [27] **[*63]** Patients and physicians are free to use either the Hospital or Blue Ridge for outpatient procedures, where before their only choice was the Hospital. See Coffey v. Healthtrust, Inc., No. CIV-89-840-A, slip op. at 15-16 (W.D. Okla. Sept. 4, 1990), aff'd, *955 F.2d 1388 (10th Cir. 1992)* (where plaintiff radiologist's exclusive hospital contract was terminated after he expanded his competing outpatient center, there was no rule of reason violation, because "the public now has the advantage of choosing between two providers"). [28]

As the Fourth Circuit unequivocally stated in rejecting a similar claim, "it is frivolous to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act." *Harron, 522 F.2d at 1134*. To hold otherwise "would be a sudden departure from a long established custom that has never **[*64]** been

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[24] Antley Depo. (7/13/92) at 31-32, 39; Antley Depo. Ex. 1; Leffler Depo. (12/2-4/92) at 302.

[25] The mere fact that the PMI contract has a four-year term with no terminable-at-will clause does not constitute evidence of a new insulation from competitive pressures, where, as here, it is clear that Plaintiffs were similarly insulated while at the Hospital. Howerton Depo. (12/18/92 P.M.) at 30-31. (when setting prices, Dr. Howerton never considered the possibility that other radiologists might be brought into the hospital to compete); *Jefferson Parish, 466 U.S. at 31* ("without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws") (emphasis added).

[26] *Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 11 (1st Cir. 1987)* ("when there is no plausible connection between exclusive dealing and antitrust harm, courts have not hesitated to hold that dealing lawful").

[27] In addition, as also noted above, even if there were evidence that the PMI contract alone indirectly caused a decrease in referrals to Plaintiffs' facility, that evidence would not suffice to show injury to competition rather than to a competitor. As Dr. Leffler recognized, where no provider has monopoly power in a market, and when patients and physicians have a choice of provider, there can be no harm to competition. Leffler Decl. 30.

[28] Although Plaintiffs allege that the Blue Ridge facility is not viable without access to the Hospital, the Plaintiffs have offered no plausible evidence that this purported lack of viability is the result of Plaintiffs' exclusion from the Hospital. If Plaintiffs are simply asserting that the facility is not viable because the Hospital has effectively prevented Plaintiffs from cross-subsidizing with inpatient professional service revenues, this assertion is clearly not cognizable under the antitrust laws. *Olympia Equip., 797 F.2d at 376* ("if a firm went to a monopolist and said, 'Please -- for the sake of competition -- give me a loan so I can compete with you and make this a competitive market,' and it was turned down, it could not invoke the Sherman Act").

found illegal.... Exclusive contracts between hospitals and physicians, (especially radiologists), are standard fare and violate no law." Coffey, slip op. at 24. [29]

7. Unreasonable Restraint of Trade

For the same reasons, defendants must also prevail with respect to plaintiffs' unreasonable restraint of trade claim, which, like the exclusive dealing claim, must be analyzed under the rule of reason. *Jefferson Parish, 466 U.S. at 29* (plaintiff has the burden of proving an unreasonable restraint on competition). [30] To the extent plaintiffs are alleging that the Hospital and PMI engaged in a conspiracy to restrain trade, plaintiffs' claim is deficient for the same reasons discussed with respect **[*65]** to the conspiracy to monopolize claim. [31]

[*66] RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED that defendants' motions for summary judgment be ALLOWED.

The parties are hereby advised that, pursuant to *28, United States Code, Section 636(b)(1)(C)*, written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within 30 days of service of same. Due to the complexity of this case, and with the concurrence of the district court, the time for filing objections provided by the statute has been enlarged *sua sponte.*

Failure to file objections to this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. *Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985)*, reh'g denied, *474 U.S. 1111, 88 L. Ed. 2d 933, 106 S. Ct. 899 (1986)*; *United States v. Schronce, 727 F.2d 91* (4th Cir.), cert. denied, *467 U.S. 1208, 81 L. Ed. 2d 352, 104 S. Ct. 2395 (1984)*.

This Memorandum and Recommendation is entered in response to Piedmont Medical Imaging, P.C.'s Motion for Summary Judgment (#__) and Grace Hospital, Inc.'s Motion for Summary Judgment (#__).

This 13th day of September, **[*67]** 1993.

J. TOLIVER DAVIS

UNITED STATES MAGISTRATE JUDGE

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[29] The sole case cited by Plaintiffs in which an exclusive physician contract was held to violate *Section 1* is inapposite because it involved a clear elimination of professional anesthesia competition orchestrated by anesthesiologists. *Oltz v. St. Peter's Community Hosp., 861 F.2d 1440* (9th ed. 1988).

[30] Plaintiffs are mistaken in suggesting that Defendants have the burden of demonstrating the pro-competitive effects of the agreement. Plaintiff's Memorandum in Opposition at 105. As noted above, the initial burden to prove adverse competitive effects is on the plaintiff, and the existence of pro-competitive justifications is relevant only after such a showing has been made. Areeda and Turner, ***Antitrust Law***, 1502 at 371-72.

[31] As briefly discussed in finding 56 supra, plaintiffs have offered a summary of their "Evidence Regarding Causation," which they contend cites specific evidence of anti-competitive and monopolistic intent on the part of defendants. For the limited purpose of the pending motions, the undersigned has drawn the suggested inference from plaintiffs' proffer. While plaintiffs have cited Supreme Court dicta to suggest that some unspecified antitrust liability may result from evidence of intent alone, the Supreme Court has clearly held, when actually applying the rule of reason, that "without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws." *Jefferson Parish, 466 U.S. at 31*; see also Steuer, 672 F.2d at 1504 (rule of reason requires showing of "substantially adverse" effect). As noted above, plaintiffs have made no such showing.

Flegel v. Christian Hosp. Northeast-Northwest

United States Court of Appeals for the Eighth Circuit

June 16, 1993, Submitted ; September 14, 1993, Filed

No. 92-3773

Reporter

4 F.3d 682 *; 1993 U.S. App. LEXIS 23354 **; 1993-2 Trade Cas. (CCH) P70,355

Gerhard Flegel, D.O.; Richard Still, D.O., Appellants, v. Christian Hospital, Northeast- Northwest; Michael R. Richmond; Robert P. Margolis; Richard A. Blath; Donald A. Blum; Wilfrido C. Feliciano; Richard J. Kloecker; Stephen N. Bell; Clarence M. Benage; Leon Bialecki; Alan C. Craig; Godofredo M. Herzog; James Debnam; Barbara Ellzey; Joshua Jensen; Loretta May Roberts; Arturo C. Montes; David M. Near; Edward A. Puro; Sanford E. Rabushka; John L. Rollo; William P. Svancarek; Alan F. Tess; Thomas J. Banton, Jr.; Mariano N. Floro, Jr.; Robert H. Halley; William F. Hoffman; Gerald W. Moritz; Gerald Newport; Sharad P. Parikh; Ebello T. Pasia; Thomas E. Shine; George T. Shuert; Mardonio J. R. Yap; Yoram Hahn; Carl S. Ingber; David Landau; Michael Matar; Thomas E. Ryan; Ivan W. Sletten; Mark L. Travis; Gloria Wattler; William E. Dreyer; Paul J. McKee; Ned Taddeucci; Arthur J. Seewoester; Leo I. Mirowitz; Arnold J. Millner; David M. Margolis; Mary J. Lee; Leonard R. Kostecki; Paul Kohnen; Gerry Kamenko; Paul F. Detrick; Fred L. Brown; Peter W. Callow, Appellees.

Subsequent History: **[**1]** Rehearing Denied October 14, 1993, Reported at: *1993 U.S. App. LEXIS 26757*.

Prior History: Appeal from the United States District Court for the Eastern District of Missouri. District No. 90-1290-C(5). Honorable Stephen Limbaugh, District Judge.

Disposition: Affirmed

Core Terms

patients, market power, privileges, rule of reason, district court, urologists, boycott, summary judgment, relevant market, anticompetitive, detrimental effect, urological, providers, training, staff privileges, Sherman Act, anesthesiologist, osteopathic, geographic, decisions, referrals, cases, no evidence, consumers, staff, violation of section, reasonably find, antitrust, possesses, effects

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN1[] **Summary Judgment, Burdens of Proof**

In reviewing a grant of summary judgment, the reviewing court applies the same standard as does the district court, and views the evidence most favorably to the nonmovant, granting all reasonable inferences in the nonmovant's favor as well.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies.

Civil Procedure > Judgments > Summary Judgment > General Overview

HN3[] **Judgments, Summary Judgment**

When neither motive nor intent are determinative, summary judgment may be particularly useful.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN4[] **Antitrust & Trade Law, Sherman Act**

A restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "per se" unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. If an alleged restraint falls within the category of restraints subject to per se analysis, a plaintiff need not prove its anticompetitive effects. The courts of appeals have generally examined the denial or revocation of hospital privileges under the rule of reason.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Practices Governed by Per Se Rule, Boycotts**

The category of restraints classed as group boycotts is not to be expanded indiscriminately, and the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor. Moreover, the court has been slow to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Practices Governed by Per Se Rule, Boycotts**

Only certain boycotts are unlawful per se. Nonetheless, the distinction between boycotts that are and those that must be tested under the rule of reason is less than crystal clear. The line can best be drawn, however, by following the analysis used to separate per se and rule of reason cases in general. Thus, the per se rule should be invoked for a group boycott when the challenged activity would almost always tend to be predominantly anti-competitive.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Regulated Practices, Market Definition**

To determine the legality of a restraint of trade under the rule of reason, one must focus on the detrimental effects to competition, often by defining the relevant market and considering evidence of the defendant's power within that market. This is not always necessary, however. Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects. Either showing -- market power or actual detrimental effects -- shifts the burden to the defendant to demonstrate pro-competitive effects. The plaintiff, driven to this point, must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner, and the court then weighs the harms and benefits to determine if the behavior is reasonable on balance.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Regulated Practices, Market Definition**

Relevant markets are defined in terms of both geography and product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Regulated Practices, Market Definition**

Like any other issue, market definition is subject to summary judgment if the plaintiffs fail to provide sufficient evidence from which a jury could reasonably find in their favor.

Counsel: Counsel who presented argument on behalf of the appellant was Steven M. Hamburg of St. Louis, MO. Theresa Counts Burke appeared on the brief.

Counsel who presented argument on behalf of the appellee was Glenn E. Davis of St. Louis, MO. Richard Scherrer and Ann E. Buckley appeared on the brief.

Judges: Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

Opinion by: HEANEY

Opinion

[*684] **HEANEY,** Senior Circuit Judge.

Gerhard Flegel and Richard Still, doctors of osteopathy (D.O.s) who were denied privileges at Christian Hospital Northeast-Northwest, sued the hospital and a number of its board members, employees, and staff physicians for antitrust violations in the United States District Court for the Eastern District of Missouri. Flegel and Still alleged that the hospital and its staff had conspired to prevent them from having access to the market of patients who would otherwise have been referred to them had they been granted privileges. The defendants moved for summary judgment, arguing, *inter alia*, that Christian lacked sufficient market power within a properly defined relevant market for an antitrust violation to have occurred. The district court granted the defendants' motion in an order from which Flegel and Still have appealed. We affirm.

I

Christian is a private, not-for-profit hospital that operates from two locations in North St. Louis County, Missouri. [1] The hospital has **[**2]** 565 physicians on staff, fifty of whom are D.O.s. Flegel and Still sought to add to those numbers by becoming the first osteopathic urologists on the hospital's staff. They filed applications for privileges at Christian in the fall of 1988. Both applications underwent numerous levels of review and both were eventually denied. Although the stated reasons for those decisions have changed somewhat before and during the course of this litigation, Christian now claims that both decisions rested on inadequate specialty and subspecialty training, and some contemporaneous evidence supports that assertion.

At the time of their applications, both Flegel and Still were certified in urologic surgery by the American Osteopathic **[**3]** Association (AOA). Certification by the AOA required completion of a four-year training program, which could be comprised of two years in general surgery and two years in urologic surgery, as was the case with both Flegel and Still. The hospital found their training inadequate in that certification by the American Board of

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[1] The recitation of facts relies heavily (often verbatim) on the district court's somewhat more detailed factual description, to which Flegel and Still have offered no relevant objection. *See Flegel v. Christian Hosp. Northeast-Northwest, 804 F. Supp. 1165, 1168-71 (E.D. Mo. 1992)*.

Medical Specialties (ABMS), the allopathic equivalent to the AOA, required three years of training specifically in urologic surgery.

Shortly after Flegel and Still filed their applications, the hospital's department of surgery revised its guidelines to require that applicants either be certified or eligible to be certified by the ABMS. Previously, applicants could receive privileges if they were certified either by the ABMS or by the AOA. The hospital asserts that it took this action to increase the quality of care within the department, to improve the department's reputation, and to respond to recommendations **[*685]** made by hospital accrediting organizations such as the Joint Commission for Accreditation of Hospital Organizations. In addition to receiving three years of subspecialty training, the ABMS requires that such training take place in a program accredited by **[**4]** the Accreditation Council for Graduate Medical Education (ACGME). The district court found that positions in such programs can be extremely difficult to attain for D.O.s. Neither Flegel nor Still attended an ACGME-accredited training program.

II

Flegel and Still alleged three separate violations of the federal antitrust laws:

> (1) the defendants combined and conspired with one another to illegally boycott the plaintiffs from obtaining hospital staff privileges in violation of section one of the Sherman Act, *15 U.S.C. § 1*;
>
> (2) the defendants entered into a combination and conspiracy in unreasonable restraint of trade and commerce in violation of section one of the Sherman Act, *15 U.S.C. § 1*; and
>
> (3) the defendants entered into a contract, combination, or conspiracy to unlawfully prevent plaintiffs from obtaining active staff privileges at the hospital in violation of section two of the Sherman Act, *15 U.S.C. § 2*.

See Flegel, 804 F. Supp. at 1167. [2] By alleging an illegal boycott, the plaintiffs sought to prove a per se violation, **[**5]** but the district court found the per se analysis inapplicable and instead applied the so-called "rule of reason" to the remaining claims.

Our discussion proceeds as follows: after concluding that the alleged restraint is subject to the rule of reason rather than per se analysis, we consider whether the plaintiffs have provided sufficient evidence of actual detrimental effects on competition to obviate the need for a more detailed market analysis. Finding that they have not, we then consider the relevant geographic market definitions proposed by Flegel and Still, and the evidence of Christian's power within the appropriate market. Because plaintiffs have produced little evidence to support their assertion that Christian possesses dominant market power, we affirm the district court's **[**6]** grant of summary judgment to the defendants on that ground. [3]

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[2] Flegel and Still also alleged several pendent state law violations over which the district court refused to exercise jurisdiction. Given our disposition of the federal antitrust claims, we likewise need not reach the state law claims.

[3] Our resolution of the issues presented in this case has made it unnecessary for us to reach all of the issues presented on appeal. Defendants argue that they are immune from antitrust liability under the Health Care Quality Improvement Act of 1986. The district court failed to reach this issue, and it is likewise unnecessary for us to address it. Although cognizant of a split between the courts of appeals on the question whether, as a matter of law, a conspiracy can be proven in a hospital privileges case, we decline to address that issue as well. *See generally* Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation* § 52.03[1][b][ii] (1993). Even were we to rule in the plaintiffs' favor on this issue, both as to the legal possibility and the sufficiency of their evidence, the defendants would still be entitled to summary judgment. We consequently leave resolution of this issue for an appropriate case.

HN1[] In reviewing a grant of summary judgment, **[**7]** we apply the same standard as does the district court, and we view the evidence most favorably to the nonmovant, granting all reasonable inferences in the nonmovant's favor as well. *See Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1489-90 (8th Cir. 1992)*, *cert. denied*, *122 L. Ed. 2d 356, 113 S. Ct. 1048 (1993)*. "*HN2*[] In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies." *Id. at 1490*. *HN3*[] When neither motive nor intent are determinative, summary judgment may be particularly useful. *See id.*

In this case, neither motive nor intent are determinative. Although the district court found that the hospital treated M.D.s and D.O.s alike, applying the same standards to each, our analysis rests on no such assumption. Rather, we assume for the purposes of our decision that a jury could reasonably find that the hospital discriminated against Flegel and Still because they were osteopaths. We nonetheless hold that a jury could not reasonably **[*686]** find that the hospital's conduct amounted to an antitrust violation.

A

Flegel and Still first assert that the actions of the defendants **[**8]** that led the hospital to deny privileges to both of them amounted to a group boycott subject to per se analysis under section one of the Sherman Act.

> *HN4*[] [A] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "per se" unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 457-58, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986) (quoting *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918))* (*IFD*). If an alleged restraint falls within the category of restraints subject to per se analysis, a plaintiff need not prove its anticompetitive effects.

The courts of appeals have generally examined the denial or revocation of hospital privileges under the rule of reason, *see*, *e.g.*, *Oksanen v. Page Memorial Hosp., 945 F.2d 696, 708-09 (4th Cir. 1991)* (en banc), *cert. denied*, **[**9]** *117 L. Ed. 2d 137, 112 S. Ct. 973 (1992)*; *Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1411-12* (9th Cir.), *cert. denied*, *116 L. Ed. 2d 639, 112 S. Ct. 617 (1991)*; *Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1445 n.1 (9th Cir. 1988)*; *Goss v. Memorial Hosp. Sys., 789 F.2d 353, 354-55 (5th Cir. 1986)*, but Flegel and Still argue that these cases have involved individual determinations of incompetence or unprofessional conduct rather than exclusion of a class of medical service providers such as D.O.s. The plaintiffs direct our attention to *Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984)*, *cert. denied*, *470 U.S. 1060 (1985)*, in which York Hospital was alleged to have engaged in "strict scrutiny" of all applications by D.O.s for privileges, a practice that often resulted in decisions to deny privileges, while essentially rubber-stamping applications by M.D.s. *See id. at 795*. The district court had instructed the jury that this practice was subject to a per se analysis, and the Third **[**10]** Circuit agreed:

> The Medical Staff is . . . entitled to exclude individual doctors, including osteopaths, on the basis of their lack of professional competence or unprofessional conduct. If York's policy toward D.O.'s could be viewed as a form of industry self-regulation of this type, the rule of reason, rather than a *per se* rule, would be applicable. We recognize, therefore, that in many cases involving exclusion from staff privilege, courts will . . . have to utilize a rule of reason balancing approach. This case is different, however, because York has not contended that osteopaths as a group are less qualified than M.D.s. In the absence of such a contention, or another legitimate explanation for the discrimination, we conclude that a *per se* rule should be applied, since the effect of the practice is identical to that of the traditional boycott, and plainly anticompetitive.

Id. at 820 (citations and footnote omitted).

Christian counters that the *Weiss* decision is unpersuasive because it precedes the Supreme Court's decisions in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*, **[**11]** and *IFD*, in which the Court indicated a reluctance to expand the category of group boycotts to which *per se* analysis should be applied:

> ***HN5***[] The category of restraints classed as group boycotts is not to be expanded indiscriminately, and the per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . . . Moreover, we have been slow . . . to extend per se analysis to restraints imposed in the
>
> context of business relationships where the economic impact of certain practices is not immediately obvious.

[*687] *IFD*, 476 U.S. at 458-59 (citation omitted). In both cases the Court held per se analysis inapplicable, and the defendants urge us to do likewise in this case.

The plaintiffs' arguments fail in two respects: first, their assertion that all relevant decisions other than *Weiss* have involved individualized determinations of incompetence or unprofessional conduct is incorrect; and second, even under the *Weiss* court's reasoning, the rule of reason should be applied to this case.

Although several of the relevant **[**12]** decisions by the courts of appeals have involved individualized denial or revocation of privileges, that cannot be said of all such cases. Two relevant decisions by the Ninth Circuit, *Bhan* and *Oltz*, involved the exclusion of registered nurse anesthetists in favor of M.D. anesthesiologists. The *Bhan* court's analysis applies with equal force to this case:

> ***HN6***[] Only certain boycotts are unlawful per se. Nonethe-less, the distinction between boycotts that are and those that must be tested under the rule of reason is less than crystal clear. *See* *Northwest Stationers, 472 U.S. at 294*. The line can best be drawn, however, by following the analysis used to separate per se and rule of reason cases in general. Thus, the per se rule should be invoked for a group boycott when the challenged activity would almost always tend to be predominantly anti-competitive. *See* [*id.*] at 298.
>
> The practice of which Bhan complains can be cast in the following general terms: physicians conspiring with a hospital to allow only physician, rather than nonphysician, providers to offer services in a particular area. As a result, the hospital eliminates a *class* **[**13]** of providers.
>
> This activity does not appear to be one that is always anti-competitive. On the one hand, hospitals must make choices about the types of qualifications a practitioner must have to apply for staff privileges in various fields of practice. *See* [*Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 30, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)]* (commenting that hospitals have an unquestioned right to exercise control over staff privileges). These restrictions help it provide more efficient, higher quality services in order to compete against other hospitals. 6 J. von Kalikowski, *Antitrust Laws & Trade Regulation* § 52.03[1], at 52-45 (1990). This also reduces its malpractice exposure. Thus, the choice of physician over nonphysician providers may actually sharpen competition by making [the hospital] a more attractive competitor in the patient market.
>
> On the other hand, a plaintiff may be able to establish in a certain situation that the physicians are conspiring to drive the nurses out of business because their services are just as good but cheaper. The hospital may be shown to be acceding to the doctors' wishes because of its wish to retain certain of the **[**14]** doctors' services. In that case, the practice of excluding nonphysician providers as a class would appear to be anti-competitive.
>
> In sum, the practice of excluding nonphysicians in favor of physicians is not one that always would have an anti-competitive effect. Given that the effect of the practice is unclear, it is appropriate to apply the rule of reason.

Bhan, 929 F.2d at 1412 (citation, footnotes, and parallel citations omitted).

Even under the reasoning of *Weiss*, the restraint alleged in this case is properly subject to the rule of reason. The *Weiss* court relied in part on York's failure to argue that D.O.s were in any way less qualified than M.D.s. Although Christian has not argued that D.O.s as a class are less qualified, they do argue that those whose subspecialty training is inadequate (not equivalent to that required by the ABMS) are less qualified. The exclusion from staff privilege in this case arguably falls within the category the *Weiss* court labeled "industry self-regulation" and is consequently not appropriate for per se analysis. Having found per se analysis inapplicable to the alleged restraint, we now turn to a **[**15]** more detailed inquiry under the rule of reason.

[*688] B

HN7[] To determine the legality of a restraint of trade under the rule of reason, one must focus on the detrimental effects to competition, often by defining the relevant market and considering evidence of the defendant's power within that market. *See Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc., 996 F.2d 537, 546 (2d Cir. 1993)*. This is not always necessary, however.

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

IFD, 476 U.S. at 460-61 (quoting 7 Phillip Areeda, ***Antitrust Law*** P 1511, at 429 (1986)). Either showing -- market power or actual detrimental effects -- shifts the burden to the defendant to demonstrate pro-competitive effects. [4] "The plaintiff, driven to this point, must then try to show that any legitimate objectives can be achieved **[**16]** in a substantially less restrictive manner," and the court then weighs "the harms and benefits to determine if the behavior is reasonable on balance." *Bhan, 929 F.2d at 1413*.

[17]** 1

Flegel and Still allege a reduction in the quality of care at Christian as proof of actual detrimental effects on competition that have resulted from the hospital's refusal to grant them privileges. They rely on affidavits of D.O.s in general practice (GPDOs) at Christian who assert that their patients would receive better care if treated by Flegel and Still rather than by M.D. urologists. The gist of these assertions is that the quality of communication between the GPDOs and the M.D. urologists is lower than it would be between the GPDOs and Flegel and Still. [5] Although

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[4] Such a showing could be made in a variety of ways, but it must consist of more than simple assertions. For example,

> if a group of practitioners such as D.O.'s or family practitioners is excluded, the institution must demonstrate the procompetitive justification, persuading the factfinder that, from the totality of circumstances, the articulated procompetitive rationale is consistent with the overall conduct of the hospital. For example, a facility might be able to justify personnel restrictions as a marketing, image-building strategy -- "our hospital only allows board-certified practitioners to use our facilities." But the institution, to prevail, would have to show active promotion of that policy in other areas (for example, through aggressive quality-monitoring programs) and active pursuit of an image-building campaign (for example, through advertising or other marketing initiatives). It would have to prove, to the satisfaction of the factfinder, that it was in fact pursuing its goals as a rational economic actor and that it could justify its conduct by reference to rational, procompetitive economic principles.

James F. Blumstein & Frank A. Sloan, *Antitrust and Hospital Peer Review*, 51 Law & Contemp. Probs. 7, 61 (1988) (footnotes omitted).

[5] Typical of the GPDOs' assertions on this point is Dr. Martin J. Roitman's:

> The denial of Plaintiffs Gerhard Flegel and Richard Still to the surgical staff at [Christian] has resulted in a lower quality of care being available for my patients, as the urologists to whom I must make referrals for patients admitted to the hospital or for patients who seek hospitalization for urologic treatment at [Christian] do not generally provide me an opportunity to continue my participation at a preferred level in that patient's care, and Plaintiffs Flegel and Still provide a higher quality of urological services.

7 R. at 1667-68; *see also* 7 R. at 1672-73, 1675-76, 1678-79, 1681, 1684-85, 1690-91, 1693-94. Some of the osteopaths' assertions in this regard were struck by the district court after their deposition testimony revealed that they had never referred patients to the M.D. urologists on staff at Christian. *See* 1 R. at 301-04. The plaintiffs have not appealed this decision by the district court. Consequently, we grant their motion to strike the appendices filed by defendants because the documents they contain either repeat material in the record or do not bear on any issue on appeal.

the proper perspective on the quality of competition is that of the consumers (in this case, the patients), Flegel and Still argue that the GPDOs are "agents" of the patients in their decisions regarding providers of urological services and consequently the GPDOs' perspectives represent those of the affected patients.

[18]** Regardless of the merit of the GPDOs' assertions, the plaintiffs have presented insufficient **[*689]** evidence of actual detrimental effects on competition to avoid the need to prove market power. We find too little evidence in this case, just as the Supreme Court found insufficient evidence that the exclusive contract for anesthesiologists' services in *Jefferson Parish* was predominantly anticompetitive:

> There is . . . insufficient evidence in this record to provide a basis for finding that the [exclusive anesthesiologists'] contract, as it actually operates in the market, has unreasonably restrained competition. The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist. The evidence indicates that some surgeons and patients preferred respondent's services to those of [the exclusive providers], but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.

Jefferson Parish, 466 U.S. at 29-30 (footnotes omitted). **[**19]** The Court anticipated the plaintiffs' arguments that patients rely on the GPDOs to select their urologists, and responded that "if, as is likely, it is the patient's doctor and not the patient who selects an anesthesiologist, the doctor can simply take the patient elsewhere if he is dissatisfied with [the exclusive providers]," adding that the district court in that case had "found that most doctors in the area have staff privileges at more than one hospital." *Id. at 30 n.50*.

Similarly in this case, there has been no showing that those patients sophisticated enough to distinguish between M.D. urologists and D.O. urologists could not go to a hospital that would provide him or her with the urologist of choice. Plaintiffs assert that a number of patients are locked in to Christian but provide no evidence of this beyond mere assertion. Although they provide evidence that patients who live near the hospital tend to buy their care at Christian, we are unwilling to infer from this that these patients are somehow "locked in." Also as in *Jefferson Parish*, the affiant GPDOs generally have privileges at more than one hospital, and, according to the record, **[**20]** over ninety percent of the D.O.s at Christian share privileges with the plaintiffs at one or more hospitals. *See* 2 R. at 440-41 (37 of 41 non-hospital-based D.O.s share privileges with Flegel and Still at another hospital). No evidence was presented, however, that any of the GPDO affiants was so moved by the lower quality of care now available at Christian that he or she took a patient elsewhere in order to have that patient receive the services of Flegel or Still. In short, the evidence of reduction in quality is insufficient. [6] "Therefore, [the plaintiffs have] not made an adequate showing of detrimental effects to obviate the need to show that appellees possess market power sufficient to stifle competition." *Capital Imaging, 996 F.2d at 546*.

[21]** 2

To establish that the defendants have market power, Flegel and Still must show that the defendants have "a dominant market share in a well-defined relevant market." *Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 318 (8th Cir. 1986)*. ***HN8***[] Relevant markets are defined in terms of both geography and product. *See* *Baxley-*

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[6] Flegel and Still argue that the presence of expert testimony by two economists suffices to survive summary judgment. That is only true if the experts' testimony would allow a finding of actual detrimental effects to competition. The testimony of neither of the proffered experts, Professor Lee K. Benham and John H. Preston, would support such a finding. Preston simply relies on the assertions of the GPDOs to find a reduction in quality, and Benham's testimony addresses only the possibility that the hospital services market in St. Louis is not competitive. A jury could not reasonably find based on these affidavits that the denial of privileges to Flegel and Still by Christian has caused actual detrimental effects to competition (to Flegel and Still, perhaps, but not to competition).

DeLamar Monuments, Inc. v. American Cemetery Ass'n, 938 F.2d 846, 850 (8th Cir. 1991). The product in this case is agreed to be urologists' services, but there is no agreement on the geographic market. Flegel and Still propose a market of targeted patients of osteopathic physicians at Christian, while the defendants **[*690]** assert that the St. Louis metropolitan area is the relevant geographic market. The question before us, then, is whether the plaintiffs have provided sufficient evidence from which a jury could reasonably find that Christian possesses market power within the relevant market. The plaintiffs argue that market determination is necessarily a question for the jury, but we disagree. ***HN9***[] Like any other issue, market definition is subject to summary judgment if the plaintiffs fail to provide sufficient evidence **[**22]** from which a jury could reasonably find in their favor. *See* *Assam Drug, 798 F.2d at 317*; *see also* *Bhan, 929 F.2d at 1413 n.9*.

Flegel and Still provide virtually no evidence to support their market definition. Market power is, as indicated earlier, simply a surrogate for actual anticompetitive effects, which are themselves determined from the viewpoint of the consumer. Yet in their arguments about the proper market definition, Flegel and Still provide no evidence that patients view Christian as a market separate from the much larger market for urologists' services. Rather, it is only the urologists seeking referrals from the GPDOs who might so define a market. [7]

[23]** Perhaps anticipating difficulties with the Ninth Circuit decision in *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484 (9th Cir. 1991)*, the plaintiffs assert that they do not seek to define the market simply as "referrals," but rather from the consumers' viewpoint. In *Morgan, Strand*, the court indicated that although the plaintiffs proposed a market in "referrals," the actual market was in radiologists' services because "nothing in the record suggested that the referrals as such are ever sold." *Id. at 1489*. The court then held that the evidence presented by plaintiffs was insufficient to allow a jury reasonably to conclude that the defendants possessed market power: "Referral pattern evidence ignores the possibility that even if referral patterns are quite fixed, or exclusive among osteopathic physicians, or University physicians, there may still be competition for the patients, who are the product's ultimate consumers." *Id.*

Flegel and Still make quite clear, at least on appeal, [8] that their proposed geographic market does not consist of referrals from the GPDOs at Christian, but of those patients **[**24]** who would be available to them as customers at Christian. We find the distinction unavailing. "The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 112 S. Ct. 2072, 119 L. Ed. 2d 265, 293-94 (1992)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 572, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*. We acknowledge that the Supreme Court's holding in *Kodak* that a single manufacturer's aftermarket products may constitute a relevant market supports the possibility that a single hospital may constitute the relevant market. *See also* *Virtual Maintenance, Inc. v. Prime Computer, Inc., 995 F.2d 1324, 1328-30 (6th Cir. 1993)* (holding that market defined by the demands of Ford Motor Company can constitute relevant market). Despite this legal possibility, a plaintiff is nonetheless required to present evidence from which a reasonable jury could find the existence of the proposed market, *i.e.*, urological services needed by GPDOs' patients in a single hospital. In this, Flegel and Still have failed, leaving us to **[**25]** consider which market definition finds support in the record and Christian's role within such a market.

[*691] The alternative market definitions to be considered are either the St. Louis metropolitan area or St. Louis County -- in either of which Christian possesses no more than fifteen percent of the market under any

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[7] The plaintiffs' perspective on the market has no bearing. Whether their business has suffered due to the absence of the potential referrals at Christian is of as little consequence as any evidence that their business is booming. *See* *Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1234 (8th Cir. 1987)* ("the concern of ***antitrust law*** is the protection of competition, not individual competitors"), *cert. denied*, ***484 U.S. 1026 (1988)***; *Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977)* ("Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." (citations omitted)), *cert. denied*, ***439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978)***.

[8] Compare the plaintiffs' description of the relevant market in their memorandum to the district court in opposition to summary judgment: "The relevant product market is the market for referrals of Target Patients from osteopathic physicians at [Christian]." 1 R. at 201.

measurement, *see* Flegel, 804 F. Supp. at 1170-71 -- or North St. Louis County, defined as the area within the twelve zipcodes surrounding Christian. Forty-one percent of the residents of the latter market buy their care at Christian. *See* 2 R. at 442-43.

Plaintiffs did not present North St. Louis County to the district court as a proposed geographic market, choosing to concentrate instead on restricting the **[**26]** market to Christian. *See* Plaintiffs' Memorandum in Opposition to Defendants' Joint Motion for Summary Judgment at 51-54 (1 R. at 198-201). Even if they had, there appears to be no evidence in the record regarding Christian's share of the product (urological services) within the proposed geographic market. Plaintiffs do not even present us with evidence of Christian's share of surgical services within North St. Louis County. Nor is there evidence that patients view this as a market, though there is evidence that Christian views it as its primary service area. The possibility of such a market definition seems to have only occurred to plaintiffs upon reading the affidavit of the defendants' economics expert, in which he indicates that even within this small (and in his view unrealistic) market, Christian does not possess market power, for none of the evidence they presented supports this market definition.

Were there further evidence of this geographic market and of Christian's share of urological (or even surgical) services within the market, summary judgment on the issue of market power might well be precluded. No such evidence has been presented, however, and no reasonable jury **[**27]** could find that Christian hospital possesses market power in urological services on the scant evidence that has been presented.

C

In addition to the alleged restraint of trade in violation of section one of the Sherman Act, Flegel and Still asserted that the defendants had violated section two as well. To establish such a violation plaintiffs must first prove defendants' "possession of monopoly power in the relevant market." Grinnell, 384 U.S. at 570. Because plaintiffs' section one claim failed due to lack of evidence of market power, it follows that their section two claim is similarly deficient.

III

In denying staff privileges to Flegel and Still, the hospital allegedly restrained trade in violation of section one of the Sherman Act. We hold that this restraint does not fall within the category of restraints subject to per se analysis, and that its actual effects have not been shown to be sufficiently anticompetitive to obviate the need for a showing that the defendants possess market power. We further hold that the plaintiffs have failed to provide evidence from which a jury could reasonably find that the defendants possess the market power necessary **[**28]** to commit violations of either section one or section two of the Sherman Act. Consequently, we affirm the order of the district court granting summary judgment to the defendants.

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Auto. Prods. v. Tilton Eng'g, Inc.

United States District Court for the Central District of California

September 16, 1993, Decided ; September 16, 1993, FILED

CV 90-5500 KN

Reporter

1993 U.S. Dist. LEXIS 20813 *; 33 U.S.P.Q.2D (BNA) 1065 **

AUTOMOTIVE PRODUCTS, plc, Plaintiff, v. TILTON ENGINEERING, INC., Defendant.

Core Terms

patent, infringement, costs, antitrust, clutches, attorney's fees, damages, monopolization, invoices, inducing, parties, revised, agrees, inequitable conduct, unfair competition, distributors, carbon, double, punitive damages, post-judgment, willful, DENIES, phase, treble damages, asserts, sales, tortious interference, jury instructions, relevant market, pre-judgment

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Trials, Judgment as Matter of Law**

A judgment as a matter of law should only be granted if the evidence construed in the light most favorable to the non-moving party permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's; it is improper if reasonable minds could differ over the verdict.

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN2[] **Relief From Judgments, Motions for New Trials**

A new trial may be ordered by the district court if, in its opinion, the jury's verdict was clearly contrary to the weight of the evidence.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

Under the Sherman Act, to prove that a defendant has monopoly power, plaintiff must show that defendant possesses (1) a high market share; and (2) that there are barriers to entry in the market.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN4[] Antitrust & Trade Law, Clayton Act

The Clayton Act, *15 U.S.C.S. § 15*, provides that any person who shall be injured by reason of anything forbidden in the ***antitrust law*** may sue therefor and shall recover threefold the damages by him sustained.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN5[] Costs & Attorney Fees, Clayton Act

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, provides that a prevailing plaintiff in an antitrust case shall recover a reasonable attorney's fee award.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] Antitrust & Trade Law, Clayton Act

Time devoted to work which is duplicative or related solely to claims or activities unrelated to the successful recovery of the antitrust damages may be excluded from the computation of fees.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Remedies > Judgment Interest > General Overview

HN7[] Remedies, Damages

Under section 4 of the Clayton Act, the court may award simple prejudgment interest beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] **Antitrust & Trade Law, Clayton Act**

In considering whether an award of interest under the Clayton Act for any period is just in the circumstances, the court must consider only the following factors: (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party of representative acted intentionally for delay, or otherwise acted in bad faith; (2) whether, in the course of the action involved, such person or the opposing representative, violated any applicable rule, statute, or court order providing for sanction for dilatory behavior or otherwise providing for expeditious proceedings; and (3) whether such person or the opposing party engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof, *15 U.S.C.S. § 15*.

Patent Law > Remedies > Damages > Increased Damages

Patent Law > ... > Damages > Collateral Assessments > General Overview

HN9[] **Damages, Increased Damages**

Under *35 U.S.C.S. § 284*, a court has the discretion to enhance the patent damages awarded by the jury by a multiplier of up to three if the infringer acted willfully or in bad faith. Although a finding of willfulness does not mandate an award of treble damages, it does authorize them.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN10[] **Basis of Recovery, Statutory Awards**

35 U.S.C.S. § 285 authorizes the court to grant reasonable attorney's fees to the prevailing party in exceptional cases.

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Torts > ... > Types of Damages > Costs & Attorney Fees > Statutory Availability

Patent Law > ... > Damages > Collateral Assessments > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

HN11[] **Collateral Assessments, Attorney Fees**

Under the *35 U.S.C.S. § 285*, a prevailing party who has brought both patent and non-patent causes of action can only recover for the patent side of his case, unless the patent and non-patent issues were so closely intermingled that the bulk of the evidence presented at trial was material to both kinds of issues.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Patent Law > ... > Damages > Collateral Assessments > General Overview

Patent Law > ... > Damages > Collateral Assessments > Costs

HN12[] Basis of Recovery, Statutory Awards

35 U.S.C.S. § 285 authorizes the court to award reasonable attorney fees to the prevailing party in exceptional circumstances. Although § 285 does not explicitly authorize the award of costs as opposed to attorney's fees, the Federal Circuit has upheld the award of costs under § 285 in several circumstances.

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN13[] Judgment as Matter of Law, Judgment Notwithstanding Verdict

Fed. R. Civ. P. 50(b) motions should normally be brought after the entry of judgment. Rule 50(b) only authorizes a party to bring a judgment notwithstanding the verdict (J.N.O.V.) motion if that party submitted a Fed. R. Civ. P. 50(a) motion after the close of evidence which was denied, or for any reason was not granted.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN14[] Relief From Judgments, Altering & Amending Judgments

A motion for a new trial should be served not later than ten days after the entry of judgment, Fed. R. Civ. P. 59.

Business & Corporate Compliance > ... > Infringement Actions > Infringing Acts > Indirect Infringement

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN15[] Infringing Acts, Indirect Infringement

Direct infringement requires sales within the bounds of this country. Sales activity outside of the United States' borders which is intended to lead to use of patented devices inside the United States is only actionable as inducing or contributory infringement.

Torts > Business Torts > Unfair Business Practices > General Overview

HN16[] Business Torts, Unfair Business Practices

Cal. Bus. & Prof. Code § 17200 proscribes unfair competition, defined broadly as any unlawful, unfair or fraudulent business practice. Unlawful business activity proscribed under *§ 17200* includes anything that can properly be called a business practice and that at the same time is forbidden by law. In essence, an action based on *§ 17200* to redress an unlawful business practice borrows violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under *§ 17200 et seq.* and subject to the distinct remedies thereunder.

Torts > Business Torts > Unfair Business Practices > General Overview

HN17[] **Business Torts, Unfair Business Practices**

Cal. Bus. & Prof. Code § 17203 clearly provides that courts may grant injunctive relief and restitution for unjust enrichment only for unfair competition which occurs within the state.

Governments > Legislation > Interpretation

HN18[] **Legislation, Interpretation**

In the absence of any ambiguity in the language or contrary indications in the legislative history, a court should defer to the statute's plain language.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN19[] **Congressional Duties & Powers, Commerce Clause**

The *Commerce Clause* precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state.

Business & Corporate Law > ... > Remedies > Equitable Relief > Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Patent Law > Remedies > Equitable Relief > Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

HN20[] **Equitable Relief, Injunctions**

Although an injunction may be enforced against third parties who are in active concert or participation with the defendant if the third parties receive actual notice of the order by personal service or otherwise *Fed. R. Civ. P. 65(d)*.

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Judges: DAVID V. KENYON, UNITED STATES DISTRICT JUDGE

Opinion by: DAVID V. KENYON

Opinion

[1066]** *ORDER RE: AP AND TILTON'S POST-TRIAL MOTIONS*

I. *Introduction:*

This case comes before the Court on a series of important post-trial motions filed by **[**1067]** both plaintiff/counterdefendant Automotive Products, plc and defendant/counterclaimant Tilton Engineering. The trial in this case was conducted in two phases: the basic issues of patent infringement and patent validity were tried in the first phase; while the issues of damages and willfulness, as well as Tilton's remaining counterclaims for antitrust, unfair competition, intentional interference with prospective business advantage, and *inducing* infringement ware saved for the second phase.

On June 14, 1993, after the conclusion of the second phase of trial, the jury issued a verdict against AP for (1) inducing infringement of Tilton's patent; (2) attempted monopolization in violation of § 2 of the Sherman Act; and (3) intentional interference with Tilton's prospective business advantage. The jury awarded Tilton damages of $ 545,000; $ 5,145,000; and $ 1,275,000, respectively. The jury also found that AP had willfully infringed Tilton's patent, but **[*2]** it rejected Tilton's counterclaims for monopolization under the Sherman Act; for violation of the California Cartwright Act; and for negligent interference with Tilton's prospective business advantage. The jurors deadlocked and were ultimately unable to reach a verdict on whether Tilton should be granted punitive damages for Tilton's tortious interference claim. *See* Special Verdict Form for Phase II of the Trial.

Three days after the verdict was issued, AP filed a "Motion to Defer Entry of Judgment", requesting that the Court defer entering Tilton's "Proposed" Judgment until the parties were given the opportunity to file a number of post-verdict motions. Among other things, AP's motion requested an opportunity to "mould" the verdict to avoid double counting by the jury and to provide briefing setting forth why Tilton's patent damages should not be enhanced. The Court granted AP's motion and set a briefing schedule which culminated in the hearing before this Court on August 6, 1993. After thorough consideration of the briefs, declarations, and exhibits filed by both parties and the oral arguments of counsel at the hearing, the court makes the following rulings.

I. *AP'S MOTIONS*

[*3] 1. *Motion to Mold the Verdict*

In this motion, AP asserts that the jury awarded duplicative damages to Tilton on its inducing infringement, intentional interference with prospective business advantage, and attempted monopolization counts and that the Court should therefore reduce the jury's monetary verdict to insure that Tilton only recovers *once* for each harm it has suffered. AP claims, in essence, that the damages sought in Tilton's tortious interference and patent infringement claims are subsets of the larger damages sought in Tilton's attempted monopolization claim and that awarding damages for both would allow Tilton a double recovery. In addition, AP claims that the jury's award of lost profits on Tilton's induced infringement claim is no supported by the evidence and therefore must be reduced from $ 545,00 to $ 206,890. The Court rejects both of these arguments and therefore DENIES AP's Motion.

A. Is the Inducing Infringement Award Supported by the Evidence?

AP's argument here is simply this: (1) AP claims that AP's actual invoices establish that there were at the most *36* sales of the infringing clutch made by AP to U.S. customers after Tilton's patent issued; **[*4]** (2) that Mr. Barker testified that only *49* Formula one cars raced in Phoenix, Arizona in 1990 and 1991 using the clutch at issue; and (3) that Tilton's expert witness testified that Tilton's profits would have been, at most, $ *2,434* per clutch. Adding the 49 clutches to the 36 clutches, produces *85* clutches; if the 85 clutches are then multiplied by $ 2,434 per clutch it equals *$ 206,890* in lost profits. AP claims that $ 206,890 is the maximum in damages to which Tilton is entitled for its inducing infringement claim and that the $ 545,000 awarded by the jury is thus unsupported by the evidence.

Tilton asserts, however, that according to Mr. Tyrell's testimony, his teams used four clutches per event, thus bringing the total used in Phoenix in 1990 and 1991 to *196* rather than 49. Moreover, Tilton claims that in addition to the 36 clutches sold to AP's distributors in 1989-90, Mr. Nolte's workpapers (Exh. 4182) and the invoices show that the total sales to U.S. customers from January 1, 1991 through August 31, 1992 was 60 clutches, bringing the total number of clutches sold in the U.S. to *96*. Adding the 96 to the 196 from the Phoenix races produces *292* sales, **[*5]** which would create a lost profit of $ 710,728 if multiplied by $ 2,434. That is considerably more than the $ 545,000 awarded by the jury.

Given that the Court must view the evidence in the light most favorable to Tilton, the Court cannot find that no reasonable jury could have granted Tilton damages of $ 545,000. The Court thus denies AP's request to reduce the damages awarded by the jury on Tilton's inducing infringement counterclaim. **[**1068]**

B. *AP's Request to Reduce Antitrust Damages To Avoid A Double Recovery*

AP claims in this part of its motion that the court erred by failing to give the jury adequate instructions not avoid double counting of plaintiff's damages and by rejecting AP's proposed special verdict form. The issues which this Court must decide are whether the Court's instructions were clear enough in their admonition to the jury not to double count and whether AP made timely and sufficient objections to the Court's jury instructions and special Verdict form.

After carefully considering the record and the arguments presented by AP, the Court finds that AP made timely objections about the dangers of double counting in general, but AP has not demonstrated that it objected **[*6]** to specific Jury Instructions for failing to instruct the jury not to double count. AP also made a timely objection to the Court's Special Verdict Form and requested the Court to use AP's Proposed Special Jury Interrogatories in its place. The Court found that AP's Special Interrogatory form was far too complex and was repetitive of the jury instructions, however, and therefore denied AP's request. There is no indication that AP tried "cure" this problem by eliminating the repetitious elements of its Interrogatories in order to preserve the parts which AP considered vital to prevent double counting. It is therefore difficult to determine whether AP preserved its right to object to the lack of adequate warnings about double counting in the jury instructions and Special Verdict Form.

The Court does not need to reach that issue, however, because the Court's jury instructions clearly and sufficiently warned the jury against awarding damages twice for the same injury. The Court's jury instructions provided, in pertinent part, that

> the computation of damages differs depending on which claim is involved, and you will be instructed concerning the damages for each of Tilton's and AP's **[*7]** claims. *Remember that Tilton is only entitled to recover each loss once, even if it is possible to recover for that lost [sic] under two or more of Tilton's claims.*

RT at 1589-1590, June 4, 1993 (emphasis added). The Court finds that this instruction was sufficient to warn the jury against the danger of double counting. While AP's Proposed Special Interrogatory may have provided more specific instructions to avoid double counting, the Court feels that that form was far too duplicative of the jury instructions and was properly rejected by the Court. AP's Motion to Mould the verdict to avoid double counting on the antitrust, tortious interference, and patent claims is therefore DENIED in its entirety.

2. *AP's Proposed Findings of Fact and Conclusions of Law on the Issue of Inequitable Conduct*

AP contends in this motion that Mr. Tilton violated his duty of candor and good faith to the Patent Office by failing to disclose in his application for a patent that (1) Tilton's carbon to carbon clutch had been displayed at the SEMA show; and (2) that it had been used in races more than one year prior to the date of Tilton's application. Because of this alleged violation, AP **[*8]** claims that the court should find that Tilton is guilty of inequitable conduct and that Tilton's patent is thus unenforceable. In order to prove inequitable conduct, AP must show by clear and convincing evidence that (1) the information about the SEMA show and the alleged experimental uses in race cars was "material"; (2) that Tilton and/or its patent agents were aware of this materiality when they made the application to the patent office, and (3) that Tilton's failure to disclose this information to the Patent and Trademark Office (the "PTO") was intended to mislead the PTO. Although the Court already granted a directed verdict for Tilton that the SEMA show was not a "public use" and the jury rendered an "advisory" verdict that Tilton was not liable for inequitable conduct, AP asserts that the court should find that Tilton's conduct amounted to inequitable conduct because "close cases must be resolved by disclosure, not unilaterally by the applicant." *Labounty Mrg. Inc. v. U.S. Int'l Trade Commission, 958 F.2d 1066, 1076 (Fed. Cir. 1992)*.

Tilton argues in response that (1) although inequitable conduct is an equitable issue which should ordinarily be tried by the court, AP waived **[*9]** its right to submit this to a judge and the jury's verdict against AP is therefore binding; and (2) even if the court considers the jury's verdict to be merely advisory, the court should reject AP's claim because AP has not shown by clear and convincing evidence that Mr. Tilton's failure to disclose certain information about the SEMA show and the "experimental uses" of the clutch was intended to defraud the PTO.

A. *Did AP Waive its Right to Have the Court Decide Inequitable Conduct?*

The parties agree that inequitable conduct should normally be tried by the court, but **[**1069]** Tilton claims that AP waived the right to have the court decide this issue by submitting a special verdict form and jury instructions and arguing to the jury on inequitable conduct. AP claims, however, that it explicitly reserved the right to have the court decide inequitable conduct in its Pre-Trial Conference Order of January 5, 1993 and its Amended Request for A Special Verdict. *See* AP's Reply Brief at p. 2. AP claims that it only argued inequitable conduct to the jury (and submitted jury instructions on the issue) to preserve its case in the event the Court ultimately decided this was an issue for the jury.

[*10] The court agrees with AP and finds that it did not waive its right to have this issue decided by the Court.

B. *Has AP Shown Inequitable Conduct by Clear and Convincing Evidence?*

The Court finds that AP has failed to show by clear and convincing evidence that Mr. Tilton intentionally withheld information about the SEMA show and the "experimental testing" of his clutches in order defraud or mislead the Patent office. AP's Motion is therefore DENIED.

II. *TILTON'S MOTIONS*

1. *Emergency Ex Parte Motion to Preclude Consideration of Jury Affidavits and Declarations*

Tilton filed this *ex parte* application on August 4 seeking to prevent AP from introducing any affidavits or declarations from jurors regarding their deliberations. Tilton claims that it has reason to believe that AP has obtained such affidavits and will try to submit them to the court for review. Tilton asserts that the Court's review of such affidavits would be a violation of *Federal Rule of Evidence 606(b)*. AP has not yet tried to file such affidavits or declarations, however, so the Court feels that Tilton's motion is premature. The Court will revisit this issue if AP later files such declarations; for **[*11]** the time being, however, Tilton's Ex Parte Motion is DENIED.

2. *Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial on Tilton's Monopolization Claim Under § 2 of the Sherman Act, Pursuant to* Rule 50(b)

In this motion, Tilton moves for a J.N.O.V. or, in the alternative, a new trial on Tilton's monopolization claim. The jury returned a verdict for Tilton on its attempted monopolization claim (for $ 5,145 million), but ruled against Tilton on its claim for monopolization under Section 2 of the Sherman Act. Tilton correctly asserts that the jury verdict on its attempted monopolization claim established all the essential elements for its monopolization claim except for a finding that AP possessed "monopoly power" in the relevant market. Tilton now contends that no reasonable jury could find that AP failed to possess monopoly power in the market and that the Court should thus grant judgment as a matter of law on Tilton's monopolization claim. Alternatively, Tilton argues that the jury's verdict was clearly contrary to the weight of evidence and that the Court should, at the very least, grant Tilton a new trial on this issue.

A. *Standards* **[*12]** *for Granting a Rule 50(b) Motion for Judgment as a Matter of Law or for Motion for New Trial under Rule 59*

HN1[] A judgment as a matter of law should only be granted if the evidence "construed in the light most favorable to the non-moving party permits only one reasonable conclusion as to the verdict and that conclusion is contrary to the jury's; it is improper if reasonable minds could differ over the verdict." *Fleming v. Dept of Pub. Safety, 837 F.2d 401, 408 (9th Cir. 1988)*, *cert. denied, 488 U.S. 889, 102 L. Ed. 2d 212, 109 S. Ct. 222 (1988)*. ***HN2***[] "[A] new trial may be ordered by the district court if, in its opinion, the jury's verdict was clearly contrary to the weight of the evidence." *William Inglis & Sons Baking Co. v. ITT Continental Baking Company, Inc., 668 F.2d 1014, 1027 (9th Cir. 1981)*.

B. *Did AP Possess Market Power in the Relevant Market?*

In order to prove monopolization, Tilton must prove that AP possessed *monopoly power* in the relevant market. ***HN3***[] Under the Sherman Act, to prove that a defendant has monopoly power, plaintiff must show that defendant possesses (1) a high market share; and (2) that there are barriers to entry in the market. Tilton claims **[*13]** that it presented uncontroverted evidence that, from 1987 through August 1992, AP increased its market share from 56% to 81 % of the market for carbon to carbon racing clutches. This left Tilton and Fitchel & Sachs to divide the remaining 19% share of the market. Tilton also presented significant evidence showing AP's ability to exclude other competitors *and* demonstrating the barriers to entry in the market. To support its argument, Tilton relies on cases which have held that **[**1070]** maintaining a market share of over 80% of the relevant market is presumptive evidence of market power. *See e.g., American Tobacco Co. v. U.S. 328 U.S. 781, 797, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*.

AP counters Tilton's argument by asserting that it is not clear what the jury decided the relevant market to be. In contrast to Tilton, which claims the relevant market was the market for carbon to carbon clutches, AP claims that the relevant market is the market for all racing clutches, including metallic and carbon/carbon clutches, in which AP appears to have a significantly smaller market share. Since the Court can not determine from the verdict which market the jury ultimately decided was the relevant **[*14]** one, AP claims that Tilton's 81% figure is speculative. Moreover, AP claims that there were not significant barriers to entry in the market, as evidenced by the entry of Fitchel & Sachs, Quartermaster, and Ram into the carbon to carbon market. Tilton contends, however, that Ram and Quartermaster have never really entered the market.

The Court DENIES Tilton's motion because it is unable to determine what the jury decided the relevant market to be and thus cannot determine what the jury found AP's market share in the relevant market to have been. Moreover, there was sufficient dispute concerning the barriers to entry to support the jury's verdict. Therefore, the Court Can not find that the jury's conclusion to reject Tilton's monopolization claim against AP was inherently unreasonable or that the jury's verdict was "clearly contrary to the weight of the evidence." *William Inglis & Sons, 668 F.2d at 1027*. Tilton's motion for a new trial or for judgment notwithstanding the verdict, pursuant to Rule 50(b), is accordingly DENIED. [1]

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[1] The Court notes, moreover, that Rule 50(b) motions should generally be filed *after* the entry of judgment, not before as in this case.

[*15] 3. *Motion for Recovery of Treble Damages, Reasonable Attorney Fees and Costs, and Pre- and Post-Judgement Interest Pursuant to § 4 of the Clayton Act, 15 USC § 15 (Antitrust)*

In this motion, Tilton seeks the following: (1) Treble Damages on its attempted monopolization claim; (2) mandatory attorney's fees incurred in prosecuting the anti-trust action in the amount of $ 2.7 million; (3) costs of prosecuting the antitrust action in the amount of $ 724,377; (4) pre-judgment interest on the $ 5,145,000 attempted monopolization award; and (5) post-judgment interest, compounded annually. The Court discusses its ruling on each of these issues below.

A. *Treble Damages for Attempted Monopolization*

HN4[] Section 4 of the Clayton Act provides that:

> any person who shall be injured. . . by reason of anything forbidden in the ***antitrust law*** may sue therefor . . . and *shall* recover threefold the damages by him sustained.

The Court, accordingly, GRANTS Tilton's request to treble the damages awarded on Tilton's attempted monopolization claim from $ 5,145,000 to $ 15,435,000.

B. *Attorney's Fees for Attempted Monopolization Claim*

Tilton also claims that it is entitled **[*16]** to attorney's fees under the ***antitrust law*** in the amount of $ 2,750,503. AP argues in response that Tilton's request is premature; that Tilton has not shown adequate evidence to justify its request for attorney's fees; and that Tilton can only recover for fees which were directly incurred in pursuing its antitrust, as opposed to its patent or willful infringement, claims. The Court agrees in large measure with AP's arguments, as explained below.

HN5[] Section 4 of the Clayton Act, *15 U.S.C. § 15*, provides that a prevailing plaintiff in an antitrust case "shall recover . . . a reasonable attorney's fee" award. *15 U.S.C. § 15*. However, the Ninth Circuit held in *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1316 (9th Cir. 1982)*, that "***HN6***[] time devoted to work which is duplicative or related solely to claims or activities unrelated to the successful recovery of the antitrust damages may be excluded" from the computation of fees. AP therefore argues that Tilton should not be granted fees under the antitrust statutes' fee provision for: (1) fees incurred before the antitrust counterclaim was filed in October 1991; (2) fees incurred during the first phase of trial, **[*17]** which was exclusively patent related; (3) fees incurred during the second phase that were patent-related; and, (4) any fees clearly attributable to prosecution of Tilton's state law claims. Tilton claims, however, that the fees it incurred in the patent litigation are recoverable under the anti-trust statute's fee provision because its patent and anti-trust claims were "interrelated" in that AP's willful patent infringement was an integral part or AP's anticompetitive scheme. **[**1071]**

The Court agrees with Tilton that AP's act of willfully infringing the patent was part and parcel of the anti-competitive scheme found by the jury. However, the Court finds that the fees incurred in prosecuting Tilton's patent and willful infringement claims are, for the most part, separate from and independent from Tilton's antitrust claims. More specifically, the Court finds that Tilton can not recover fees for either (1) the time period prior to the investigation of and filing of Tilton's antitrust counterclaims; or (2) for the first phase of the trial which was purely directed towards the patent issues. Tilton is also prohibited from obtaining attorney's fees under the antitrust statute for (3) the fees purely **[*18]** attributable to the prosecution of its state law claims or (4) for the fees it incurred in the second phase of the trial, and the preparation therefore, which were purely attributable to proving its inducing infringement claims. Tilton may recover half of the fees incurred in the prosecution and preparation of the willful infringement issue, however, as the Court finds that this claim was an underlying aspect of the anticompetitive scheme found by the jury to have been perpetrated by AP.

The Court agrees with AP, however, that it would be premature to grant fees to Tilton until this Court has entered its judgment pursuant to the jury verdict. Moreover, the summary of fees provided in the declaration of Alan Block, filed on July 12, 1993, does not provide sufficient detail to justify the award of fees requested. "In determining reasonable hours, counsel has the burden of submitting detailed time records justifying the hours claimed to have been expended." *Chalmers v. City of Los Angeles, 67 F. Supp. 1515, 1517 (C.D. Cal. 1987)*. Tilton has failed to meet that burden. Tilton should therefore file a more detailed summary of its reasonable fees, in accordance with the guidelines set **[*19]** forth above, within ten days after the issuance of this Order. [2] As the Court indicates below, in its ruling on Tilton's Motion for Leave to File Attorney's Fees invoices *In Camera,* Tilton must turn over its unredacted invoices unless it can show the Court specifically how providing these invoices will impermissibly infringe on the attorney-client privilege.

Tilton's request for reasonable attorney's fees is therefore stayed, pending Tilton's resubmission of a more detailed billing summary in accordance with the guidelines set forth above.

C. *Costs Associated with Prosecution of Antitrust Action*

Tilton next claims that it is entitled to $ 724,377 in costs incurred in bringing its antitrust claims. While AP acknowledges that Tilton may recover "the cost of suit" under *15 U.S.C. § 15*, it claims that Tilton is seeking reimbursement for several kinds of costs which are not reimbursable **[*20]** under the antitrust laws. [3] In particular, AP claims that Tilton may not recover (1) its expert witness fees; (2) its deposition and transcript costs because it has not properly documented them; (3) its duplicating costs because it has not properly documented them; or (4) any other expenses except for its filing fees. The Court discusses these issues briefly below.

(1) *Expert Witness Fees*

AP claims that under the Supreme Court's holding in *Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987)*, Tilton is not entitled to recover its expert witness fees because they do not fall within any statutory cost category. In *Crawford,* the Court held that the district court could not award the defendant's expert witness more than the $ 30-per-day limit set forth in *§ 1821(b)* [4] unless the expert was court appointed. A **[*21]** close reading of the case reveals that AP reads far too much into it, however. *Crawford* merely holds that "absent explicit statutory or contractual authorization" to the contrary, federal courts are bound by the limitations set forth in *28 U.S.C. § 1821* and *§ 1920*. *Crawford, supra at 445*. Since the Clayton Act does not authorize the award of costs to a prevailing defendant, the Court held that Crawford was only entitled to $ 30 a day for his witnesses' testimony. In this case, by contrast, the prevailing party on the antitrust claim was the plaintiff, Tilton. Section 4 of the Clayton Act specifically provides for the "costs of suit" to be awarded to the plaintiff if he prevails. The Court thus requests additional briefing from the parties as to whether a prevailing plaintiff in an antitrust case should be allowed to recover expert witness fees and, if so, under **[**1072]** what circumstances. The parties should submit simultaneous briefing on this issue within ten days from the issuance of this order.

[*22] (2) *Deposition and Transcript Costs*

The Court finds that Tilton's request for deposition costs, transcript costs, and court reporter fees is insufficient in that Exhibit D to Mr. Block's declaration fails to show that these costs were primarily incurred in prosecuting the anti-trust aspect of Tilton's case. Moreover, Tilton fails to provide evidence as to whether the deposition costs include travel and lodging for deposition purposes. Tilton should therefore submit a more detailed statement of costs in accordance with these provision within ten days from the issuance of this order. AP may then reply within 7 days after Tilton's filing.

(3) *Duplicating Costs*

The Court finds that Tilton's request for $ 133,042.13 in duplicating costs is insufficient in that it fails to show that these costs were primarily incurred in prosecuting and researching the anti-trust aspect of Tilton's case. Tilton

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[2] AP may then file objections to Tilton's fee statement within 10 days after Tilton files and serves its statement on AP.

[3] AP claims that the costs that can be awarded under the antitrust statutes are limited to those enumerated in ***28 U.S.C. §§ 1920*** and *1821*.

[4] *Section 1821(b)* was subsequently amended to allow witness statements of up to $ 40 per day.

should therefore submit a more detailed statement of costs in accordance with these provisions within ten days from the issuance of this order. AP may then reply within 7 days after Tilton's filing.

(4) *Other Expenses*

The Court believes that Tilton may be awarded costs for all the **[*23]** expenses listed in AP's motion except for Poms, Smith's air conditioning costs of $ 10,685, which are part of Poms, Smith's regular overhead that would presumably have to be paid whether the firm was working on this case or not. AP has presented no authority for its claim that the other costs sought by Tilton are not awardable. AP merely states that "none of the other categories of expenses" are awardable because they "do not fall within the categories enumerated by the cost statute." AP's Opposition at 18. However, the antitrust statute explicitly provides that other "costs" are awardable to a prevailing plaintiff in an antitrust suit. The Court therefore awards Tilton all these expenses except for the costs of air conditioning.

D. *Prejudgment Interest for Antitrust Claims*

Tilton also claims that it is entitled to simple interest on its actual damages for the period beginning on the date of its pleading to the date when the judgment is finally paid ***HN7***[] Under section 4 of the Clayton Act, the court may award simple prejudgment interest "beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or **[*24]** for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances." *15 U.S.C. § 15*. ***HN8***[] In considering whether an award of such interest under this section for any period is just in the circumstances, the court shall consider only the following factors:

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party of representative acted intentionally for delay, or otherwise acted in bad faith;
> (2) whether, in the course of the action involved, such person or the opposing representative, violated any applicable rule, statute, or court order providing for sanction for dilatory behavior or otherwise providing for expeditious proceedings; and
> (3) whether such person or the opposing party . . . engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

15 U.S.C. § 15.

Tilton claims that AP should be subject to pre-judgment interest because of its alleged discovery abuses including withholding the Llewelyn letter; failing to turn over evidence of the **[*25]** involute hub during discovery; and not producing its distributorship agreements. Tilton claims that these maneuvers were part of an intentional conspiracy to delay trial and drive Tilton into the ground.

AP denies any bad faith, however, and points out that, in any event, most of these actions alleged by Tilton took place before Tilton even filed its anti-trust claim and thus are irrelevant to the determination of whether to impose pre-judgment interest (which begins accruing "on the date of service of such persons' pleading setting forth a claim under the anti-trust laws.") AP also points out that, although *§ 15* permits the imposition of pre-judgment interest, neither AP nor Tilton has been able to find a case that actually awards them, suggesting that they can only be awarded in cases of extreme bad faith. *See* *Zapata Gulf Marine v. P.R. Maritime Shipping Auth, 133 F.R.D. 481, 487 n. 4 (E.D. La. 1990)* ("neither the court nor the parties found any case where the court imposed prejudgment interest under *15 U.S.C. § 15(a)*." **[**1073]**

Although the Court thinks that Tilton has presented strong circumstantial evidence that AP was less than forthcoming in responding to Tilton's discovery requests, **[*26]** the Court DENIES Tilton's request for pre-judgment interest because (1) most of AP's alleged behavior occurred prior to the filing of Tilton's antitrust claims and (2) because Tilton has failed to demonstrate that AP's behavior was in such bad faith that the Court should make the rare exception of granting pre-judgment interest.

E. *Post-Judgment Interest for Anti-Trust Claims*

Tilton originally requested an order that its post-judgment interest should be compounded quarterly, but both parties now agree that under *28 U.S.C. § 1961*, Tilton's post-judgment interest should only be compounded annually.

4. *Request for Award of Treble Damages, Attorney Fees and Prejudgment Interest (Patent)*

In this motion, Tilton requests the court to award treble damages, attorneys fees, costs, and pre-judgment interest under *35 U.S.C. § 284* on Tilton's patent claim for inducing infringement.

A. *Treble Damages*

HN9[] Under *§ 284*, the court has the discretion to enhance the patent damages awarded by the jury by a multiplier of up to three if the infringer acted willfully or in bad faith. Although a finding of wilfulness does not mandate an award of treble damages, it does authorize them. Tilton **[*27]** claims that the court should treble damages for several reasons, including: (1) because AP willfully infringed and copied Tilton's patent/design; and (2) because of AP's bad faith and dilatory tactics during the litigation, including withholding the distributorship agreements, the Llewelyn letter, the design of the involute hub, and the Willoughby logbook and race reports during discovery. Tilton also cites case law suggesting that, since enhanced damages are meant at least partly as a deterrent, they are especially appropriate in situations like this when a Goliath like AP (with $ 380 million in assets) tries to crush, through willful infringement and questionable litigation tactics, a David like Tilton (with $ 1.7 million in assets.)

AP, on the other hand, asserts that the court should exercise its discretion to deny enhancing Tilton's patent damages for several reasons, including that the jury's finding of willfulness was incorrect; and that, even if it was correct, several factors militate against enhancing the damages. Among these latter factors cited by AP is that (1) the case was closely litigated (the jury deliberated for two weeks on the first patent phase and the court dismissed **[*28]** Tilton's claim that AP's declaratory relief action was a "sham litigation"); (2) AP had a good faith belief that the Tilton patent was invalid; (3) AP's infringement was minimal in terms of sheer numbers of items; (4) AP took remedial acts to alleviate the on-going infringement (it claims that it instructed its U.S distributors to stop selling infringing clutches); and (5) AP's Ian Nash allegedly began designing AP's clutch before Tilton even applied for his patent. *See Deere & Co.,* 658 F.2d at 1147 (award of enhanced damages *reversed* as an *abuse Of discretion* where alleged copying occurred before patent issued and infringer consulted counsel upon learning of the patent grant.)

The Court has weighed the evidence before it and finds that AP's infringement was both willful and in bad faith. The Court therefore awards Tilton treble damages on its inducing infringement claim. Since the jury awarded Tilton $ 545,000, the judgment for Tilton should be entered in the amount of $ 1,635,000.

B. *Attorneys Fees*

HN10[] *35 USC § 285* authorizes the court to grant reasonable attorney's fees to the "prevailing party" in "exceptional cases". In this case, Tilton is clearly the prevailing **[*29]** party and this is an exceptional case due to the jury's finding -- and this Court's belief on reviewing the evidence -- that AP willfully copied and infringed Tilton's patent. *See* *S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc., 781 F.2d 198, 200 (Fed. Cir. 1986)*("District Courts have tended to award attorney's fees when willful infringement has been proved, and this Court has uniformly upheld such awards.") The Court's finding of "exceptional circumstances" is also supported by the circumstantial evidence presented by Tilton of AP's evasive and dilatory tactics during the prosecution of this case -- including its apparent withholding of certain key documents from Tilton during discovery. The only remaining question is whether Tilton's request for $ 2,750,503 in attorney's fees under the patent statute is reasonable.

As in its motion for attorney's fees under the antitrust statute, Tilton claims that its patent, antitrust, and tortious interference **[**1074]** claims are so closely intertwined that it is entitled to recover *all* of its attorneys fees, incurred during the entire course of this litigation, under the patent statute. [5] **[*31]** This Court disagrees. ***HN11***[] Under the *§ 285*, a prevailing **[*30]** party who has brought both patent and non-patent causes of action can only recover for the patent side of his case, unless the patent and nonpatent issues were so closely intermingled that "the bulk of the evidence presented at trial was material to both kinds of issues." *Monolith Portland Midwest Co. v. Kaiser Aluminum & C. Corp., 407 F.2d 288, 297-298 (9th Cir. 1969)*. *See also* *Machinery Corp of America v. Gullfiber AB, 774 F.2d 467, 475 (Fed Cir. 1985)* ("when an action embraces both patent and non-patent claims, no fees under *§ 285* can be awarded for time incurred in the litigation of the non-patent issues.") Although the Court finds that AP's willful infringement of Tilton's patent was part of the anti-competitive scheme found by the jury, the Court thinks that the patent and non-patent claims in this litigation are otherwise separate and distinct. Thus Tilton may only recover attorneys' fees under the patent statute for fees incurred in the prosecution of its patent claims. [6]

[*32] Tilton should therefore present a revised statement of its fees within ten days from the issuance of this order setting forth in more detail those fees that it reasonably incurred in the patent phase of this litigation. AP may then file a responsive brief one week after Tilton files and serves its revised statement.

C. *Reasonable Costs*

Tilton also asserts that it is entitled to recover $ 724,377 in costs under *§ 285* of the patent statute. ***HN12***[] Section *§ 285* authorizes the court to "award reasonable attorney fees to the prevailing party" in "exceptional circumstances." Although *§ 285* *does not* explicitly authorize the award of "costs" as opposed to attorney's fees, the Federal Circuit has upheld the award of costs under *§ 285* in several circumstances *See e.g.,* *Central Soya Co. Inc. v. Geo. A. Hormel & Company, 723 F.2d 1573 (Fed. Cir. 1983)*; *Mathis v. Spears, 857 F.2d 749 (Fed. Cir. 1988)*. The Federal Circuit has been less clear, however, in setting forth whether costs should be awarded in any "exceptional circumstance" or only in cases, like *Mathis,* where the losing party has exhibited such extreme bad faith during the course of the litigation that failure **[*33]** to award costs in excess of those normally allowed (under Rule 54 and *28 U.S.C. §§ 1821* and *1920*) would amount to a "gross injustice." The Court finds, however, that given the jury's finding of willfulness and the apparent failure of AP to produce certain documents during discovery, Tilton should be awarded its reasonable costs.

The Court agrees with AP, however, that Tilton is not entitled to reimbursement for its air conditioning. Nor can Tilton recover for the nearly $ 50,000 in fees allegedly paid to Mr. Burroughs, since Tilton had to dismiss Burroughs at the last minute for his alleged misrepresentations about his education and work experience. Finally, the Court agrees that Tilton's $ 133,000.00 bill for photocopying seems excessive and is thus inclined to reduce it by 33% unless Tilton can show In more detail why it is reasonable. Tilton may file a revised statement on this issue within ten days from the issuance of this order.

D. *Prejudgment Interest*

Tilton has also asked for pre-judgment interest on its patent claims. The Court GRANTS Tilton's request, but holds that the interest should be compounded annually; should be determined according to the Treasury Bill rate **[*34]** as

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[5] Tilton acknowledges in a footnote, however, that if the Court grants the full amount of Tilton's requested attorneys' fees under both the antitrust and patent statutes, the Court could then decide to award the fee only once to avoid a double recovery for Tilton's lawyers.

[6] The Court agrees with AP that most of the motion practice and discovery that occurred between October 1991 and the eve of the first phase of the trial involved Tilton's antitrust and state law claims, not its patent claims. To the extent this is true, Tilton may not recover attorneys' fees under *§ 285* for this work. Moreover, Tilton should only be able to recover fees under *§ 285* for those aspects of the second phase of the trial that directly involved Tilton's willful infringement and induced infringement claims. Tilton's billing statement must therefore present a rather detailed breakdown in the subjects on which its attorneys were working during any given time period. While the Court realizes that Tilton can not reconstruct the breakdown in hours with 100% accuracy, the Court expects a detailed showing of the breakdown in work hours expended on the patent versus the antitrust claims. The only overlap between the fees awarded to Tilton under the antitrust and patent laws should be in the time expended working on the willful infringement claim *after* the filing of Tilton's antitrust claims.

set forth in 28 U.S.C. § 1961; and that the interest may only begin to accrue after July 1989, the month when Tilton was awarded its patent. Moreover, **[**1075]** Tilton may *not* recover prejudgment interest on its attorney's fees.

E. *Postjudgment Interest*

The Court grants Tilton's request for postjudgment interest on its patent damages, attorney fees and costs, and prejudgment interest from the date of the entry of judgment until payment of the money judgment pursuant to 28 U.S.C. § 1961. The postjudgment interest shall be awarded at the treasury bill rate and compounded annually.

5. *Motion and Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial on the Issue of Direct Infringement Pursuant to* Rule 50(b)

In this motion, Tilton seeks a Judgment as a matter of law that no reasonable jury could have found that AP was not a direct infringer of Tilton's patent by its sales to AP's U.S. distributors. In the alternative, Tilton seeks a new trial on the direct infringement issue on the grounds that the Court incorrectly took the direct infringement issue away from the jury. The Court finds that Tilton's Motion for Judgment as a Matter of Law **[*35]** is flawed both procedurally and on the merits and thus DENIES Tilton's Rule 50(b) Motion and it Motion for a new Trial.

The Court finds that Tilton's Rule 50(b) Motion is procedurally improper for several reasons. First, ***HN13***[] Rule 50(b) motions should normally be brought after the entry of judgment. [7] Second, and more importantly, Rule 50(b) only authorizes a party to bring a J.N.O.V. motion if that party submitted a Rule 50(a) after the close of evidence which was denied, or for any reason was not granted. In this case, by contrast, Tilton never filed a Rule 50(a) motion and the issue of direct infringement was never even presented to the jury. Thus Tilton's motion for judgment notwithstanding the verdict or as a matter of law is procedurally improper.

Tilton's Motion for a New Trial is the more appropriate means to achieve relief, but again, Tilton technically **[*36]** should have waited until judgment was entered to bring this motion. "***HN14***[] A motion for a new trial *shall* be served not later than 10 days *after the entry of judgment."* Fed.R.Civ.Pro. 59. (emphasis added.)

The Court rejects Tilton's Motion for a New Trial on the merits, however. Tilton essentially presents two arguments. First, Tilton contends that this Court erred in finding that AP's "EX WORKS" sales to its U.S. distributors could only constitute inducing or contributory infringement, but not direct infringement. Secondly, Tilton contends that AP misled Tilton and the Court into believing that all of AP's sales to its U.S. distributors were "EX WORKS". Tilton contends that while the two invoices produced by AP as exhibits had "EX WORKS" printed on the their face, Tilton later found invoices that did not have this EX WORKS provision on their face. The Court rejects both of these arguments.

With regard to Tilton's "factual" argument, the Court reminds Tilton, that as the plaintiff, Tilton *not* AP had the burden of showing that some of AP's sales to its U.S. distributors were not EX WORKS. Mr. Rossman explained at the August 6, 1993 hearing that AP's distributorship agreements **[*37]** clearly provide that all sales to its distributors are to be made EX WORKS and that the invoices held by the distributors all had EX WORKS stamped on their back. According to Rossman, Tilton could have obtained these original invoices by discovering them from the distributors, but instead chose to seek discovery only from AP Racing. The confusion arose, claims Rossman because the copies of the invoices kept by AP do not have the EX WORKS stamp on the back. While the Court does not have sufficient evidence to make a finding on the veracity of Mr. Rossman's claim, it is clear that Tilton had the burden of proving that some of AP's sales were not made EX WORKS and Tilton failed to meet that burden.

The Court also rejects Tilton's legal argument. Tilton asserts that the mere fact that AP's title to the clutches passed to its U.S. distributors in England, by virtue of the EX WORKS designation, does not prohibit the Court from finding

[7] Rule 50(b) reads in part: "Such a motion may be renewed by service and filing not later than 10 days *after entry of judgment".* (emphasis added).

that the clutches were sold "within" the United States, as required under 35 U.S.C. § 271(a). To support this argument, Tilton relies on *Fausett v. Pansy Ellen, Inc.,* 19 U.S.P.Q.2d 1228, 1230 (N.D.Ga. 1990), in which the court stated that "it is not appropriate **[*38]** for application of the patent laws to depend on whether the goods are designated F.O.B. shipping point or destination."

The Court rejected this argument in its earlier ruling and repeats its reasoning again. Upon reviewing the patent law, the Court holds that ***HN15***[] direct infringement requires sales "within the bounds of this country." *Deepsouth Packing Co. v. Laitram* ***[**1076]*** *Corp., 406 U.S. 518, 527, 32 L. Ed. 2d 273, 92 S. Ct. 1700 (1971)*. Sales activity outside of the United States' borders which is "intended to lead to use of patented [devices] inside the United States" is only actionable as inducing or contributory infringement. *Deepsouth, at 526*. Thus, assuming the clutches were sold on an EX WORKS basis, the Court correctly ruled that AP was liable only for contributory or inducing infringement. *See Engineered Sports Products v. Brunswick Corp., 362 F. Supp. 722, 727 (D.Utah 1970)* (sale of patented device "outside the United States is not proscribed unless it induces or contributes to a domestic infringement"); *G.D. Searle & Co. v. Byron Chem. Co., 233 F. Supp. 172, 173 (S.D.N.Y. 1963)* (infringing act of sale occurs where title passes); *Dr. Beck & Co v. General Electric* ***[*39]*** *Co., 210 F. Supp. 86, 92 (S.D.N.Y. 1962)* (infringement cannot be predicated on acts consummated in a foreign country").

Tilton's *Rule 50(b)* and *Rule 59* Motions on the issue of direct infringement are accordingly DENIED.

6. *Motion for Judgment and Accounting on Tilton's Unfair Competition Claim*

Tilton also moves for a Judgment from this Court that AP has violated California's Unfair Competition Act, Business and Professions Code *§ 17200*, and for an Accounting under *§ 17203* of that Act. The Court DENIES Tilton's Motion for the reasons discussed below.

HN16[] *Section 17200* proscribes unfair competition, defined broadly as any "unlawful, unfair or fraudulent business practice." "Unlawful business activity proscribed under *section 17200* includes anything that can properly be called a business practice and that at the same time is forbidden by law." *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 826 P.2d 730 (1992)*. "In essence, an action based on . . . *section 17200* to redress an unlawful business practice borrows violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under **[*40]** *section 17200 et seq.* and subject to the distinct remedies thereunder." *Id.*

Tilton's claim under this statute is quite simple. Tilton asks the Court to borrow the jury's finding that AP violated the Sherman Act (by attempting to monopolize) and intentionally interfered with Tilton's prospective economic advantage, construe the jury's verdict as a finding of one or more unfair or unlawful business practices, and grant Tilton's request for judgment under 17200 and for an accounting under *§ 17203*.

AP contends that Tilton's motion should be DENIED for several reasons, including that: (1) Tilton has failed to show AP'S behavior amounted to a "business practice"; (2) Tilton's complaint was filed after the applicable four year statute of limitations expired [8]; (3) Tilton's request for unjust enrichment is preempted by the federal patent statute; and (4) the application of the Unfair Competition Act against AP violates the federal *Commerce Clause*.

[*41] The Court's decision to deny Tilton's motion is based on a separate ground, although one which is clearly related to AP's arguments about the absence of a "business practice" and the violation of the *Commerce Clause*. The Court denies Tilton's motion because the section pursuant to which Tilton seeks an accounting, *§ 17203*, only provides for relief in cases where the defendant has performed or is proposing to perform "an act of unfair competition *within this state". Cal. Bus. and Profess. Code § 17203*. In this case, however, the only act which AP is

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[8] The Court has already ruled in connection with the antitrust claims that because this case involves a "continuing violation," Tilton may recover damages *caused* by the initial termination which occurred outside the four year limitations period, but only to the extent such damages were *incurred* within the four year period preceding the filing of the claim. Order of February 12, 1993, at 5-6; *LaSalvia v. United Dairymen of Arizona, 804 F.2d 1113, 1118-19 (9th Cir. 1986)*.

alleged to have committed "within the state" of California is the act of terminating Tilton's distributorship. While the Court agrees with Tilton that its termination was part of a larger scheme by AP to injure Tilton, the only aspect of this on-going conduct, or "practice", which occurred within California was the termination itself. Thus, Tilton has not show that AP engaged in an unlawful "business practice" within the state of California in violation of California's Unfair Competition Act.

The Court's reading of section 17203 is supported by several factors beginning, of course, with the plain language of the statute. **HN17**[] Section [*42] 17203 clearly provides that courts may grant injunctive relief and restitution for unjust enrichment *only* for unfair competition which occurs "within this state". **HN18**[] In the absence of any ambiguity In the language or contrary indications in the legislative history, the Court should defer to the statute's plain language. The Court's **[**1077]** research of the relevant case law supports this reading. The Court has yet to find a case in which the Unfair Competition Act has been applied against a "business practice" which occurs wholly, or even primarily, outside of the state's borders. Although the Court can only surmise about the reasons that the legislature limited the reach of section 17203 to acts which occur "within the state," the desire to avoid violating the Commerce Clause was probably the paramount concern. As the Supreme Court has held, "**HN19**[] the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. Mite Corp., 457 U.S. 624, 642-43, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982)*.

Tilton's motion for a judgment and accounting on its Unfair Competition **[*43]** Claim against AP is therefore DENIED. The Court also REJECTS both AP's and Tilton's "Proposed Findings of Fact and Conclusions of Law" on Tilton's Unfair Competition Claims.

7. *Motion for Recovery of Post-Judgment Interest on the Jury's Tortious Interference Award (Tortious Interference)*

The Court GRANTS Tilton's Motion for Post-Judgment Interest on the damages awarded under its tortious interference claims, but holds that the interest should only be compounded annually.

8. *Request for Injunctive Relief*

Tilton has also submitted a detailed request for injunctive relief. *See* Tilton's "Proposed" Judgment at P 7. AP objects to several aspects of the form and scope of Tilton's requested judgment/injunction. The Court briefly discusses AP's objections and the Court's rulings below.

(A) *The Patent Injunction*

AP objects to four elements of Tilton's proposed injunction on its patent claims. First, AP claims that the injunction improperly names AP's U.S. distributors -- Carl Hass, B.R.I.T.S., Essex Racing, and True Sports -- even though they are not parties to this litigation. The Court agrees. **HN20**[] Although an injunction may be enforced against third parties who "are in active **[*44]** concert or participation with [the defendant]" if the third parties "receive actual notice of the order by personal service or otherwise", Federal Rule 65(d), the Court feels that it would be inappropriate to name AP's distributors in the judgment since they are not parties to this suit and therefore have not had the opportunity to be heard [9]; nor has the Court made a specific finding that they were acting "in active concert" with AP. The Court therefore orders Tilton to revise P7(A) of its Proposed Order as follows: redact from "including but not limited to . . ." on line 1, page 3 through "True Sports" on line 3 of that judgment.

Secondly, AP objects to the language of P 7(A) in that it appears to impose a worldwide ban on the manufacturing , selling or using of AP's infringing clutches. The Court holds that P7(A) should thus be revised as follows: after the words "carbon/carbon clutch on line 7, page 3, **[*45]** add the words "within the United States."

Third, AP objects to the labelling requirement imposed by P7(B) of Tilton's Proposed Injunction as being overly burdensome given that "less than 2%" of AP's infringing clutches were ever used in the United States. The Court agrees that it would be overly burdensome to have to include the message drafted by Tilton in all advertisements

[9] Tilton can achieve the same result, however, by Serving AP's distributors with the injunction.

and promotional brochures, but AP should be forced to include a notice with every "infringing" clutch that it should not be used or sold in the United States. Tilton should thus revise P 7(B) as follows: Redact from "AP shall" on line 8 of page 3 to "clutch component is" on line 12. Then add the following lead-in before the warning in all capitals which begins on line 13: "AP shall include a prominent notice with every 'infringing' clutch that is sold that the Clutch is NOT AVAILABLE . . ." The Court feels that this requirement will only place a minimal burden on AP is justified to help insure that no infringing clutches make their way into the United States.

Finally, AP objects to the recordkeeping provisions of P7(C) because they are overly burdensome and would force AP to turn over confidential competitive **[*46]** information to Tilton. The Court agrees in part and thus modifies Tilton's Proposed P7(C) as follows: AP should be forced to file an annual sworn statement with the Court for the next four years certifying that it is complying with this Court's orders. AP must also comply with the record keeping requirements set forth in PP 7(C)(1-4), but It need not file these records with the Court or serve them on **[**1078]** Tilton. If Tilton is able to show at some time in the future that AP has violated the Court's injunction, it may then seek to obtain AP's records through discovery. The Court finds that this record keeping requirement is justified given the difficulties incurred during litigation by AP'S apparent inability to trace its infringing clutches.

(B) *Tilton's Other Requests for Injunctive Relief*

AP also objects to Tilton's requests for prospective injunctive relief on its anti-trust and unfair competition causes of action because Tilton has not proved that it faces an imminent threat of injury or that its remedies at law are inadequate. Moreover, AP contends that the Court has not provided it with an adequate opportunity to present the consequence that Tilton's proposed relief would have **[*47]** on the market in the future. [10] The Court agrees In large measure with AP's objections and thus ORDERS Tilton to revise its Proposed Judgment as follows: (1) delete PP 7(D), 7(E), and P7(G). In addition, Tilton is ORDERED to delete P7(F) as being unduly vague and ambiguous in the use of the words "threats" and "acts of coercion". Finally, the Court deletes P7(H) because Tilton has failed to show that there is any imminent danger that AP will try to "dispose, sell, distribute, transfer," encumber or in any way secret away the assets of AP in order to avoid having to pay a judgment.

Tilton should revise its "Proposed" Judgment in accordance **[*48]** with these directions and those provided in paragraph 11 below and file a revised Judgment within 7 days from the issuance of this Order.

9. *Motion for Trial Setting on the Issue of Punitive Damages for Intentional Interference With Prospective Business Advantage*

In this motion, Tilton requests the Court to set a trial date in the near future to retry whether Tilton is entitled to punitive damages -- and if so, the amount of such damages -- on its claim for intentional interference with its prospective business advantage. Although the jury awarded Tilton compensatory damages on this claim, the jury was unable to reach a unanimous verdict on whether Tilton was entitled to punitive damages. AP contends, however, that if Tilton wishes to retry the issue of punitive damages, the Court must also retry the issue of whether AP is liable for tortious interference in the first place since the issues of liability and punitive damages are so closely intertwined.

The Court disagrees with AP. Although the Court agrees that AP and Tilton must present the evidence of liability to the new jury, the jury does not need to retry that issue. The jury should be instructed that a previous jury has **[*49]** already found that AP is liable, but was unable to reach a verdict on punitive damages.

Then, the jury should be instructed that they must independently find that AP was liable before they can decide on whether Tilton is entitled to punitive damages. If the jury finds that AP is liable for both compensatory damages and punitive damages, the jury should then be asked to decide on the proper amount of punitive damages to be

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[10] The Court notes, for example, that while the jury apparently found that AP's exclusive distributorship agreements have caused Tilton anti-trust injury, there has been no showing about the effect that these agreements would have on Tilton, or the market, in the future Tilton has apparently set up some of its own distribution networks, so injunctive relief may not be necessary.

awarded, keeping in mind that the amount of punitive damages must bear a reasonable relation to the injury, harm or damages actually suffered by Tilton.

The Pre-Trial Conference in this case is set for November 18, 1993, and the trial is scheduled for December 14, 1993. The parties should try to reach an agreement on exactly how and what information should be presented to the jury about the first trial. In the event that the parties are unable to reach a consensus, they should file separate briefs on this issue on November 1, 1993. Reply briefs will be due on November 8, 1993.

10. *Motion Seeking an Order Compelling AP to Produce its Attorney's Fee and Cost Invoices*

In this motion, Tilton seeks an Order compelling AP to produce its attorney's fees and cost **[*50]** invoices so that Tilton can compare its costs and attorney's fees to those incurred by AP. Tilton claims that this information is necessary to demonstrate that Its own fee and cost requests are reasonable.

In response, AP asserts that the amount of fees and costs it incurred in this lawsuit have little or nor relevance to the fees and costs incurred by Tilton. In support of this argument, AP cites a number of cases from other circuits which have denied plaintiffs the right to discover their opponents' fees and **[**1079]** costs. *See e.g., Ohio-Sealy Mattress Mfg Co. v. Sealy Inc., 776 F.2d 646 (7th Cir. 1985)*(affirming district court's denial of plaintiff's request to discover its opponent's attorneys fees records to justify an upward adjustment of its fees for "quality".); *Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053 (2d Cir. 1989)*. One of the central themes that runs through these cases is that the reasonable amount of fees and costs that opponents should be expected to spend on a particular case may differ dramatically depending on their relative stakes in the litigation. In an antitrust case, for instance, where a defendant must pay treble damages if it loses, **[*51]** the Court "would normally expect a defendant to invest more in defending [the suit] than a Plaintiff," who only has to pay its costs and attorney's fees if he loses, "would invest in prosecuting it." *Ohio-Sealy, 776 F.2d at 659*.

The Court agrees in large measure with these arguments and therefore DENIES Tilton's motion. The Court notes, moreover, that AP had yet to challenge the size of Tilton's request for attorney fees, as opposed to the legal basis for granting the fees. If AP should challenge the reasonableness of the size of Tilton's fee request at a later date, the Court would consider examining AP's fees and costs as a point of comparison. The Court does not anticipate that being necessary, however, so the Court DENIES Tilton's Motion.

11. *Motion for Leave to File Attorneys' Fees Invoices in Camera*

In this motion, Tilton seeks permission to file its attorney's fees invoices in *camera* and serve AP with a redacted version of those invoices. Tilton claims that this procedure is necessary to maintain the secrecy of the confidential attorney work product contained in its detailed billing summaries. The Court disagrees and therefore DENIES Tilton's motion. Given that **[*52]** the major trial Work has been completed, the Court finds it hard to imagine how Tilton could be harmed by revealing the amount of time which its attorneys spent researching and preparing for different issues While such information may be useful to an opponent prior to a trial -- in that it would help the opponent anticipate his adversary's trial strategy -- it would appear to have little value now, after the trial is complete. The Court believes, moreover, that AP must have access to a detailed breakdown and summary of Tilton's fee request in order to meaningfully challenge the propriety and reasonableness of Tilton's request.

In the event that the billing summaries prepared by Tilton's attorneys discuss matters which are of a more Confidential nature than those alluded to above, and the attorneys believe that the revelation of these matters would seriously harm their client, Tilton may selectively file certain items *in camera.* Routine billing summaries, Involving issues that have already been litigated before this Court, may not be filed *in camera,* however.

12. *Motion for Entry of Judgment Pursuant to Jury Verdict*

The Court finds Tilton's Proposed Judgment, lodged on **[*53]** June 21, 1993 to be largely acceptable, but requests that Tilton revise P7 in accordance with the suggestions in paragraph 8 above. Tilton should also remove all references to the amount of fees, costs, and interest to be awarded and should modify the Proposed Judgment so that it merely indicates that the Court has decided to grant Tilton's request for reasonable attorneys fees and costs on its antitrust and patent claims; pre-judgment interest on its patent claims; and post-judgment interest on its patent, antitrust, and tortious interference claims. Tilton should file a revised "Proposed" Judgment in accordance with these guidelines Within 7 days from the issuance of this Order. AP may then file any new objections [11] to Tilton's revised Judgment 5 days after that. The Court will then issue a separate order setting forth the amount of costs, fees, and interest to be awarded to Tilton after it has examined Tilton's revised statements of fees and costs and AP's (anticipated) objections to the amount of those requests. The Court thinks that this approach is preferable to Tilton's suggestion that the Court should first issue and enter its judgment and then later fill in the amount of **[*54]** costs and fees to be awarded on the same document.

IT IS SO ORDERED.

DATED: September 16, 1993

DAVID V. KENYON

UNITED STATES DISTRICT JUDGE

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[11] That is, any objections that Tilton's revised "Proposed" Order does not accurately reflect the holdings of this Order.

United States v. Brown Univ.

United States Court of Appeals for the Third Circuit

June 22, 1993, Argued ; September 17, 1993, Filed

No. 92-1911

Reporter

5 F.3d 658 *; 1993 U.S. App. LEXIS 23895 **; 1993-2 Trade Cas. (CCH) P70,358

THE UNITED STATES OF AMERICA v. BROWN UNIVERSITY IN PROVIDENCE IN THE STATE OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS; THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK; CORNELL UNIVERSITY; THE TRUSTEES OF DARTMOUTH COLLEGE; PRESIDENT AND FELLOWS OF HARVARD COLLEGE, MASSACHUSETTS; MASSACHUSETTS INSTITUTE OF TECHNOLOGY; THE TRUSTEES OF PRINCETON UNIVERSITY; THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA; YALE UNIVERSITY Massachusetts Institute of Technology, Appellant

Subsequent History: As Corrected October 1, 1993.

Prior History: [1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 91-03274)

Core Terms

district court, financial aid, Sherman Act, schools, rule of reason, commerce, tuition, needy, antitrust, anticompetitive, institutions, anti trust law, consumer, procompetitive, Methodology, Dentists, charitable, effects, attend, professional engineer, higher education, enhanced, social welfare, abbreviated, discount, practices, benefits, cases, nonprofit, promoted

LexisNexis® Headnotes

Education Law > Administration & Operation > Student Financial Aid > Eligibility for Financial Aid

HN1[] **Student Financial Aid, Eligibility for Financial Aid**

Under the Congressional Methodology, schools may increase or decrease the family contribution determination for financial aid, using their professional judgment. *20 U.S.C.S. § 1087tt*. Professional judgment may be used only on a case-by-case basis when special circumstances exist.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Higher Education & Professional Associations, Colleges & Universities

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, by its terms, does not apply to all conspiracies, but only to those which restrain trade or commerce.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Higher Education & Professional Associations, Colleges & Universities

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, regulates only transactions that are commercial in nature. Congress, however, intended this statute to embrace the widest array of conduct possible. Section 1's scope thus reaches the activities of nonprofit organizations, including institutions of higher learning. The sweeping language of § 1 applies to nonprofit entities. Nonprofit organizations can be held liable under the antitrust laws.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN4[] Scope, Exemptions

Although nonprofit organizations are not entitled to a class exemption from the Sherman Act, 15 U.S.C.S. § 1 et seq., when they perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation. This immunity, however, is narrowly circumscribed. It does not extend to commercial transactions with a public-service aspect. Courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

HN5[] **Regulated Industries, Higher Education & Professional Associations**

The exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction. The exchange of a service for money is "commerce" in the most common usage of that word. The payment of tuition in return for educational services constitutes commerce.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Higher Education & Professional Associations, Colleges & Universities**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not apply to the noncommercial aspects of the liberal arts.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In determining whether a business combination unreasonably restrains trade under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, the traditional rule of reason requires a fact-finder to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The plaintiff bears an initial burden of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets, and satisfy this burden by proving the existence of actual anticompetitive effects. Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct. Accordingly, courts typically allow proof of a defendant's market power instead--with market power being a surrogate for detrimental effects.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Regulated Practices, Price Fixing & Restraints of Trade

The true test of legality, under § 1 of the Sherman Act, 15 U.S.C.S. § 1, is whether a restraint of trade imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Antitrust & Trade Law > Sherman Act > Defenses

Evidence > Burdens of Proof > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Sherman Act, Defenses

In an action under § 1 of the Sherman Act, 15 U.S.C.S. § 1, if a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. A restraint on competition cannot be justified solely on the basis of social welfare concerns. To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Enforcement

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

While the rule of reason typically mandates an elaborate inquiry into the reasonableness of a challenged business practice. There 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. Such plainly anticompetitive agreements or practices are deemed to be illegal per se.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Evidence > Burdens of Proof > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN12[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In addition to the traditional rule of reason and the per se rule commonly applied in federal antitrust litigation, courts sometimes apply an abbreviated rule of reason analysis. The abbreviated rule of reason is an intermediate standard. It applies in cases where per se condemnation is inappropriate, but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint. Because competitive harm is presumed, the defendant must promulgate some competitive justification for the restraint, even in the absence of detailed market analysis indicating actual profit maximization or increased costs to the consumer resulting from the restraint. If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and the court condemns the practice without ado. If the defendant offers sound procompetitive justifications, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Horizontal price-fixing, where competitors at the same market level agree to fix or control the prices they will charge for their respective goods or services, is among the activities that is illegal per se. The test for determining what constitutes per se unlawful price-fixing is one of substance, not semantics. Per se rules of illegality are judicial constructs. The fact that overlap may be said to involve price-fixing in a literal sense, therefore, does not mean that it automatically qualifies as per se illegal price-fixing.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike, and the elimination of so-called competitive evils in an industry is no legal justification for price-fixing agreements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN15[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason ordinarily requires a detailed inquiry into the market impact of a restraint.

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Donald K. Joseph, Wolf, Block, Schoor & Solis-Cohen, S.E. Corner 15th & Chestnut Streets, Packard Building, 12th Floor, Philadelphia, PA 19102, ASSOCIATION OF ALUMNI AND ALUMNAE OF THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Counsel for Amicus-appellant. A. Leon Higginbotham, Jr. (argued pro bono publico), Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, New York 10019-6064, SCHOOL DISTRICT **[**2]** OF PHILADELPHIA, URBAN LEAGUE OF PHILADELPHIA, GREATER PHILADELPHIA URBAN AFFAIRS COALITION, HISPANIC BAR ASSOCIATION OF PENNSYLVANIA, BARRISTERS ASSOCIATION OF PHILADELPHIA, INC., ASIAN AMERICAN BAR ASSOCIATION OF THE DELAWARE VALLEY, NATIONAL BAR ASSOCIATION, National Bar Association Women Lawyers Division, Philadelphia Chapter, Counsel for Amicus-appellants. Melvin A. Schwarz, Dechert, Price & Rhoads, 1717 Arch Street, 4000 Bell Atlantic Tower, Philadelphia, PA 19103, ROCKEFELLER BROTHERS FUND, INC., Counsel for Amicus-appellant. Eugene D. Gulland, Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044, THE AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, THE ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES, THE COLLEGE BOARD, THE COUNCIL OF INDEPENDENT COLLEGES, THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS, THE NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS, **[**3]** THE UNITED NEGRO COLLEGE FUND, Counsel for Amicus-appellants.

Judges: Before: Mansmann, Cowen and Weis Circuit Judges

Opinion by: COWEN

Opinion

[*661] OPINION OF THE COURT

Cowen, *Circuit Judge*.

The Antitrust Division of the United States Department of Justice ("Division") brought this civil antitrust action against appellant Massachusetts Institute of Technology ("MIT") and eight Ivy League colleges and universities. The Division alleged that MIT violated section one of the Sherman Antitrust Act, *15 U.S.C. § 1*, by agreeing with the Ivy League schools to distribute financial aid exclusively on the basis of need and to collectively determine the amount of financial assistance commonly admitted students would be awarded.

The district court entered judgment in favor of the Division. *United States v. Brown University, et al., 805 F. Supp. 288 (E.D. Pa. 1992)*. We agree with the district court that the challenged practices implicate "trade or commerce" within the meaning of section one, and should be accorded more inquiry than a conclusory rejection under the *per se* rule, given the institutional context. However, we hold that the district court **[**4]** erred by failing to adequately consider the procompetitive and social welfare justifications proffered by MIT and by deciding the case on the basis of an abbreviated rule of reason analysis. We therefore will reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

MIT, founded in 1861, is a private nonprofit institution of higher education offering undergraduate and graduate programs. According to MIT's charter, it exists to maintain a school of industrial science and to advance the practical application of science. Its governing body, the MIT Corporation, is comprised of distinguished leaders in science, engineering, industry, education and public service. By virtue of its educational mission, MIT qualifies as a charitable, tax-exempt corporation under the Internal Revenue Code. See *26 U.S.C. § 501(c)(3)*.

MIT has vast resources. It has an operating budget of $ 1.1 billion and an endowment of $ 1.5 billion, among the ten largest in the nation. It receives in excess of $ 200 million annually in tuition and room and board payments. Although the annual student **[**5]** budget (tuition, room and board, books and incidental expenses) is approximately $ 25,000, MIT still operates its undergraduate educational program at a significant loss. Alumni contributions and investment income from the endowment heavily subsidize the cost of MIT's educational services.

Each year, MIT receives between six and seven thousand applications for admission to its undergraduate program. MIT then evaluates applicants' grades, class rank, standardized test scores and personal accomplishments, and admits approximately 2,000 students. Approximately 1,100 of the accepted students ultimately matriculate at MIT. MIT accepts only exceptionally talented students. In the 1991-92 academic year, eighty-three percent of the first-year class were in the top five percent of their high school class and eighty percent had math SAT scores over 700. MIT's principal competitors for these high quality undergraduate students are Harvard, Princeton, Yale and Stanford. In 1988, eighty-two percent of all students admitted to MIT chose to attend either MIT, an Ivy League school or Stanford.

Although MIT could fill its entire entering class with students able to pay the full tuition, it utilizes **[**6]** a need-blind admissions system under which all admission decisions are based entirely on merit without consideration of an applicant's ability to pay tuition. Because financial status is irrelevant, very intelligent but needy students are preferred over **[*662]** less accomplished but more affluent ones. To provide admitted needy students with a realistic opportunity to enroll, MIT also is committed to satisfying the full financial aid needs of its student body. This commitment is expensive. In the 1991-92 academic year, fifty-seven percent of the entering class received some financial aid. The combination of need-blind admissions and full need-based aid allows many students to attend MIT who otherwise could not afford to attend. For the 1991-92 academic year, minorities comprised forty-four percent of the entering class, while thirty years earlier minorities represented only three to four percent of the undergraduate class.

Before explaining how MIT calculates financial assistance packages, we provide an overview of the financial aid process. Under the federal financial aid program, students and their families must use their combined assets to pay for the students' college education. *See* **[**7]** *20 U.S.C. §§ 1087kk*, *1087mm*. When family assets are insufficient to meet expenses, the student is eligible for federal loans and loan guarantees. *See id.* To qualify for federal financial aid, students and their parents must disclose financial information to the College Scholarship Service ("CSS"). CSS processes this information and distributes the results to the United States Department of Education, which calculates each aid applicant's expected family contribution using the "Congressional Methodology" formula. The family contribution is the amount the student and his or her family may reasonably be expected to contribute annually toward educational expenses. *See id. § 1087mm*. CSS then forwards these results to participating institutions.

HN1[] Under the Congressional Methodology, schools may increase or decrease the family contribution determination using their professional judgment. *See id. § 1087tt(a)*. Professional judgment may be used only on a case-by-case basis when special circumstances exist. *See id.* Through the exercise of professional judgment, schools may have differing family contribution determinations for the same applicant. **[**8]** If a student receives any federal aid, however, he or she may not receive supplemental aid from an institution that would exceed his or her need as computed under the Congressional Methodology.

In 1958, MIT and the eight Ivy League schools [1] **[**9]** formed the "Ivy Overlap Group" to collectively determine the amount of financial assistance to award to commonly admitted students. The facts concerning this Agreement are

[1] The eight Ivy League schools include Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, the University of Pennsylvania, and Yale University. These schools were also named as defendants in this case, but each signed a consent decree with the United States immediately after the complaint was filed.

essentially undisputed. The Ivy Overlap Group expressly agreed that they would award financial aid only on the basis of demonstrated need. Thus, merit-based aid was prohibited. To ensure that aid packages would be comparable, the participants agreed to share financial information concerning admitted candidates and to jointly develop and apply a uniform needs analysis for assessing family contributions. [2]

[10] [*663]** The Ivy Overlap Group conducted their needs analysis pursuant to the "Ivy Methodology," which differed from the Congressional Methodology in several significant respects. For example, when a family has two or more children simultaneously attending college, the Congressional Methodology evenly apportions the parental contribution while the Ivy Methodology apportions the contribution based on the relative cost of the colleges. When a student's parents are divorced, the Congressional Methodology expects a parental contribution only from the custodial parent while the Ivy Methodology expects a contribution from both the custodial and noncustodial parents. Each deviation resulted in less generous aid packages than under the Congressional Methodology.

Although each Ivy Overlap institution employed the same analysis to compute family contributions, discrepancies in the contribution figures still arose. To eliminate these discrepancies, the Overlap members agreed to meet in early April each year to jointly determine the amount of the family contribution for each commonly admitted student. Prior to this conference, the Overlap schools independently determined the family contribution of each **[**11]** student they admitted, and transmitted this data to Student Aid Services. Student Aid Services then compiled rosters. A bilateral roster listed aid applicants who were admitted to two Ivy Overlap Group schools, and a multilateral roster compiled applicants admitted to more than two participating schools. For each student, the rosters showed each school's student budget, proposed student and parent contributions, self-help levels, and grant awards.

At the two-day spring Overlap conference, the schools compared their family contribution figures for each commonly admitted student. Family contribution differences of less than $ 500 were ignored. When there was a disparity in excess of $ 500, the schools would either agree to use one school's figure or meet somewhere in the middle. Due to time constraints, the schools spent only a few minutes discussing an individual and the agreed upon

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[2] The Manual of the Council of Ivy League Presidents states:

> 1. Member institutions agree that the primary purpose of a college financial aid program for all students is to provide financial assistance to students who without such aid would be unable to attend that institution. Financial aid should only be awarded after it is determined that family resources are inadequate to meet the student's educational expenses, and such aid should not exceed the difference between educational expenses and family resources. MIT is considered a member of the Ivy Group for purposes of these rules.
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> 2. Ivy Group institutions follow the common policy that any financial aid shall be awarded solely on the basis of demonstrated need. Moreover, in order to insure that financial awards to commonly admitted candidates are reasonably comparable, all Ivy Group institutions will share financial information concerning admitted candidates in an annual "Ivy Overlap" meeting just prior to the mid-April common notification date. The purpose of the overlap agreement is to neutralize the effect of financial aid so that a student may choose among Ivy Group institutions for non-financial reasons.
>
> a. Family contributions shall be compared and adjusted if necessary so that, as a general rule, families will be asked to pay approximately the same amount regardless of the Ivy Group institution they choose to attend. As a result, total financial need should differ by the approximate amount that costs at the respective institutions differ. Also, subject to variations in individual institutional financial aid policy, there is a further goal of establishing a balance between scholarship and self-help that is roughly comparable.
>
> b. Member institutions shall continue to compare late awards and adjustments to awards after the formal overlap session until the student decides which college he or she will attend.
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> 3. So that the process of comparing financial aid awards among member institutions can be facilitated, Ivy Group financial aid directors shall meet as necessary to agree on the basic principles of a financial needs analysis system. In particular they shall agree on a common system for measuring parental ability to pay and also seek to reduce differences in the other elements of needs analysis such as: contributions from student assets and benefits, summer savings expectations, travel allowances, and adjustments for use of outside scholarships.

App. at 1211-12.

figures were more a result of compromise than of a genuine effort to accurately assess the student's financial circumstances.

All Ivy Overlap Group institutions understood that failing to comply with the Overlap Agreement would result in retaliatory sanctions. Consequently, noncompliance was rare and quickly **[**12]** remedied. For example, in 1986, Princeton began awarding $ 1,000 research grants to undergraduates based on academic merit. After a series of complaints from other Overlap institutions who viewed these grants as a form of scholarship, Princeton terminated this program.

Stanford represented the Overlap schools' only meaningful competition for students. The Ivy Overlap Group, fearful that Stanford would lure a disproportionate number of the highest caliber students with merit scholarships, attempted to recruit Stanford into the group. Stanford declined this invitation.

In 1991, the Antitrust Division of the Justice Department brought this civil suit alleging that the Ivy Overlap Group unlawfully conspired to restrain trade in violation of section one of the Sherman Act, *15 U.S.C. § 1*, by (1) agreeing to award financial aid exclusively on the basis of need; (2) agreeing to utilize a common formula to calculate need; and (3) collectively setting, with only insignificant discrepancies, each commonly admitted students' family contribution toward **[*664]** the price of tuition. [3] The Division sought only injunctive relief. All of the Ivy League institutions signed **[**13]** a consent decree with the United States, and only MIT proceeded to trial. After a ten-day bench trial, the district court held that the Ivy Overlap Group's conduct constituted "trade or commerce" under section one of the Sherman Act. Rejecting MIT's argument that financial aid is pure charity and thus exempt from the dictates of the Sherman Act, the district court characterized the Overlap Agreement as setting a selective discount off the price of educational services.

The district court found that the Overlap Agreement constituted price fixing. Due to the nonprofit status and educational mission of the alleged conspirators, however, the court declined to apply the *per se* rule of illegality that summarily **[**14]** invalidates most horizontal price fixing agreements. Because the conflicting and complex expert testimony left the court unsure that the economic effect of Overlap could be accurately measured, it assumed without deciding MIT's premise that the Overlap Agreement was revenue neutral, *i.e.*, did not increase or decrease the *average* tuition payment made by students. Nevertheless, the court was quick to point out that assuming the fact of revenue neutrality, without more, offers no insight into any alleged procompetitive virtue of a restraint. Hence, despite this assumption of revenue neutrality, the court found the Agreement plainly anticompetitive because it eliminated price competition for outstanding students among the participating schools. Because the harm was tampering with free market forces, the court deemed it irrelevant whether the total amount of tuition payments collected from all students increased, decreased or remained the same.

Faced with what it believed was a plainly anticompetitive agreement, the district court applied an abbreviated version of the rule of reason and took only a "quick look" to determine if MIT presented any plausible procompetitive affirmative **[**15]** defenses that justified the Overlap Agreement. MIT argued that Overlap widened the pool of applicants to Overlap institutions by providing needy students with the ability to enroll if accepted. This, MIT asserted, increased consumer choice and enhanced the quality of the education provided to all students by opening the doors of the most elite colleges in the nation to diversely gifted students of varied socio-economic backgrounds. The district court deemed these explanations to be social welfare justifications and flatly rejected the contention that the elimination of competition may be justified by non-economic considerations. The court based its reasoning on the unambiguous pronouncements of the Supreme Court in landmark Sherman Act cases, which preclude substituting Congress' view of the social benefits of competition for that of a defendant. In two cases which the district court deemed closely analogous to the present case, the Supreme Court had rejected social welfare

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[3] Section one of the Sherman Act provides in pertinent 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.

15 U.S.C. § 1 (1988).

justifications for the anti-competitive designs of certain professional associations. National Society of Professional Engineers v. United States, 435 U.S. 679, 695, 98 S. Ct. 1355, 1367, 55 L. Ed. 2d 637 (1978); **[**16]** FTC v. Indiana Federation of Dentists, 476 U.S. 447, 463, 106 S. Ct. 2009, 2020, 90 L. Ed. 2d 445 (1986). This holding with respect to social welfare justifications led the district court to find insufficient MIT's proffered justification that Overlap promoted equality of educational access and opportunity.

The district court also discredited MIT's prediction that without Overlap, bidding for the highest achieving students would partially if not totally displace need-based aid. Absent Overlap, the district court found, each institution acting independently would be free to dedicate the necessary resources to ensure the continuation of need-blind admissions and full need-based aid. The district court apparently believed that even if eliminating merit scholarships and distributing student financial aid exclusively according to need promoted cognizable social objectives, Overlap was not a necessary means to effectuate **[*665]** these goals. The district court therefore entered a broad permanent injunction prohibiting MIT from:

> entering into, being a party to, maintaining or participating in -- directly or indirectly, on a case-by-case-basis or otherwise -- any combination **[**17]** or conspiracy which has the effect, or the tendency to affect, the determination of the price, or any adjustment thereof, expected to be paid by, or on behalf of, a prospective student, whether identified as tuition, family contribution, financial aid awards, or some other component of the cost of providing the student's education by the institutions to which the student has been admitted.

App. at 499-500.

MIT appealed the order of the district court. We granted leave for several *amicus curiae* briefs to be filed in support of MIT. [4]

[18]** II. *TRADE OR COMMERCE*

As a threshold matter, we must decide whether section one of the Sherman Act applies to the challenged conduct -- MIT's agreement with the other Overlap institutions to award financial aid only to needy students and to set the amount of family contribution from commonly admitted students. Section one, ***HN2***[] by its terms, does not apply to all conspiracies, but only to those which restrain "trade or commerce." 15 U.S.C. § 1. MIT characterizes its conduct as disbursing charitable funds to achieve the twin objectives of advancing equality of access to higher education and promoting socio-economic and racial diversity within the nation's most elite universities. This alleged pure charity, MIT argues, does not implicate trade or commerce, and is thus exempt from antitrust scrutiny.

It is axiomatic that section one of the Sherman Act ***HN3***[] regulates only transactions that are commercial in nature. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7, 79 S. Ct. 705, 710, 3 L. Ed. 2d 741 (1959). Congress, however, intended this statute to embrace the widest array of conduct possible. Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88, 95 S. Ct. 2004, 2013-14, 44 L. Ed. 2d 572 (1975). **[**19]** Section one's scope thus reaches the activities of nonprofit organizations, including institutions of higher learning. NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 100 n.22, 104 S. Ct. 2948, 2960, 82 L. Ed. 2d 70, n.22 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities."); American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576, 102 S. Ct. 1935, 1948, 72 L. Ed. 2d 330 (1982)

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[4] *Amici curiae* include the American Council on Education, the Association of American Medical Colleges, The Association of American Universities, The Association of Catholic Colleges and Universities, the College Board, the Council of Independent Colleges, The National Association of Independent Colleges and Universities, the National Association of State Universities and Land-Grant Colleges, the National Association of Student Financial Aid Administrators, the National Association of Student Personnel Administrators, the United Negro College Fund, the School District of Philadelphia, the Urban League of Philadelphia, the Greater Philadelphia Urban Affairs Coalition, the Hispanic Bar Association of Pennsylvania, the Barristers' Association of Philadelphia, Inc., the Asian American Bar Association of the Delaware Valley, the National Bar Association Women Lawyers Division, Philadelphia Chapter, the Association of Alumni and Alumnae of the Massachusetts Institute of Technology, and the Rockefeller Brothers Fund, Inc.

("It is beyond debate that nonprofit organizations can be held liable under the antitrust laws."); *see also* Goldfarb, 421 U.S. at 781-88, 95 S. Ct. at 2010-14 (finding nonprofit professional association violated Sherman Act). Nonprofit organizations are not beyond the purview of the Sherman Act, because the absence of profit is no guarantee that an entity will act in the best interest of consumers. *See* P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 232.2, at 275 (Supp. 1991); *see also* United States v. Rockford Memorial Corp., 898 F.2d 1278, 1285 (7th Cir.), *cert. denied*, *498 U.S. 920, 111 S. Ct. 295, 112 L. Ed. 2d 249 (1990)*. **[**20]**

HN4[] Although nonprofit organizations are not entitled to a class exemption from the Sherman Act, when they perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation. *Cf.* *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)* (labor union strike does not implicate commerce under **[*666]** Sherman Act); *National Org. For Women, Inc. v. Scheidler, 968 F.2d 612 (7th Cir. 1992)* (violent pro-life protests that successfully closed abortion clinics do not implicate commerce), *cert. granted in part*, *113 S. Ct. 2958, 61 U.S.L.W. 3834* (June 14, 1993). This immunity, however, is narrowly circumscribed. It does not extend to commercial transactions with a "public-service aspect." *Goldfarb, 421 U.S. at 787-88, 95 S. Ct. at 2013-14*. Courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances.

HN5[] The exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction. **[**21]** *See* *id. at 787-88, 95 S. Ct. at 2013* ("the exchange of . . . a service for money is 'commerce' in the most common usage of that word"). Therefore, the payment of tuition in return for educational services constitutes commerce. MIT concedes as much by acknowledging that its determination of the full tuition amount is a commercial decision.

We thus come to the crux of the issue -- is providing financial assistance solely to needy students a selective reduction or 'discount' from the full tuition amount, or a charitable gift? If this financial aid is a component of the process of setting tuition prices, it is commerce. *See* *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648, 100 S. Ct. 1925, 1928, 64 L. Ed. 2d 580 (1980)* (agreement to eliminate discounts violates section one). If it is pure charity, it is not. [5]

[22]** When MIT admits an affluent student, that student must pay approximately $ 25,000 annually (tuition plus room, board and incidental expenses) if he or she wishes to enroll at MIT. If MIT accepts a needy student and calculates that it will extend $ 10,000 in financial aid to that student, the student must pay approximately $ 15,000 to attend MIT. The student certainly is not free to take the $ 10,000 and apply it toward attendance at a different college. The assistance package is only available in conjunction with a complementary payment of approximately $ 15,000 to MIT. The amount of financial aid not only impacts, but directly determines the amount that a needy student must pay to receive an education at MIT. The financial aid therefore is part of the commercial process of setting tuition. [6]

[23]** MIT suggests that providing aid exclusively to needy students and setting the amount of that aid is not commercial because the price needy students are charged is substantially below the marginal cost of supplying a year of education to an undergraduate student. Because profit maximizing companies would not engage in such economically abnormal behavior, MIT concludes that such activity must be noncommercial. MIT's concession, however, that setting the full tuition amount is a commercial decision subject to antitrust scrutiny undermines this argument. The full tuition figure, like the varying amounts charged to needy students, is significantly below MIT's marginal cost. Therefore, whether the price charged for educational services is below marginal cost is not probative of the commercial or noncommercial nature of the methodology utilized to determine financial aid packages.

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[5] The district court commenced its analysis by noting that MIT is a significant economic entity, controlling substantial assets and operating a billion dollar budget. We agree with MIT that the extent of its resources is not probative of whether its financial aid is commerce.

[6] At least one Overlap member apparently agrees with this conclusion. In a paper entitled "Tuition Income," Yale explains that "tuition, modified by student aid expenditures, is in essence the price that the University charges for its educational programs." App. at 1315.

The fact that MIT is not obligated to provide any financial aid does not transform that aid into charity. Similarly, discounting the price of educational services for needy students is not charity when a university receives tangible benefits in exchange. Regardless of whether MIT's motive is altruism, self-enhancement **[**24]** or a combination of the two, [7] MIT benefits from providing financial **[*667]** aid. MIT admits that it competes with other Overlap members for outstanding students. By distributing aid, MIT enables exceptional students to attend its school who otherwise could not afford to attend. The resulting expansion in MIT's pool of exceptional applicants increases the quality of MIT's student body. MIT then enjoys enhanced prestige by virtue of its ability to attract a greater portion of the "cream of the crop." The Supreme Court has recognized that nonprofit organizations derive significant benefit from increased prestige and influence. *See* *American Society of Mechanical Engineers, Inc., v. Hydrolevel Corp., 456 U.S. 556, 576, 102 S. Ct. 1935, 1948, 72 L. Ed. 2d 330 (1982)*. Although MIT could fill its class with students able to pay the full tuition, the caliber of its student body, and consequently the institution's reputation, obviously would suffer. Overlap affords MIT the benefit of an overrepresentation of high caliber students, with the concomitant institutional prestige, without forcing MIT to be responsive to market forces in terms of its tuition costs. By immunizing **[**25]** itself through the Overlap from competition for students based on a price/quality ratio, MIT achieves certain institutional benefits at a bargain.

[26]** Our holding that the Overlap Agreement clearly implicates trade or commerce is consistent with *Marjorie Webster Junior College*, *Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 139 U.S. App. D.C. 217, 432 F.2d 650 (D.C. Cir. 1970)*, upon which MIT heavily relies. In that case, the Middle States Association ("MSA"), a nonprofit corporation dedicated to improving quality in institutions of higher learning, was responsible for, among other things, accrediting qualified colleges. One of the prerequisites to accreditation was that institutions be nonprofit organizations. Following this longstanding policy, the MSA declined to accredit Marjorie Webster because it was a proprietary junior college. The Court of Appeals for the District of Columbia Circuit held that the MSA's refusal to accredit Marjorie Webster was not commercial activity under section one of the Sherman Act. *Marjorie Webster*, 432 F.2d at 654. The Sherman Act's proscriptions, the court stated, do not extend to "the noncommercial aspects of the liberal arts." *Id.* Therefore, the refusal to accredit an institution "absent an intent or purpose to affect the commercial **[**27]** aspects of the profession" did not constitute commerce. *Id.*

The Marjorie Webster court focused primarily on intent because the nature of the conduct in that case was distinctly noncommercial. The MSA received no payment or other benefit for evaluating institutions and deciding whether to accredit them. In contrast to the Overlap Agreement, there was no exchange of money for services or the setting of a price. We agree that ***HN6***[] the Sherman Act does not apply to "the noncommercial aspects of the liberal arts." *Id.* MIT's conduct, however, presents the opposite side of the coin -- the commercial aspects of the liberal arts. Like the district court, we "can conceive of few aspects of higher education that are more commercial than the price

[7] The district court did not make a factual finding with respect to MIT's motivation for joining the Overlap Agreement. There is ample evidence that MIT's indirect objective was to promote equal access to higher education and diversity within the student body. We cannot overlook, however, that MIT also desired to attract the most talented students at the least expense to itself, a result which would also flow directly from the elimination of price competition among the Ivy Overlap member institutions. In fact, we could conjecture a number of self-serving reasons why MIT might have entered the Overlap Agreement, not the least of which might have been the market power which typically accompanies combinations. The higher than competitive tuition prices which MIT and the other Overlap members were able to charge, absent tuition competition, enhances "revenues", if not "profits", which can be allocated to any conceivable internal institutional purpose.

In any event, to determine whether trade or commerce is implicated, motive plays a much less important role when the nature of the activity, as here, is plainly commercial. An anticompetitive motive may trigger antitrust scrutiny of otherwise noncommercial conduct. *See Marjorie Webster Junior College*, *Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 139 U.S. App. D.C. 217, 432 F.2d 650, 654-55* (D.C. Cir.), *cert. denied*, *400 U.S. 965, 91 S. Ct. 367, 27 L. Ed. 2d 384 (1970)*. The opposite, however, is not also true. A beneficent objective does not excuse commercial activities from compliance with the Sherman Act. In *Goldfarb*, the Supreme Court held that a minimum fee schedule for attorneys published by a county bar association violated section one of the Sherman Act. 421 U.S. at 781-87, 95 S. Ct. at 2010-13. The bar association argued that the goal of professions, in contrast to businesses, "is to provide services necessary to the community." *Id. at 786, 95 S. Ct. at 2013*. The Supreme Court discounted the significance of this purported motive, finding that motive arguments lose force when used to justify an obviously commercial endeavor. *Id.*

charged to students." *United States v. [*668] Brown University, 805 F. Supp. 288, 298 (E.D. Pa. 1992)*. The *Marjorie Webster* court even acknowledged that if the MSA engaged in commercial activity, "antitrust policy would presumably be applicable." *432 F.2d at 654-55*.

We hold that financial assistance to students is part and parcel of the process of setting tuition and thus a commercial transaction. **[**28]** Although MIT's status as a nonprofit educational organization and its advancement of congressionally-recognized and important social welfare goals does not remove its conduct from the realm of trade or commerce, these factors will influence whether this conduct violates the Sherman Act. *See Goldfarb, 421 U.S. at 788 n.17, 95 S. Ct. at 2013 n.17*.

III. *RESTRAINT OF TRADE*

Section one of the Sherman Act provides that ***HN7***[] "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." *15 U.S.C. § 1*. Courts long ago realized that literal application of section one would render virtually every business arrangement unlawful. "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918)*. Because even beneficial business contracts or combinations restrain trade to some degree, section one has been interpreted to prohibit **[**29]** only those contracts or combinations that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 515, 55 L. Ed. 619 (1911)*.

Three general standards have emerged for ***HN8***[] determining whether a business combination unreasonably restrains trade under section one. Most restraints are analyzed under the traditional "rule of reason." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977)*. The rule of reason requires the fact-finder to "weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* [8] The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets. *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)*, *cert. denied*, U.S. , *112 S. Ct. 3034 (1992)*; *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979)*. **[**30]** The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, *see FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 2019, 90 L. Ed. 2d 445 (1986)*, increase in price, or deterioration in quality of goods or services, *see Tunis Bros., 952 F.2d at 728*. Such proof is often impossible to make, however, due to the difficulty of isolating the market effects of challenged conduct. 7 P. Areeda, ***Antitrust Law*** P 1503, at 376 (1986). Accordingly, courts typically allow proof of the defendant's "market power" instead. *Tunis Bros., 952 F.2d at 727*; *see NCAA v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, 110, 104 S. Ct. 2948, 2965, 82 L. Ed. 2d 70 (1984)*. Market power, the ability to raise prices above those that would prevail in a competitive market, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46, 104 S. Ct. 1551, 1566, 80 L. Ed. 2d 2 (1984)*, is essentially a "surrogate for detrimental effects." *Indiana Dentists, 476 U.S. at 460-61, [*669] 106 S. Ct. at 2019* **[**31]** (quoting 7 P. Areeda, *supra*, P 1511, at 429).

HN10[] If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual **[**32]** anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently

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[8] The contours of the traditional rule of reason inquiry have remained largely unchanged since they were first defined in *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918)*:

> ***HN9***[] The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

pro-competitive objective. A restraint on competition cannot be justified solely on the basis of social welfare concerns. *See*, *e.g.*, *Professional Engineers, 435 U.S. at 695, 98 S. Ct. at 1367*; *Indiana Dentists, 476 U.S. at 463, 106 S. Ct. at 2020*. To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective. 7 P. Areeda, *supra* P 1507, at 397; *Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1413* (9th Cir.), *cert. denied*, U.S. , *116 L. Ed. 2d 639, 112 S. Ct. 617 (1991)*.

HN11[] While the rule of reason typically mandates "an elaborate inquiry into the reasonableness of a challenged business practice," *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343, 102 S. Ct. 2466, 2472, 73 L. Ed. 2d 48 (1982)*, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue **[**33]** are conclusively presumed to be unreasonable," *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*. Such "plainly anticompetitive" agreements or practices are deemed to be "illegal *per se*." *National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978)*. "Business certainty and litigation efficiency" are the principal salutary effects of *per se* rules. *Maricopa, 457 U.S. at 344, 102 S. Ct. at 2473*. Such rules "tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials." *Continental T.V., 433 U.S. at 50 n.16, 97 S. Ct. at 2557 n.16*.

HN12[] In addition to the traditional rule of reason and the *per se* rule, courts sometimes apply what amounts to an abbreviated or "quick look" rule of reason analysis. The abbreviated rule of reason is an intermediate standard. It applies in cases where *per se* condemnation is inappropriate, but **[**34]** where "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an inherently suspect restraint. *See* *NCAA, 468 U.S. at 109, 104 S. Ct. at 2964* (quoting *Professional Engineers, 435 U.S. at 692, 98 S. Ct. at 1365*); *Indiana Dentists, 476 U.S. at 459, 106 S. Ct. at 2018* (same). Because competitive harm is presumed, the defendant must promulgate "some competitive justification" for the restraint, "even in the absence of detailed market analysis" indicating actual profit maximization or increased costs to the consumer resulting from the restraint. *NCAA, 468 U.S. at 110, 104 S. Ct. at 2965*; *accord* *Indiana Dentists, 476 U.S. at 459, 106 S. Ct. at 2018*. If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and "the court condemns the practice without ado." *Chicago Prof'l Sports Limited Partnership v. National Basketball Ass'n, 961 F.2d 667, 674* (7th Cir.), **[**35]** *cert. denied*, *U.S. , 113 S. Ct. 409 (1992)*. If the defendant offers sound procompetitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.

In the present case, the district court applied the abbreviated rule of reason analysis. Emphasizing that its decision to apply this analysis did "not stem from a reluctance to characterize the Ivy Overlap process as the type of price fixing which is ordinarily *per se* unreasonable," *Brown University, 805 F. Supp. at 301* (footnote omitted), the court nevertheless adopted the more cautious approach in deference to Supreme Court precedents counseling special scrutiny of restraints involving professional association. *Id.* Accordingly, rather than immediately condemning the Overlap because of its apparent quintessentially anti-competitive nature, the court afforded MIT an opportunity to proffer a procompetitive affirmative defense -- an acknowledged "heavy burden." *Id. at 304*.

MIT first claims that the district court erred by applying an abbreviated **[**36]** rather than a full-scale rule of reason analysis. The Division, on the other hand, argues that the **[*670]** district court erred by failing to declare Overlap illegal *per se*. In the alternative, the Division argues that if the *per se* rule is inapplicable, the district court correctly applied the abbreviated rule of reason.

A. *Is Overlap Illegal Per Se?*

The district court found that the "Ivy Overlap Group members, which are horizontal competitors, agreed upon the price which aid applicants and their families would have to pay to attend a member institution to which that student had been accepted." *Brown University, 805 F. Supp. at 301*. Based on this finding, the Division argues that MIT's conduct was *per se* unlawful price fixing. We disagree.

HN13[] Horizontal price-fixing, where competitors at the same market level agree to fix or control the prices they will charge for their respective goods or services, is among the activities that the Supreme Court has consistently held to be illegal *per se*. *See, e.g.*, FTC. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 435-36, 110 S. Ct. 768, 781-82, 107 L. Ed. 2d 851 (1990); **[**37]** Maricopa, 457 U.S. at 344-47, 102 S. Ct. at 2472-74; Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646-47, 100 S. Ct. 1925, 1927-28, 64 L. Ed. 2d 580 (1980); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 47 S. Ct. 377, 379, 71 L. Ed. 700 (1927). The Court has made clear, however, that the test for determining what constitutes *per se* unlawful price-fixing is one of substance, not semantics. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 8-9, 99 S. Ct. 1551, 1556-57, 60 L. Ed. 2d 1 (1979). *Per se* rules of illegality are judicial constructs, Superior Court Trial Lawyers Ass'n, 493 U.S. at 432-33, 110 S. Ct. at 780, and are based in large part on economic predictions that certain types of activity will more often than not unreasonably restrain competition, Maricopa, 457 U.S. at 344, 102 S. Ct. at 2473 **[**38]** ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."); *Northwest Wholesale Stationers*, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 2617, 86 L. Ed. 2d 202 (1985) ("The *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive."); NCAA, 468 U.S. at 103-04, 104 S. Ct. at 2961 ("*Per se* rules are invoked when the surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); Broadcast Music, 441 U.S. at 19-20, 99 S. Ct. at 1562 (In determining whether to characterize conduct as *per se* unlawful, the Court considers "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."). The economic models of behavior that spawn **[**39]** these predictions are not equally applicable in all situations. The fact that Overlap may be said to involve price-fixing in "a literal sense," therefore, does not mean that it automatically qualifies as *per se* illegal price-fixing. Broadcast Music, 441 U.S. at 8, 99 S. Ct. at 1556; *see also* NCAA, 468 U.S. at 102, 104 S. Ct. at 2960 (the Court declined to apply *per se* rule to agreement that raised price and restricted output because some regulation needed to make product available); *Northwest Wholesale Stationers*, 472 U.S. 284, 295-97, 105 S. Ct. at 2620-21 (cooperative buying arrangement was not automatically subject to *per se* treatment accorded other concerted refusals to deal).

The Court in Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), counseled against applying traditional antitrust rules outside of conventional business contexts. At issue in *Goldfarb* was the legality under section one of a minimum-fee schedule published by the Fairfax County Bar Association. **[**40]** The County Bar argued that the conduct of the "learned professions" was not "trade or commerce" and therefore not regulated under section one. The Court dismissed this argument and invalidated the fee schedule, but added the following, often-quoted caveat:

> The fact that a restraint operates upon a profession as distinguished from a business **[*671]** is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Id. at 788 n.17, 95 S. Ct. at 2013 n.17.

Since *Goldfarb*, the Supreme Court has been avowedly reluctant "to condemn rules adopted by professional associations as unreasonable *per se*." Indiana Dentists, 476 U.S. at 458, 106 S. Ct. at 2018 **[**41]** (citations omitted). In *Professional Engineers*, a group of professional engineers agreed, through an ethics rule issued by their non-profit trade association, to refuse to negotiate or discuss fees until after a potential client selected an engineer. 435 U.S. at 682-83, 98 S. Ct. at 1361. Although the acknowledged intent was to restrain price decreases, the Court analyzed the agreement under an abbreviated rule of reason analysis and invalidated it only after fully considering its ostensible redeeming virtues. Id. at 693-96, 98 S. Ct. at 1366-68.

In *Maricopa*, the Court reached the opposite outcome but affirmed in a qualified way the distinction between professional organizations and ordinary commercial businesses drawn in earlier cases. 457 U.S. 332, 102 S. Ct.

2466, 73 L. Ed. 2d 48 . The Court in *Maricopa* struck down as illegal *per se* an agreement among competing physicians setting the maximum fees that could be submitted to specified health insurers. Citing *Goldfarb*, the Court explained that

> the price-fixing agreements in this case . . . are not **[**42]** premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* or *Professional Engineers*, that the quality of the professional services their members provide is enhanced by the price restraint.

Id. at 349, 102 S. Ct. at 2475. The court further stated that

In unequivocal terms . . . ". . . ***HN14***[] the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." [citing *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)]*

. . . "the elimination of so-called competitive evils [in an industry] is no legal justification" for price-fixing agreements . . . .

Id., 102 S. Ct. at 2476. Thus the Court held that price-fixing agreements among medical professionals can sometimes be *per se* illegal, as it was found to be in that case, despite the claim that the health care industry was far removed from the competitive model. *Maricopa, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48* .

In other cases **[**43]** the Court has been more hesitant to condemn agreements by professional associations as unreasonable *per se*, or to apply a *per se* rejection to competitive restraints imposed in contexts where the economic impact of such practices is neither one with which the Court has dealt previously, nor immediately apparent. In *Indiana Dentists*, the Court once again reaffirmed *Goldfarb* and *Professional Engineers*, this time by refusing to apply the *per se* label to a rule adopted by an association of dentists. *476 U.S. at 458-59, 106 S. Ct. at 2018*. Pursuant to the rule, the dentists agreed to withhold x-rays from patients' insurers, who used the x-rays to evaluate benefit claims. Although the Court noted that the dentists' policy with respect to insurers "resembled practices that have been labeled [*per se* illegal] 'group boycotts,'" the Court expressly declined to resolve the case "by forcing the . . . policy into the 'boycott' pigeonhole and invoking the *per se* rule." *Id. at 458, 106 S. Ct. at 2017-18*.

Antitrust analysis is based largely on price theory, which "assures us that **[**44]** economic behavior . . . is *primarily* directed toward the maximization of profits." R. Bork, *The Antitrust Paradox* 116 (1978) (emphasis in original). The rationale for treating professional organizations differently is that they tend to vary somewhat from this economic model. *See* *Professional Engineers, 435 U.S. at 696,* ***[*672]*** *98 S. Ct. at 1367* ("by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary"). Specifically, while professional organizations aim to enhance the profits of their members, they and the professionals they represent may have greater incentives to pursue ethical, charitable, or other non-economic objectives that conflict with the goal of pure profit maximization. While it is well settled that good motives themselves "will not validate an otherwise anticompetitive practice," *NCAA, 468 U.S. at 101 n.23, 104 S. Ct. at 2960 n.23*, courts often look at a party's intent to help it judge the likely effects of challenged conduct. *See, e.g.*, *Broadcast Music, 441 U.S. at 19-20, 99 S. Ct. at 1562* **[**45]** ("our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy"); *Chicago Board of Trade, 246 U.S. at 238, 38 S. Ct. at 244* ("knowledge of intent may help the court to interpret facts and to predict consequences"). Thus, when bona fide, non-profit professional associations adopt a restraint which they claim is motivated by "public service or ethical norms," *Maricopa, 457 U.S. at 349, 102 S. Ct. at 2475*, economic harm to consumers may be viewed as less predictable and certain. In such circumstances, it is proper to entertain and weigh procompetitive justifications proffered in defense of an alleged restraint before declaring it to be unreasonable.

The same rationale counsels against declaring Overlap *per se* unreasonable. As a qualified charitable organization under *26 U.S.C. § 501(c)(3)*, MIT deviates even further from the profit-maximizing prototype than do professional associations. While non-profit professional associations **[**46]** advance the commercial interests of their for-profit constituents, MIT is, as its 501(c)(3) status suggests, an organization "operated exclusively for . . . educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual." *26 U.S.C. § 501(c)(3)*. This does not mean, of course, that MIT and other bona fide charitable organizations lack incentives to increase revenues. Nor does it necessarily mean that commercially motivated conduct of such organizations should be immune from *per se* treatment. Like the defendant associations in *Indiana Dentists* and *Professional Engineers*, however, MIT vigorously maintains that Overlap was the product of a concern for the public interest, here the undisputed public interest in equality of educational access and opportunity, and alleges the absence of any revenue maximizing purpose.

This alleged pure altruistic motive and alleged absence of a revenue maximizing purpose contribute to our uncertainty with regard to Overlap's anti-competitiveness, and thus prompts us to give careful scrutiny to the nature of Overlap, and to refrain from declaring **[**47]** Overlap *per se* unreasonable. [9] We thus agree with the district court that Overlap must be judged under the rule of reason.

B. *The Rule of Reason*

Although ***HN15***[] the rule of reason ordinarily requires a detailed inquiry into the market impact of a restraint, the district court held that no elaborate industry analysis **[**48]** was required to demonstrate Overlap's anticompetitive character. *See* *Indiana Dentists, 476 U.S. at 459, 106 S. Ct. at 2018*; *NCAA, 468 U.S. at 109, 104 S. Ct. at 2964*; *Professional Engineers, 435 U.S. at 692, 98 S. Ct. at 1366*. The district court found that colleges and universities traditionally use financial aid to recruit desirable students and that students and their families are heavily influenced by **[*673]** the amount of financial aid schools offer. The district court further found that:

> as a result of the Ivy Overlap Agreements, the member schools created a horizontal restraint which interfered with the natural functioning of the marketplace by eliminating students' ability to consider price differences when choosing a school and by depriving students of the ability to receive financial incentives which competition between those schools may have generated.

Brown University, 805 F. Supp. at 302. Because Overlap interfered with free market price structures and created a market unresponsive to consumer preferences, **[**49]** the district court concluded that no additional evidence of actual or likely economic repercussions was required to establish Overlap's anticompetitive character. The district court imposed upon MIT "a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *Brown University*, *id. at 304* (quoting *NCAA, 468 U.S. at 113, 104 S. Ct. at 2966*).

MIT does not dispute that the stated purpose of Overlap is to eliminate price competition for talented students among member institutions. Indeed, the intent to eliminate price competition among the Overlap schools for commonly admitted students appears on the face of the Agreement itself. In addition to agreeing to offer financial aid solely on the basis of need and to develop a common system of needs analysis, the Overlap members agreed to meet each spring to compare data and to conform one another's aid packages to the greatest possible extent. Because the Overlap Agreement aims to restrain "competitive bidding" and deprive prospective students of "the ability to utilize and compare **[**50]** prices" in selecting among schools, it is anticompetitive "on its face." *Professional Engineers, 435 U.S. at 693, 98 S. Ct. at 1366*. Price is "the central nervous system of the economy,"

[9] MIT's alleged pure social benefit motivation is arguably, but not necessarily, corroborated by the fact that MIT sets tuition considerably below its cost to begin with, and could fill its class each year with affluent students who do not need financial assistance. Even assuming the social benefit motivation of Overlap, however, the absence of a revenue maximizing purpose is neither corroborated nor obvious, notwithstanding the absence of a strictly "profit" maximizing purpose. Nevertheless, given the alleged centrality of Overlap to extending certain educational benefits to needy students, we believe that a rule of reason inquiry is required here to fairly assess the applicability of the Sherman Act.

Socony-Vacuum Oil, 310 U.S. at 224 n.59, 60 S. Ct. at 845 n.59, and "the heart of our national economic policy long has been faith in the value of competition," *Standard Oil Co. v. FTC, 340 U.S. 231, 248, 71 S. Ct. 240, 249, 95 L. Ed. 239 (1951)*. We therefore agree that Overlap initially "requires some competitive justification even in the absence of a detailed market analysis." *Indiana Dentists, 476 U.S. at 460, 106 S. Ct. at 2019* (quoting *NCAA, 468 U.S. at 109-10, 104 S. Ct. at 2965*); *see Professional Engineers, 435 U.S. at 695, 98 S. Ct. at 1367*.

MIT's principal counterargument is that an abbreviated rule of reason analysis is appropriate only where economic harm to consumers may fairly be presumed; and such harm may be presumed only when **[**51]** evidence establishes that "the challenged practice, unlike Overlap, manifestly has an adverse effect on price, output, or quality." MIT Opening Brief, at 41. As the Division aptly points out, however, if an abbreviated rule of reason analysis always required a clear evidentiary showing of a detrimental effect on price, output, or quality, it would no longer be abbreviated. *See Tunis Bros., 952 F.2d at 728* (under the traditional rule of reason, "an antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality 'of goods or services.'"). This is because proof of actual adverse effects generally will require the elaborate, threshold industry analysis that an abbreviated inquiry is designed to obviate.

MIT's position also is contradicted by Supreme Court precedent. Without any mention of actual effects on price, output, or quality, the Court in *Professional Engineers* required the association of engineers to affirmatively defend an ethics rule prohibiting members from discussing fees with prospective customers prior to being selected for a project. *435 U.S. at 692-96, 98 S. Ct. at 1365-68*. **[**52]** The Court reasoned that the "anticompetitive character" of the agreement could be presumed because the ban on competitive bidding, like price fixing, "impeded the ordinary give and take of the market place." *Id. at 692, 98 S. Ct. at 1366*. Similarly, the Court in *Indiana Dentists* held that collectively withholding x-rays from patients' insurers was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or . . . the purchase of higher priced services, than would occur in its absence." **[*674]** *476 U.S. at 461-62, 106 S. Ct. at 2019*.

Since the Overlap Agreement is a price fixing mechanism impeding the ordinary functioning of the free market, MIT is obliged to provide justification for the arrangement. In *NCAA*, the Supreme Court credited the district court's findings that the NCAA's television agreements actually increased prices and restricted output. "Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference." *NCAA, 468 U.S. at 107, 104 S. Ct. at 2963*. **[**53]** According to the Court, "these hallmarks of anticompetitive behavior placed upon [the NCAA] a *heavy burden* of establishing an affirmative defense." *Id. at 113, 104 S. Ct. at 2966* (emphasis added).

The district court did not make any conclusive findings with regard to these "hallmark" consequences of price fixing in the present case. First, the district court did not find, and we do not understand the Division to suggest, that Overlap has caused or is even likely to cause any reduction of output. Second, while the parties sharply dispute the effect of Overlap on the price of education at the member colleges, the district court expressed doubt as to whether price effects could be determined to a reasonable degree of economic certainty. The court therefore assumed without deciding that the cooperation among the schools had no aggregate effect on the price of an MIT education. Thus, while MIT bears the burden of establishing an affirmative justification for Overlap, *see Indiana Dentists, 476 U.S. at 460, 106 S. Ct. at 2019*; *Professional Engineers, 435 U.S. at 695, 98 S. Ct. at 1367*, **[**54]** the absence of any finding of adverse effects such as higher price or lower output is relevant, albeit not dispositive, when the district court considers whether MIT has met this burden. Nevertheless, the absence or inconclusivity of a finding of actual adverse effects does not mitigate MIT's burden to justify price fixing with some procompetitive virtue, or with a showing of Overlap's reasonable necessity to its institutional purpose, because actual dollar amount effects do not necessarily reflect the harm to competition which Congress intended to eliminate in enacting the Sherman Act.

MIT claims that even if the district court properly decided to apply an abbreviated rule of reason analysis, the court applied it incorrectly by failing to adequately consider the economic and social welfare justifications proffered by MIT. We will address MIT's claims with respect to economic and social welfare justifications separately.

At trial, MIT maintained that Overlap had the following procompetitive effects: (1) it improved the quality of the educational program at the Overlap schools; (2) it increased consumer choice by making an Overlap education more accessible to a greater number of students; **[**55]** and (3) it promoted competition for students among Overlap schools in areas other than price. The district court rejected each of these alleged competitive virtues, summarily concluding that they amounted to no more than non-economic social welfare justifications.

On appeal, MIT first contends that by promoting socio-economic diversity at member institutions, Overlap improved the quality of the education offered by the schools and therefore enhanced the consumer appeal of an Overlap education. The Supreme Court has recognized improvement in the quality of a product or service that enhances the public's desire for that product or service as one possible procompetitive virtue. *See* NCAA, 468 U.S. at 114-15, 104 S. Ct. at 2967. The district court itself noted that it cannot be denied "that cultural and economic diversity contributes to the quality of education and enhances the vitality of student life." Brown University, 805 F. Supp. at 306. Albeit in a different context, the Supreme Court also has recognized that "the atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher **[**56]** education -- is widely believed to be promoted by a diverse student body." Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312, 98 S. Ct. 2733, 2760, 57 L. Ed. 2d 750 (1978) (opinion of Powell, J.) (use of race as a factor in medical school admissions survives equal protection challenge).

MIT also contends that by increasing the financial aid available to needy students, Overlap **[*675]** provided some students who otherwise would not have been able to afford an Overlap education the opportunity to have one. In this respect, MIT argues, Overlap enhanced consumer choice. The policy of allocating financial aid solely on the basis of demonstrated need has two obvious consequences. First, available resources are spread among more needy students than would be the case if some students received aid in excess of their need. Second, as a consequence of the fact that more students receive the aid they require, the number of students able to afford an Overlap education is maximized. In short, removing financial obstacles for the greatest number of talented but needy students increases educational access, thereby widening consumer choice. Enhancement of consumer **[**57]** choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit. *See* NCAA, 468 U.S. at 102, 104 S. Ct. at 2960-61. [10]

Finally, MIT argues that by eliminating price competition among participating schools, Overlap channelled competition into areas such as curriculum, campus activities, and student-faculty interaction. As the Division correctly notes, however, any competition that survives a horizontal price restraint naturally will focus on attributes other than price. This is not the kind of procompetitive virtue contemplated under the Act, but rather one mere consequence of limiting price competition.

[58]** MIT next claims that beyond ignoring the procompetitive effects of Overlap, the district court erroneously refused to consider compelling social welfare justifications. MIT argues that by enabling member schools to maintain a steadfast policy of need-blind admissions and full need-based aid, Overlap promoted the social ideal of equality of educational access and opportunity.

Congress has sought to promote the same ideal of equality of educational access and opportunity for more than twenty-five years. Testimony at trial established that a primary objective of federal financial aid policy is to promote "horizontal equity" and "vertical equity." App. at 511-12, 916. In other words,

> federal financial aid policy aims to ensure that similarly situated students are treated the same regardless of which institution, or aid officer within that institution, reviews their applications, and that students with less financial need do not receive more aid than those students with more financial need.

Brown University, 805 F. Supp. at 291. The federal government seeks to effectuate these goals through programs that distribute financial aid exclusively on the **[**59]** basis of need.

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[10] To the extent that increasing consumer choice and promoting socioeconomic diversity in the context of higher education reflect social as well as procompetitive values, the district court should have considered the degree to which Overlap furthered these social objectives. *See* discussion *infra*, typescript at 45-51.

As the evidence attested, MIT has sought to promote similar social and educational policy objectives by limiting financial aid to those with demonstrated need, although the district court found that the Ivy Needs Analysis Methodology differed significantly from the Congressional Methodology. The Overlap Agreement states:

> Member institutions agree that the primary purpose of a college financial aid program for all students is to provide financial assistance to students who without such aid would be unable to attend that institution. Financial aid should only be awarded after it is determined that family resources are inadequate to meet the student's educational expenses, and such aid should not exceed the difference between educational expenses and family resources. . . .

Brown University, 805 F. Supp. at 292-93. Although the percentage of American minorities comprising MIT's student body has dramatically risen over the last three decades, [11] which MIT attributes to the Overlap policy, the Ivy Methodology for performing a student needs analysis was ironically less generous to needy students in certain key ways **[*676]** than the Congressional **[**60]** Methodology. The district court noted three main areas in which the Ivy Methodology departed from the Congressional Methodology, including the way in which the Overlap apportions family income when multiple siblings attend college simultaneously, [12] **[**61]** the requirements of separate payment from non-custodial parents where there is a divorce or separation, [13] and the way Overlap treats capital losses, depreciation losses, and losses from secondary business which are reported on the parents' tax returns. [14] Despite these discrepancies, the facts certainly attest that MIT has widened the access of certain minorities to its educational institution, whether or not the Overlap was mainly responsible for or necessary to that result. MIT maintains Overlap's virtual necessity to its continuing commitment to widening its access to needy minority students.

The district court was not persuaded by the alleged social welfare values proffered for Overlap because it believed the Supreme Court's decisions in *Professional Engineers* and *Indiana Dentists* required a persuasive procompetitive justification, or a showing of necessity, neither of which it believed that MIT demonstrated. In *Professional Engineers*, the engineers maintained that an ethics rule banning competitive bidding was reasonable because price competition for projects would **[**62]** induce engineers to offer their services at unsustainably low prices and compensate by cutting corners on the quality of their work. *435 U.S. at 684-85, 98 S. Ct. at 1361-62*. Because consumers in most instances award contracts to the lowest bidder, regardless of quality, competitive bidding "would be dangerous to the public health, safety and welfare." *Id. at 685, 98 S. Ct. at 1362*. The Court flatly rejected the engineers' "public safety" argument, viewing it as nothing more than an attempt to impose "[their own] views of the costs and benefits of competition on the entire marketplace." *Id. at 695, 98 S. Ct. at 1367*. The Court explained that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id. at 696, 98 S. Ct. at 1368*.

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11 In the 1991-1992 academic year, American minorities comprised 44% of MIT's undergraduate enrollment, up from 3% to 4% just three decades earlier.

12 The district court found that:

When more than one child in a family is attending college, the Congressional Methodology evenly apportions the parental contribution; for example, if two children in one family are attending college, half the parental contribution would be attributed to each child. By contrast, the Ivy methodology apportioned the family contribution for multiple siblings based on the cost of the colleges the children were attending. The more a college costs, the greater part of the family contribution would be attributed to the student attending that college.

805 F. Supp. at 293-94.

13 The district court found that "in the event a student's parents were divorced or separated, the Congressional Methodology expects a contribution from the custodial parent only. The Ivy Overlap Group schools considered the income of the non-custodial parent." *805 F. Supp. at 294*.

14 The district court found that "the Congressional Methodology subtracts from income the losses reported on parents' tax returns. The Ivy Overlap Group schools did not subtract these losses in calculating income to determine family contribution." *805 F. Supp. at 294*.

In *Indiana Dentists*, where a group of dentists agreed to withhold x-rays from patients' insurers, the dentists association argued that certain noncompetitive "quality of care" effects of the agreement were relevant to the **[**63]** Court's analysis under the rule of reason. *476 U.S. at 462, 106 S. Ct. at 2020*. According to the Court,

> the gist of the claim is that x rays, standing alone, are not adequate bases for diagnosis of dental problems or for the formulation of an acceptable course of treatment. Accordingly . . . there is a danger that [insurers] will erroneously decline to pay for treatment that is in fact in the interest of the patient, and that the patient will as a result be deprived of fully adequate care.

Id. at 462-63, 106 S. Ct. at 2020. Unconvinced, the Court explained that "precisely such a justification for withholding information from customers was rejected as illegitimate in the [*Professional Engineers*] case." *Id. at 463, 106 S. Ct. at 2020*. The Court continued:

> The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument **[*677]** amounts to "nothing less than a frontal assault on the **[**64]** basic policy of the Sherman Act."

Id. (quoting *Professional Engineers, 435 U.S. at 695, 98 S. Ct. at 1367*).

Both the public safety justification rejected by the Supreme Court in *Professional Engineers* and the public health justification rejected by the Court in *Indiana Dentists* were based on the defendants' faulty premise that consumer choices made under competitive market conditions are "unwise" or "dangerous." Here MIT argues that participation in the Overlap arrangement provided some consumers, the needy, with additional choices which an entirely free market would deny them. The facts and arguments before us may suggest some significant areas of distinction from those in *Professional Engineers* and *Indiana Dentists* in that MIT is asserting that Overlap not only serves a social benefit, but actually enhances consumer choice. Overlap is not an attempt to withhold a particular desirable service from customers, as was the professional combination in *Indiana Dentists*, but rather it purports only to seek to extend a service to qualified students who are financially "needy" and would not otherwise be able to afford **[**65]** the high cost of education at MIT. Further, while Overlap resembles the ban on competitive bidding at issue in *Professional Engineers*, MIT alleges that Overlap enhances competition by broadening the socio-economic sphere of its potential student body. Thus, rather than suppress competition, Overlap may in fact merely regulate competition in order to enhance it, while also deriving certain social benefits. If the rule of reason analysis leads to this conclusion, then indeed Overlap will be beyond the scope of the prohibitions of the Sherman Act.

We note the unfortunate fact that financial aid resources are limited even at the Ivy League schools. A trade-off may need to be made between providing some financial aid to a large number of the most needy students or allowing the free market to bestow the limited financial aid on the very few most talented who may not need financial aid to attain their academic goals. Under such circumstances, if this trade-off is proven to be worthy in terms of obtaining a more diverse student body (or other legitimate institutional goals), the limitation on the choices of the most talented students might not be so egregious as to trigger the obvious **[**66]** concerns which led the Court to reject the "public interest" justifications in *Professional Engineers* and *Indiana Dentists*. However, we leave it for the district court to decide whether full funding of need may be continued on an individual institutional basis, absent Overlap, whether tuition could be lowered as a way to compete for qualified "needy" students, or whether there are other imaginable creative alternatives to implement MIT's professed social welfare goal.

We note too, however, that another aspect of the agreements condemned in *Professional Engineers* and *Indiana Dentists* was that those agreements embodied a strong economic self-interest of the parties to them. In *Professional Engineers*, the undisputed objective of the ban on competitive bidding was to maintain higher prices for engineering services than a free competitive market would sustain. 435 U.S. at 18-19, 98 S. Ct. at 1366. The engineers' public safety justification "rested on the assumption that the agreement [would] tend to maintain price level; if it had no such effect, it would not serve its intended purpose." *Id.* Likewise, the Court in *Indiana Dentists* **[**67]** characterized the dentists' agreement to withhold x-rays as an "attempt to thwart" the goal of "choosing the least expensive adequate course of dental treatment." *Indiana Dentists, 476 U.S. at 461, 106 S. Ct. at 2019*.

Though not singled out by the Court in these two cases, the nature of the agreements made any public interest argument greatly suspect. To the extent that economic self-interest or revenue maximization is operative in Overlap, it too renders MIT's public interest justification suspect.

The role that economic self-interest plays in evaluating affirmative defenses to a Sherman Act claim was made clear by the Court in *FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*, where the Court condemned as *per se* illegal the trial lawyers' concerted refusal to accept further assignments **[*678]** to defend indigents until they receive an increase in compensation. The Trial Lawyers Association asserted a justification based on the exercise of *First Amendment* rights, citing *N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982)*. **[**68]** The Supreme Court rejected Trial Lawyers Association's argument because the participants' undenied objective was to reap the economic advantage resulting from the boycott. The Court distinguished *Claiborne Hardware*, where a boycott was aimed at promoting equal respect and equal treatment instead of naked economic self-interest. The justification based on the *First Amendment* rights as in *Claiborne Hardware* does not apply, the Court emphasized, to a boycott conducted by business competitors who "stand to profit financially from a lessening of competition in the boycotted market." *Trial Lawyers, 493 U.S. at 427, 110 S. Ct. at 777*. In the case *sub judice*, the quest for economic self-interest is professed to be absent, as it is alleged that the Overlap agreement was intended, not to obtain an economic profit in the form of greater revenue for the participating schools, but rather to benefit talented but needy prospective students who otherwise could not attend the school of their choice.

The nature of higher education, and the asserted procompetitive and pro-consumer features of the Overlap, convince us that a full rule of reason **[**69]** analysis is in order here. It may be that institutions of higher education "require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb v. Virginia, 421 U.S. 773, 788 n.17, 95 S. Ct. 2004, 2013, 44 L. Ed. 2d 572 (1975)*. *See also* *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7, 79 S. Ct. 705, 710 n.7, 3 L. Ed. 2d 741 (1959)* ("the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives").

It is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education. There is no doubt, too, that enhancing the quality of our educational system redounds to the general good. To the extent that higher education endeavors to foster vitality of the mind, to promote free exchange between bodies of thought and truths, and better communication among a broad spectrum of individuals, as well as prepares individuals for the intellectual **[**70]** demands of responsible citizenship, it is a common good that should be extended to as wide a range of individuals from as broad a range of socio-economic backgrounds as possible. It is with this in mind that the Overlap Agreement should be submitted to the rule of reason scrutiny under the Sherman Act.

We conclude that the district court was obliged to more fully investigate the procompetitive and noneconomic justifications proffered by MIT than it did when it performed the truncated rule of reason analysis. Accordingly, we will remand this case to the district court with instructions to evaluate Overlap using the full-scale rule of reason analysis outlined above. [15]

[71]** The final step of the rule of reason involves determining whether the challenged agreement is necessary to achieve its purported goals. The district court alternatively rejected MIT's social welfare justifications because it

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[15] We reject the argument raised by an *amicus curiae* that MIT's conduct is protected by the *First Amendment*. The Supreme Court has characterized academic freedom as "a special concern of the *First Amendment*." *Regents of the Univ. of California v. Bakke, 438 U.S. 265, 312, 98 S. Ct. 2733, 2759, 57 L. Ed. 2d 750 (1978)* (opinion of Powell, J.) (upholding the use of race as a factor in admission decisions of a medical school). The freedom of a university to make its own judgments includes four elements: a university may "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* (quoting *Sweezy v. New Hampshire, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218, 1 L. Ed. 2d 1311 (1957))*. This constitutionally protected sphere of activity does not extend to determining how much to charge students for educational services.

"questioned" whether Overlap was necessary to achieve egalitarian educational access. Even if an anticompetitive restraint is intended to achieve a legitimate objective, the restraint only survives a rule of **[*679]** reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant. *See* *Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 151-52 n.18 (3d Cir. 1981)* (quoting *American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248-49 (3d Cir. 1975))*, *cert. denied*, *455 U.S. 1019, 102 S. Ct. 1715 (1982)*; 7 P. Areeda, ***Antitrust Law*** P 1505, at 383-4 (1986). To determine if a restraint is reasonably necessary, courts must examine first whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through a substantially less restrictive alternative. 7 P. Areeda, **[**72]** *supra*

P 1505, at 388. Once a defendant demonstrates that its conduct promotes a legitimate goal, the plaintiff, in order to prevail, bears the burden of proving that there exists a viable less restrictive alternative. 7 P. Areeda, *supra* P 1507, at 397; *Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1413* (9th Cir.), *cert. denied*, U.S. , *112 S. Ct. 617 (1991)*.

The district court "questioned" whether the Overlap Agreement was "a necessary ingredient" to achieve the social welfare objectives offered by MIT. *Brown University, 805 F. Supp. at 306*. The district court implicitly concluded, and we agree, that to some extent the Overlap Agreement promoted equality of access to higher education and economic and cultural diversity. It thus turned directly to the second inquiry -- whether a substantially less restrictive alternative, the free market coupled with MIT's institutional resolve, could achieve the same benefits. In a conclusory statement, the court found "no evidence supporting MIT's fatalistic prediction that the end of the Ivy Overlap Group necessarily would sound the death **[**73]** knell of need-blind admissions or need-based aid." *Id.* Although the district court acknowledged that the end of Overlap could herald the end of full need-based aid at MIT, it also observed that this was not an inevitability if indeed MIT counted full need-based aid among its priority institutional goals.

On remand if the district court, under a full scale rule of reason analysis, finds that MIT has proffered a persuasive justification for the Overlap Agreement, then the Antitrust Division of the Justice Department, the plaintiff in this case, must prove that a reasonable less restrictive alternative exists. *See*, *e.g.*, 7 P. Areeda, *supra* P 1507, at 397. The district court should consider, if and when the issue arises, whether the Antitrust Division has shown, by a preponderance of the evidence, that another viable option, perhaps the free market, can achieve the same benefits as Overlap.

IV. *CONCLUSION*

For the foregoing reasons, we will reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

Dissent by: WEIS

Dissent

Weis, *Circuit Judge*, *dissenting*.

Although the century that has passed since the enactment of the Sherman **[**74]** Act may make reliance upon legislative history somewhat hazardous, it is a fair assumption that the drafters of the statute would have been quite astounded at the government's contention that the student aid program at issue here is covered by the antitrust laws. In response to a motion on the Senate floor to amend the legislation by exempting temperance societies, Senator Sherman remarked:

> "I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce . . . .
>
> You might as well include churches and Sunday schools."

21 Cong. Rec. 2658-59 (1890) (statement of Sen. Sherman), *reprinted in* 1 *The Legislative History of the Federal Antitrust Laws and Related Statutes* 252 (Earl W. Kintner ed., 1978), and *reprinted in* *Missouri v. National Org. for Women, Inc., 620 F.2d 1301, 1309 (8th Cir. 1980)*. [16]

[75] [*680]** Glossing over the policy articulated in this bit of legislative history, the government has rushed into discussions of economic theory using pejorative terms such as "price fixing" and illegal "discounts." But before such considerations have any relevance, a formidable threshold must be crossed in this case -- the applicability of the Sherman Act to agreements on need-blind admission policies and student aid. It is premature to analyze activities in the business world that violate ***antitrust law*** until it has been established that the Sherman Act does, in fact, govern the conduct in the circumstances present here.

The challenged practices, designed to provide high quality education to those who have demonstrated academic talent without regard to their financial status, do not instinctively conjure up images of reprehensible business dealings. Quite to the contrary, the initial reaction is to question why the heavy artillery of antitrust has been wheeled into position to shoot down practices that so obviously advance the public interest.

Practices that might be illegal in the commercial area do not transform a charitable activity into a business one. To the extent that the government **[**76]** pursues that course, its argument is simply a non sequitur.

In his treatise on antitrust, Professor Areeda observes:

> "It would seem strange, for example, to bring the antitrust laws to bear on two philanthropists who 'divided the market' by agreeing that one would care for the homeless on the east side of town while the other did so on the west side. They would say -- perhaps correctly in that particular situation -- that they are not part of the 'trade or commerce' to which the antitrust laws apply."

Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* § 232.2, at 286-87 (Supp. 1992).

The hypothetical can be moved a bit closer to the situation at hand by assuming that the two philanthropists chose to provide food for needy persons not only by "dividing the territory," but also by agreeing to allocate their aid on the basis of a formula that includes factors such as income and the number of family members. This, too, would be a purely charitable enterprise that the Sherman Act was never intended to cover. It would make no difference that the two philanthropists were business competitors, and that similar agreements **[**77]** between them with respect to their companies would run afoul of the antitrust laws. Similarly here, the issue is not whether MIT is a nonprofit entity, but rather whether the challenged *activity* is commercial or not.

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy "in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. Because *section 1* could outlaw the entire body of private contract law, courts have not read the statute literally, *National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687-88, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*, but have drawn upon its language to fashion appropriate limits. The unique circumstances of this case require a careful examination of the statute, particularly the words "trade or commerce."

The Supreme Court has defined "trade or commerce" to be commercial competition in the marketing of goods or services. In that light, the aim of the statute was "to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers **[**78]** of goods and services." *Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)*. As the Court pointed out, "restraint of trade" had a well-understood meaning at common law. The addition of "commerce among the several states" was not a further restraint, but was the constitutional basis on

[16] "The unanimity with which foes and supporters of the bill spoke of its aims as the protection of free competition, permit use of the debates in interpreting the purpose of the act." *Apex Hosiery Co. v. Leader, 310 U.S. 469, 495, n.15, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)*.

which federal action was founded. *Id. at 495*. Thus, the Sherman Act was directed at "the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition." *Id. at 500*.

When considering the scope of "trade or commerce," courts must be cautious in examining the entities and activities that are the **[*681]** intended objects of the statute. The Sherman Act applies to organizations that sell services as well as commodities. *See*, *e.g.*, *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459-64, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*; *Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348-49, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*; *Professional Eng'rs, 435 U.S. at 693-96*; **[**79]** *Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)*. Moreover, the Act applies to nonprofit corporations as well as business entities. *See*, *e.g.*, *NCAA v. Board of Regents, 468 U.S. 85, 100-01*, & n.22, *82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*; *Maricopa County, 457 U.S. at 348-49*; *Professional Eng'rs, 435 U.S. at 693-96*; *Goldfarb, 421 U.S. at 787-88*. But it is significant that in each of the cases brought against nonprofit organizations, the practice condemned was the setting of, or affecting, fees for services -- activity that fell within the ambit of commerce even though conducted by professionals.

Those cases focused on the nature of the challenged activity rather than on the institution that performed the service. Thus, *Goldfarb* cautioned: "The public service aspect, and other features of the professions, may require that *a particular practice*, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *421 U.S. at 788-89 n.17* **[**80]** (emphasis added). In *NCAA, 468 U.S. at 100-103*, the Court observed that some restraints might be necessary to make a product pro-competitive, but concluded, nevertheless, that the practice of limiting the number of college football games that could be shown on television violated the antitrust laws. It is unremarkable that marketing of football games, an outright profit-making activity, was found to be subject to review under commercial, rather than educational, standards.

In considering the challenged practices here, the question is whether agreeing to give financial aid only on the basis of need and cooperating in determining the amount of support offered to applicants are activities in trade or commerce. [17] If they are not, then an exchange of information or an agreement on the appropriate allowances in individual cases does not come within the scope of the Sherman Act.

[81]** The district court concluded that the price charged to students by the universities was an exchange of money for services and was, thus, commerce. As the majority explains, the government objected to the school's agreement on the amount of the family contribution expected from each student, a factor that is used in determining the total amount of aid that the universities extend. The district court characterized student aid as a "discount" from the price students would otherwise pay. Determining the amount of aid is not always a simple calculation, but often involves several categories of assistance. Government grants or loans are one type of financial support. Another, termed self-help, includes amounts earned by a student during the school year (often while participating in government-funded work-study programs), and loans the student secures directly from a bank. As the district court found, each university sets its own levels for self-help.

Thus, although the participating institutions in Overlap might agree on a family contribution figure, the type of aid an individual student receives could vary substantially. For example, in weighing self-help bank loans, government grants, **[**82]** and work-study earnings, one school might conclude that there is no need for university-funded grants. Another school, however, might decide to offer a grant to a student in lieu of all or part of a bank loan. Thus, although the family contribution would be identical for both schools, the first school would not expend any of its own funds, whereas the second would be more generous.

The government's description of financial aid as a "discount" is a semantic attempt to **[*682]** bring the process within the Sherman Act and puts the rabbit into the hat. "Discount" is a term used in commercial transactions when a reduction in price is used to increase sales volume or enhance revenues. *See*, *e.g.*, *Catalano, Inc. v. Target*

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[17] The government has not demonstrated that the Overlap Group conspired to set base tuition levels, and the district court's findings do not discuss that issue.

Sales, Inc., 446 U.S. 643, 645-50, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980). A discount, which is intended to improve profits from a business, is not a gift, and is not intended as such. The record demonstrates that MIT receives over three times as many applications as it can accept and that it could fill its classrooms with students who are able to pay the full base tuition. In the business world, that would eliminate any need for a "discount."

It is true enough **[**83]** that the effect of financial aid is to reduce the amount of money that students are required to expend for their education. However, that result follows regardless of the source of the aid. Students who receive university-funded aid are in the same position as those who receive federal grants or gifts from philanthropic organizations that provide scholarships for needy students.

To pinpoint the issue here, it is necessary to separate the functions of calculating base tuition and awarding financial aid. The granting of aid is the gravamen of the government's complaint, not the setting of base tuition.

Although *Goldfarb* emphasized the need to focus on the "particular practice" under scrutiny, *421 U.S. at 788-89 n.17*, there is little decisional authority on this point in the antitrust field as it might affect educational institutions. *Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984)*, however, provides a helpful analogy. In that case, brought under Title IX of the Education Amendments of 1972, the Court was required to decide whether the statutory language, "any education program or activity receiving Federal **[**84]** financial assistance," applied to the college as a whole. *Id. at 558-59*. The Court rejected the notion that the "education program" embodied the entire school, but held instead that it was limited to the student financial aid program. *Id. at 571*.

> "Student financial aid programs, we believe, are *sui generis*. . . . The [government grant] program was designed, not merely to increase the total resources available to educational institutions, but to enable them to offer their services to students who had previously been unable to afford higher education. . . . The economic effect of student aid is far different from the effect of nonearmarked grants to institutions themselves since the former, unlike the latter, increases both an institution's resources and its obligations." [18]

[85]** *Id. at 573*.

The same reasoning is applicable to the financial aid programs here. A university sets its base tuition after calculating the expense of operating the institution, including such mundane matters as utility charges, building maintenance expenses, and salaries. Universities must also consider the ratio of faculty to students, the number of students reasonably expected to attend, and the services to be offered to those students. When the costs of administering the institution have been compiled, all or a portion of the expense is calculated to be met by base tuition, applicable to all students.

As part of their perceived responsibility to society, MIT and the other Ivy League schools adopted a policy of admitting students based on academic, and not financial, ability. Those universities further decided that all students who were admitted would receive financial aid to the full extent of their needs. As a result of these policies, the record demonstrates that the number of students from minority groups and non-affluent families who attend MIT has increased dramatically in recent years. The government does not challenge the societal good that **[**86]** flows from these need-blind admission and need-based aid policies. Indeed, financial aid **[*683]** made available by the government is aimed at the very same objective. *See* Higher Education Act of 1965, *20 U.S.C. §§ 1001-1146a*.

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[18] In response to the *Grove City* decision, Congress amended Title IX by providing a more expansive definition of "program or activity." Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 908 102 Stat. 28, 28-29 (1988) (codified at *20 U.S.C. § 1687*). That amendment, designed to broaden the scope of Title IX, in no way detracts from the value of using *Goldfarb*'s "particular practice" analysis for determining the application of antitrust laws.

As the district court conceded, the nation profits in immeasurable ways

> "when our many great institutions of higher education open their doors to those who for too long were denied the privilege of attending college . . . . These policies send an important signal to a large segment of our society that persons need not presume they are unable to attend college for fear of not being able to afford what has become the extraordinary cost of higher education."

To meet its societal obligations as it sees them, MIT takes some of the funds it could otherwise use to augment salaries, modernize buildings, increase laboratory resources, or otherwise invest in the school, and donates them to worthy, but needy, students in the form of grants. This decision is not compelled nor advised by business considerations, but only serves commendable social objectives. Such university-provided aid is charity, just as would be a gift from an independent **[**87]** fund established to pay the tuition of needy students. If that fund conditioned the size of awards on considerations of family contributions, as does the MIT program, the gift would be charitable nonetheless.

Under an analysis commonly used by courts in the tax field, university-funded aid is undoubtedly charitable. In *Hernandez v. Commissioner, 490 U.S. 680, 104 L. Ed. 2d 766, 109 S. Ct. 2136 (1989)*, the Court cited Congressional reports defining "'gifts' as payments 'made with no expectation of a financial return commensurate with the amount of the gift.'" *Id. at 690* (quoting S. Rep. No. 1622, 83d Cong., 2d Sess. 196 (1954); H. R. Rep. No. 1337, 83d Cong., 2d Sess. A44 (1954)). The question is whether the payment is made with the "expectation of any quid pro quo." *Id*. In *United States v. American Bar Endowment, 477 U.S. 105, 91 L. Ed. 2d 89, 106 S. Ct. 2426 (1986)*, the Court said: "The *sine qua non* of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return." **[**88]** *Id. at 18*.

Singer Co. v. United States, 196 Ct. Cl. 90, 449 F.2d 413 (Ct. Cl. 1971), discusses specific transfers that both satisfy and fail to meet this definition. The Singer Company had granted substantial discounts on its sewing machines to schools, in order to encourage training of young women, and charitable institutions. Because the company expected the reductions granted to schools to result in future increases in sales, those discounts were not deemed charitable under the tax code. *Id. at 423-24*.

In contrast, because the primary purpose of the discounts to charitable institutions was to assist the recipients in the performance of their religious, charitable, or public services, a tax deduction was allowed. *Id. at 424*. The Court noted that "the incidental effect of this policy was the development and maintenance of a favorable public image for [the donor] in the eyes of those organizations and their members." *Id*. Nevertheless, that was not a benefit of such substance as to deny a deduction. *Id*. I see no need in the antitrust context to interpret charity less liberally than the Internal **[**89]** Revenue Code.

It is an unfortunate trait of human nature that if increased respect in the community as a result of philanthropy would be a sufficient quid pro quo under the tax code to deny a deduction, charitable contributions would diminish significantly. Substantial anonymous contributions are not unknown, but they are rare as demonstrated by the paucity of nameless buildings on university campuses.

The tax cases generally eschew reliance on motivation largely because of difficulties of proof. Motivation need not be put aside here, however, where the record convincingly demonstrates the benefits to the public and the absence of financial return to the university. The government does not dispute the facts that MIT provides over $ 20 million in aid annually, that 57% of the student population receives such help, nor that, as a result of this assistance, the percentage of minorities at MIT has increased from 3% to 44% over the last thirty years.

[*684] The government argues that, in addition to social approbation, MIT could expect an increase in reputation by admitting a higher caliber of student. This contention is highly speculative and has no record support. The students are the recipients **[**90]** of largesse, and any contribution they make in return has not been substantiated. No quid pro quo of substance exists.

Although it may be that, through the need-blind admission policy, MIT and the other Ivy league schools enhance their institutional prestige, such a legacy is a breed apart from naked economic benefits.

The funds that are earmarked for student aid could instead be used to increase salaries as a means of attracting the very finest faculty. Thus, an allocation for financial aid could have a negative effect on a school's reputation for excellence because students are generally attracted to a university because of the standing of its faculty rather than that of its students.

The antitrust laws have their limits. They are not all-encompassing statutes that regulate every facet of human conduct. In a case involving unsavory business practices, we remarked that "the Sherman Act may not be extended beyond its intended scope and used to police the morals of the marketplace." *Sitkin Smelting & Ref. Co. v. FMC Corp., 575 F.2d 440, 448 (3d Cir. 1978)*. The Act is not "a panacea for all business affronts which seem to fit nowhere else." *Id*. (internal **[**91]** quotation omitted). That general concern is equally appropriate in determining whether a particular activity arises in a commercial or non-commercial setting. The need for restraint in marking out the perimeters of the Sherman Act is demonstrated by cases holding that certain practices are foreign to the purposes of the antitrust laws.

In *National Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 620-23 (7th Cir. 1992)*, the Court refused to find that otherwise illegal conduct having an economic effect on abortion clinics was within the scope of the antitrust laws. The Court remarked: "We are convinced by the economic and legislative history of the Sherman Act that it was intended to prevent business competitors from making restraining arrangements for their own economic advantage . . . . Defendants are not involved in business, and have no ability to concentrate economic power." *Id. at 621*.

In *Missouri v. National Org. for Women, Inc., 620 F.2d 1301, 1312-17 (8th Cir. 1980)*, the Court found that a boycott organized by the National Organization for Women because of Missouri's failure to ratify **[**92]** the Equal Rights Amendment was not subject to the Sherman Act. The Court pointed out that the ERA was not a "'financial,' 'economic,' or 'commercial' piece of legislation." *Id. at 1311*. Despite the fact that the boycott had an adverse economic effect, the Court concluded that "using a boycott in a non-competitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act." *Id. at 1315*. [19]

In a case closer to the one at hand, *Marjorie Webster Junior College*, *Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 139 U.S. App. D.C. 217, 432 F.2d 650 (D.C. Cir. 1970)*, the Court found that an accrediting institution's refusal to recognize a proprietary **[**93]** school did not come within the Sherman Act. "Absent [commercial motives] . . . the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself." *Id. at 655*; *see also* *Donnelly v. Boston College, 558 F.2d 634, 635 (1st Cir. 1977)* (law school admissions not within antitrust); *Selman v. Harvard Medical Sch., 494 F. Supp. 603, 621* (S.D.N.Y.) ("Academic admissions criteria may well have a purely incidental effect on the commercial aspects of the medical profession. They are, however, non-commercial in nature."), *aff'd*, *636 F.2d 1204 (2d Cir. 1980)*.

My view that the antitrust laws do not apply to student aid activities in the circumstances of this case is not meant to convey any opinion on the desirability or necessity of all of the Overlap procedures. That is more properly the prerogative of Congress. In that connection, it is interesting that, in an **[*685]** interim measure enacted during the pendency of this case, Congress approved the concept of need-blind admissions and agreement among schools **[**94]** on general principles for determining student aid, but prohibited discussion of individual cases. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1544, 106 Stat. 448, 837 (codified at *20 U.S.C. § 1088* note). [20] Perhaps it is of some significance that this statute was an amendment to the Higher Education Act, rather than to the Sherman Act.

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[19] In contrast to the NOW cases, the Supreme Court found that a boycott motivated by economic considerations violated the Sherman Act. *FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426-27, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990)*.

[20] Section 1544 provides in full:

[95]** Although Senator Sherman did not envision the application of the antitrust laws to schools in any circumstances, such a blanket exemption for educational institutions is not required to decide this case. [21] It does seem ironic, however, that the Sherman Act, intended to prevent plundering by the "robber barons," is being advanced as a means to punish, not predations, but philanthropy. The result that the government seeks would divert funds that otherwise could be used for student aid to cover the expenses generated by treble damage suits. [22] This is hardly the public good that Congress intended.

[96]** On the record in this case, I would grant judgment in favor of defendant MIT.

SEC. 1544. AUTHORITY TO AWARD NEED-BASED AID.

(a) *Effect on Pending Cases Prohibited*. -- Nothing in

this section shall in any way be construed to affect any antitrust litigation pending on the date of enactment of this Act.

(b) *In General*. -- Except as provided in subsections

(a), (c), and (e), institutions of higher education may --

(1) voluntarily agree with any other institution of

higher education to award financial aid not awarded under the Higher Education Act of 1965 to students attending those institutions only on the basis of demonstrated financial need for such aid; and

(2) discuss and voluntarily adopt defined principles of

professional judgment for determining student financial need for aid not awarded under the Higher Education Act of 1965.

(c) *Exception*. -- Institutions of higher education shall

not discuss or agree with each other on the prospective financial aid award to a specific common applicant for financial aid.

(d) *Related Matters*. -- No inference of unlawful

contract, combination, or conspiracy shall be drawn from the fact that institutions of higher education engage in conduct authorized by this section.

(e) *Sunset Provision*. -- This section shall expire on September 30, 1994.

Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1544, 106 Stat. 448, 837 (codified at *20 U.S.C. § 1088* note).

[21] In *Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90, 92 (3d Cir. 1982)*, we applied the Sherman Act in a suit between a competing retailer and the University book store.

[22] At least one private suit has been filed seeking damages for this alleged violation of the Sherman Act. *See Kingsepp v. Wesleyan Univ.*, No. 89 Civ. 6121 (S.D.N.Y. filed 1990) (motions to dismiss were denied in 1991, *763 F. Supp. 22*, as was a motion to certify a class in 1992, *142 F.R.D. 597*).

Brookeside Ambulance Serv. v. Walker Ambulance Serv.

United States District Court for the Northern District of Ohio, Western Division

September 18, 1993, Filed

Case No. 3:92CV7463

Reporter

1993 U.S. Dist. LEXIS 16886 *; 1993-2 Trade Cas. (CCH) P70,394

Brookeside Ambulance Service, Inc., Plaintiff v. Walker Ambulance Service, Inc., Defendant

Core Terms

monopoly power, competitors, summary judgment, stations, rivals, genuine issue of material fact, relevant market, anti trust law, Sherman Act, anticompetitive, customers, regulated, monopoly, anticompetitive conduct, summary judgment motion, monopolist, ambulance, nonmoving, meetings, prices

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. In reviewing a motion for summary judgment, however, all inferences must be viewed in the light most favorable to the party opposing the motion.The nonmoving party's inferences must be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision. If the nonmoving party's theory is senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] **Discovery, Methods of Discovery**

The party moving for summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any which he believes demonstrate the absence of a genuine issue of material fact. The substantive law of the case identifies which facts are material. Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. A moving party may discharge its burden by "showing" - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case. Where the moving party has met its initial burden, the adverse party must set forth specific facts showing that there is a genuine issue for trial.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3[] **Discovery, Methods of Discovery**

Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file. *Fed. R. Civ. P. 56(e)* therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN5[] **Scope, Monopolization Offenses**

The offense of attempt to monopolize (Sherman Act *§ 2*) is composed of the following elements: 1. Specific intent to monopolize; 2. Anti-competitive conduct; 3. A dangerous probability of success.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

Monopoly power is defined as the power to control prices or exclude competition.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

The existence of monopoly power has been inferred from a predominate share of the relevant market, but predominate market share is a less reliable indicia of monopoly power in the case of a regulated industry.Reliance on statistical market share is a questionable approach in cases involving regulated industries, however. A predominate market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power. Ultimately, a court should focus directly upon the ability of the regulated firm to control prices or exclude competition.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

HN8[] **Antitrust & Trade Law, Exemptions & Immunities**

A finding that an industry is regulated does not confer immunity from antitrust liability. Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Sherman Act, Claims**

The second element of a *§ 2* Sherman Antitrust Act claim is the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor. If there evidence of exclusionary action to maintain a monopoly and use of control to strengthen its monopoly share of the relevant market, liability will turn whether valid business reasons can explain the business' actions.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Scope**

Whether or not a monopolist has grown and developed as a consequence of willful acts directed at maintaining its monopoly or, in the alternative, as a consequence of a superior product, business acumen, or historic accident is not always an easy question to answer. It is made more difficult by the fact that the acts or practices upon which a monopolization claim may rest need not be in themselves illegal. Nor is it necessary that in commission of those acts, a monopolist have had the specific intent to eliminate competition. Nevertheless, not every act by a monopolist which has lawfully acquired its monopoly power violates *§ 2* of the Sherman Antitrust Act. The otherwise lawful conduct forbidden by *§ 2* is a monopolist's use of monopoly power in order to maintain or improve its position in the market. Generally speaking, a monopolist uses its monopoly power in a manner prohibited by *§ 2* when it acts in an unreasonably exclusionary or anticompetitive manner towards its rivals.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN11[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is properly granted where the plaintiff fails to rebut the defendant's legitimate explanations for the alleged anticompetitive conduct with significant probative evidence tending to support the complaint.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN12[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act protects competition, not competitors, and does not reach conduct that is only unfair, impolite, or unethical. Competition is a ruthless process. A firm that reduces costs and expands sales injures rivals-sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are by-products of vigorous competition, and the antitrust laws are not balm for rivals' wounds.

Judges: [*1] Potter

Opinion by: JOHN W. POTTER

Opinion

OPINION AND ORDER

POTTER, J.:

This matter is before the Court on defendant's motion for partial summary judgment as to Count 1, plaintiff's opposition, defendant's reply, and plaintiff's surreply. The Court has also received defendant's supplemental motion for summary judgment as to Count 1, plaintiff's opposition and defendant's reply. Also pending is defendant's motion to preclude expert testimony, to which the Court has received plaintiff's opposition and defendant's reply. This is an antitrust action alleging, *inter alia,* that defendant unlawfully acquired and exercised or attempted to acquire and exercise monopoly power in the relevant product market consisting of the owning, maintaining and providing of basic life support (BLS) transport services in the City of Toledo, Ohio in violation of *Section 2* of the Sherman Anti-Trust Act, *15 U.S.C. § 2*.

> ***HN1***[] Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The Supreme Court has recently stated that the inquiry **[*2]** is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986)*. . . . In reviewing a motion for summary judgment, however, all inferences "'must be viewed in the light most favorable to the party opposing the motion.'" *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986)* (quoting *United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962))*.

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

> *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision. If the [nonmoving party's] theory is . . . senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman Kodak Co. v. Image Technical Servs., Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2083 (1992) **[*3]** (footnote omitted).

HN2[] The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The substantive law of the case identifies which facts are material. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." *Celotex, 477 U.S. at 324-325*. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson, 477 U.S. at 250*. **[*4]**

> ***HN3***[] Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." . . . *Rule 56(e)* therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324.

The Court begins with an examination of the law applicable to this case. As the Supreme Court explained:

> ***HN4***[] The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).

HN5[] "The offense of attempt to monopolize (Sherman Act *§ 2*) is composed of the following elements:

> 1. Specific **[*5]** intent to monopolize;
>
> 2. Anti-competitive conduct;
>
> 3. A dangerous probability of success."

Arthur S. Langenderfer, Inc. v. S. E. Johnson Co., 917 F.2d 1413, 1431 (6th Cir. 1990), *cert. denied, 116 L. Ed. 2d 29, 112 S. Ct. 51* and *112 S. Ct. 274 (1991)*.

HN6[] Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *Continental Cablevision of Ohio, Inc. v. American Electric Power Co., 715 F.2d 1115, 1120 (6th Cir. 1983)*. Defendant asserts that the City of Toledo, through a review process, regulates and controls the price ceiling for the relevant product in the market and thus it is the City, by regulation, rather than defendant who controls the price of the service provided. Defendant therefore suggests that by definition, it cannot be vested with the power to control prices. Plaintiff asserts that price competition takes place below the regulated ceiling and that, at least to some extent, defendant might be able to control prices. There is, however, no evidence **[*6]** of anticompetitive pricing on the part of defendant.

Plaintiff cites the lack of new competitors in the market and the decreasing number of competitors in support of its proposition that defendant is vested with the ability to exclude competition. In opposition to that position, defendant cites what it asserts are low barriers to entry.

HN7[] The existence of monopoly power has been inferred from a predominate share of the relevant market. *Grinnell, 384 U.S. at 571* (87% of the market is a monopoly); *American Tobacco Co. v. United States, 328 U.S. 781, 797, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)* (over 2/3 of the market is a monopoly).

It is not controverted for purposes of this motion that defendant enjoys a dominant position in the relevant market. Defendant directs the Court to *Southern Pacific Communications v. American Tel. & Tel. Co., 238 U.S. App. D.C. 309, 740 F.2d 980 (D.C. Cir. 1984)*, *cert. denied, 470 U.S. 1005, 84 L. Ed. 2d 380, 105 S. Ct. 1359 (1985)*, for the proposition that predominate market share is a less reliable indicia of monopoly power in the case of a regulated industry.

> Reliance on statistical market share is a questionable approach **[*7]** in cases involving regulated industries, however. A predominate market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power. Ultimately, a court should focus directly upon the ability of the regulated firm to control prices or exclude competition.

Id. at 1000.

It is clear that ***HN8***[] a finding that an industry is regulated does not confer immunity from antitrust liability. "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions. *Otter Tail Power Co. v. United*

States, 410 U.S. 366, 372, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973), (quoting United States v. Philadelphia National Bank, 374 U.S. 321, 350-351, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)).

While the Court finds persuasive defendant's position as to the non-existence of monopoly power, it is not clear whether such a determination could be made at this juncture. Therefore, without determining whether or not defendant possesses monopoly power, the Court turns to the second prong of *Grinnell.*

> **HN9**[] The second element **[*8]** of a § 2 claim is the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236 (1948). . . .
>
> As recounted at length above, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the [relevant] market. Liability turns, then, on whether "valid business reasons" can explain Kodak's actions. *Aspen Skiing Co.,* 472 U.S., at 605, 105 S. Ct., at 2859; *United States v. Aluminum Co. of America,* 148 F.2d, at 432. . . . Factual questions exist, however, about the validity and sufficiency of each claimed justification, making summary judgment inappropriate.

Eastman Kodak Co. v. Image Technical Servs., Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2090-91 (1992) (footnote omitted).

The Court will address the alleged anticompetitive conduct of defendant. In opposition to the motion for summary judgment, plaintiff submits **[*9]** the affidavit of Donald J. Kish, its President. By way of background, the uncontroverted facts reflect that both parties provide BLS ambulance service within the City of Toledo and that emergency calls for private ambulance service are dispatched by Lucas County Emergency Medical Services (LCEMS) to the company with the nearest "in service" station to the scene.

The Kish affidavit first states that defendant has taken LCEMS dispatched runs which should have gone to one of its competitors by providing false information to the LCEMS dispatchers as to the availability of ambulances and by sending ambulances from stations other than the one closest to the scene. Considering the evidence in the light most favorable to the plaintiff, this conduct, whether or not in violation of LCEMS protocol, simply does not rise to the level of being anticompetitive in nature.

More troubling is plaintiff's allegation that defendant opened new stations in order to block its competitors.

> Walker has engaged in a scheme to open temporary new stations in close proximity to its competitors for the sole purpose of blocking its competitors from receiving EMS runs. In so doing it has entered into short term **[*10]** leases and month to month leases for these locations. The effect of this blocking scheme is to deny its competitors access to EMS dispatched runs by cutting off their responding area.

Kish Affidavit at P 9 C.

Based upon the summary judgment evidence, defendant argues that plaintiff admits that plaintiff located its stations in high volume areas of the City, but then claims a Sherman Act violation when defendant did the same thing. Defendant asserts that the charge that the opening of new stations hurt plaintiff's business is an allegation of injury to plaintiff as a competitor and is not an injury to competition.

> **HN10**[] Whether or not a monopolist has grown and developed as a consequence of willful acts directed at maintaining its monopoly or, in the alternative, as a consequence of a superior product, business acumen, or historic accident is not always an easy question to answer. It is made more difficult by the fact that the acts or practices upon which a monopolization claim may rest need not be in themselves illegal. *Borden,* 674 F.2d at 513; California Computer Products v. International Business Machines, 613 F.2d 727, 735 (9th Cir.1979). **[*11]** Nor is it necessary that in commission of those acts, a monopolist have had the specific intent to eliminate competition. *Id.;* Dimmitt Agri Industries, Inc. v. CPC International, Inc., 679 F.2d 516, 531 (5th Cir.1982), *cert. denied, 460 U.S. 1082, 103 S. Ct. 1770, 76 L. Ed. 2d 344 (1983)*. Nevertheless, not every act by a monopolist

> which has lawfully acquired its monopoly power violates section 2. California Computer Products, 613 F.2d at 736 n. 7. "The otherwise lawful conduct forbidden by section 2 . . . is a monopolist's use of *monopoly* power in order to maintain or improve its position in the market." *Borden,* 674 F.2d at 518 (emphasis in original). *See* United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236 (1948); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir.1979), *cert. denied, 444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*. Generally **[*12]** speaking, a monopolist uses its monopoly power in a manner prohibited by section 2 when it acts "in an unreasonably exclusionary," Byars v. Bluff City News Co., Inc., 609 F.2d 843 at 853, or "anticompetitive," *Borden,* 674 F.2d at 518, manner towards its rivals. *See* California Computer Products, 613 F.2d at 735 ("plaintiff must show that the defendant's acts 'unnecessarily excluded competition' from the relevant market").

D. E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1438 (6th Cir. 1983), *cert. denied, 467 U.S. 1242, 82 L. Ed. 2d 822, 104 S. Ct. 3513 (1984)*.

Defendant sets forth reasons for each of its station openings and closings. In support of this assertion, defendant offers the deposition testimony of Gary Walker, its President. Plaintiff has failed to provide any evidence which contradicts what otherwise appear to be valid and legitimate business purposes for opening the additional stations. ***HN11***[] Summary judgment is properly granted where the plaintiff fails to "rebut the defendant's legitimate explanations for the alleged anticompetitive conduct **[*13]** with 'significant probative evidence tending to support the complaint.'" *Smith v. Burns Clinic Medical Center, 779 F.2d 1173, 1176 (6th Cir. 1985)* (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*); *see also,* Beard v. Parkview Hosp., 912 F.2d 138, 145 (6th Cir. 1990).

Plaintiff further complains that defendant violated the antitrust laws when it purchased two ambulance companies in 1988 and 1989. Defendant properly observes that plaintiff did not begin competing in the relevant market until 1991 and, therefore, could not have been injured by the acquisition. The Court agrees.

Plaintiff alleges that defendant made defamatory remarks about plaintiff to LCEMS officials, hospitals, and plaintiff's customers. The only evidence in support of this allegation is the Kish affidavit which states:

> D. Walker has engaged in defamatory remarks to EMS officials and customers of Brookeside for BLS services. Walker's use of defamatory remarks were[sic] directed to EMS officials, hospitals and customers of Brookeside for BLS services.
>
> E. Walker has also tortiously interfered **[*14]** with Brookeside's contracts and business relationships. Walker told Golden Haven Nursing Home, a customer of Brookeside that Brookeside was out of business and Golden Haven stopped doing business with Brookeside until they were advised that they were not in fact out of business. Regardless, Walker brought pressure to bear at Golden Haven and Brookeside lost the account to Walker.

Kish Affidavit at P 9. These statements are both hearsay and conclusory in nature and plaintiff has therefore failed to meet its burden of coming forward with any evidence sufficient to raise a genuine issue of material fact with regard to this allegation.

Plaintiff contends that defendant refuses service to customers who are unable to pay. In support of this contention, plaintiff offers a general and conclusory allegation and a reference to one particular incident in which a non-paying client was refused service by defendant. Even if plaintiff had carried its burden and raised a genuine issue of material fact as to whether defendant refused service to non-paying clients, this conduct would not rise to the level of being anti-competitive. Plaintiff's reliance on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*, **[*15]** and *Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951)*, for its proposition that this conduct on the part of defendant violates ***antitrust law*** is misplaced.

Plaintiff alleges that defendant failed to notify it of various meetings attended by the private ambulance companies in Toledo. The affidavit of Gary Walker states that he was not responsible for setting up any of the meetings complained of or for determining who was to be invited to the meetings. Additionally, the affidavit states that the participants in the meetings were companies which provided advanced life support (ALS) ambulance service and that, at the time they were held, plaintiff did not provide ALS service. The Court finds that as a matter of law plaintiff has not carried its burden with regard to establishing that a genuine issue of material fact exists as to anticompetitive conduct in the form of meetings among private ambulance companies.

Construing all of the evidence in the light most favorable to the plaintiff and giving it every reasonable inference, the Court finds that there is no material factual question which survives defendant's supplemental motion. Plaintiff has failed **[*16]** to come forward with evidence raising a genuine issue of fact as to whether defendant engaged in any prohibited anticompetitive conduct. The Sixth Circuit has quoted extensively from an opinion by the Seventh Circuit with regard to what constitutes prohibited anticompetitive conduct:

> ***HN12***[] The Sherman Act protects competition, not competitors, and does not reach conduct that is only unfair, impolite, or unethical. *United States v. American Airlines, Inc., 743 F.2d 1114, 1119 (5th Cir.1984)*, *cert. dismissed, 474 U.S. 1001, 106 S. Ct. 420, 88 L. Ed. 2d 370 (1985)*. As we recently emphasized in *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325 (7th Cir.1986)*,
>
> "competition is a ruthless process. A firm that reduces costs and expands sales injures rivals-sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are by-products of vigorous competition, and the antitrust laws are not balm for **[*17]** rivals' wounds."
>
> *Id. at 1338*.
>
> This is not to say that injury to rival firms cannot ever lead to injury to consumers and that *section 2* of the Sherman Act cannot be used to prevent such injury. But *section 2*
>
> "must be used with the greatest caution. Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition. Thus, the plaintiff faces a stiff burden in any *section 2* litigation. 'It is not enough that a single firm appears to restrain trade unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral **[*18]** conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.'"
>
> *Id.* (quoting *Copperweld Corp. v. Independence Tube Cob,* [sic] *467 U.S. 752, 767-68, 104 S. Ct. 2731, 2739-40, 81 L. Ed. 2d 628 (1984))*.
>
> *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413-14 (7th Cir.1989)* (footnotes omitted).

Langenderfer, 917 F.2d at 1422-23.

The Court finds that plaintiff has failed to raise a genuine issue of material fact with regard to whether any of its claims in Count One set forth any violation of the antitrust laws. Defendant is therefore entitled to judgment as a matter of law with regard to Count One.

Since Count Two of the complaint alleges a violation of state law and jurisdiction of this count is based upon the Court's pendent jurisdiction, the federal claims having been dismissed, the Court will sua sponte dismiss the remaining count without prejudice. *Wolotsky v. Huhn, 960 F.2d 1331, 1338 (6th Cir. 1992)*.

THEREFORE, for the foregoing reasons, **[*19]** good cause appearing, it is

ORDERED that defendant's supplemental motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the remainder of this action be, and hereby is, DISMISSED.

John W. Potter

Sr. United States District Judge

DR PEPPER/SEVEN-UP COS. v. FTC

United States District Court for the District of Columbia

September 30, 1993, Decided ; September 30, 1993, Filed

Civil Action No. 92-2760 (JLG)

Reporter

1993 U.S. Dist. LEXIS 15984 *; 1993-2 Trade Cas. (CCH) P70,374

DR PEPPER/SEVEN-UP COMPANIES, INC., et al., Plaintiffs, v. FEDERAL TRADE COMMISSION, Defendant.

Core Terms

Bottling, consent order, rights, prior approval, license, distribute, acquisition, soft drink, proposed acquisition, staff, metropolitan, proposed transaction, coverage, parties, ceased, entity, terms, agency's action, supermarkets, plaintiffs', negotiated, franchise, vertical, brand, sells, summary judgment motion, civil penalty, Memorandum, formerly, acquire

LexisNexis® Headnotes

Administrative Law > Agency Adjudication > Informal Agency Action

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Administrative Law > Agency Adjudication > General Overview

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN1[] **Agency Adjudication, Informal Agency Action**

Prior approval provisions in Federal Trade Commission (FTC) consent orders have been held to give the commission a veto over proposed acquisitions or divestitures. The FTC's exercise of that veto with respect to a prior approval application is an adjudication within the meaning of the Administrative Procedure Act (APA), falling within the residual category of "informal adjudication," to which apply the minimal procedural requirements of the APA § 555, and as such, is reviewable as final agency action. A predicate for the lawful exercise of that veto power is that the prior approval provisions of a consent order govern the proposed transaction in the first place; if they do not govern, then the exercise of that veto in the denial of an application is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706(2)(A)*.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Contracts Law > Contract Interpretation > General Overview

HN2[] **Settlements, Consent Judgments**

A consent decree should be read as a contract. Thus, while the meaning of a decree's terms must be discerned within its four corners, an inquiry should be guided by conventional aids to construction, including 'the circumstances surrounding the formation of the consent order and any technical meaning words used may have had to the parties.

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Judges: GREEN

Opinion by: JUNE L. GREEN

Opinion

MEMORANDUM OPINION

This case concerns the bottling and distribution of Seven-Up brand soft drinks in the metropolitan New York City area. It is the second of two related lawsuits brought by plaintiffs Harold A. Honickman ("Mr. Honickman") and Dr. Pepper/Seven-Up Companies, Inc. ("DPSU") against the Federal Trade Commission ("FTC" or "the Commission"), challenging the Commission's refusal to approve proposed acquisitions by Mr. Honickman of certain soft drink bottling assets pursuant to a 1991 **[*2]** Consent Order. The earlier case, referred to here as *DPSU I* and presently on partial remand to the FTC, concerned Mr. Honickman's proposed acquisition of assets of the now defunct Brooklyn Bottling Company ("Seven-Up Brooklyn"). *Dr Pepper/Seven-Up Companies, Inc. v. Federal Trade Comm'n, 798 F. Supp. 762 (D.D.C. 1992)*, *aff'd in part and rev'd in part,* *991 F.2d 859 (D.C. Cir. 1993)*. This case concerns distribution rights formerly held by the also defunct New York Seven-Up Bottling Company ("New York

Bottling") and is now before this Court on cross-motions for summary judgment. [1] For the reasons set forth below, the Court will grant plaintiffs' motion for summary judgment and deny defendant's cross-motion.

[*3] *THE PARTIES*

Mr. Honickman owns interests in and controls all voting rights of the Canada Dry Bottling Company of New York and the Pepsi Cola Bottling Company of New York, Inc., which are bottlers and distributors of soft drinks in New York State. AR 4. [2] DPSU is a manufacturer of soft drink concentrate, in particular of "Seven-Up," a leading lemon-lime flavored soft drink brand. Like other major concentrate manufacturers, DPSU does not distribute Seven-Up directly to consumers, but rather grants exclusive territorial marketing rights to bottlers to do so. New York Bottling was one such franchisee, with rights to bottle and distribute Seven-Up and other soft drinks in a portion of the lucrative New York metropolitan market before it ceased operations in October 1991. AR 6000. [3] DPSU and Mr. Honickman now want the latter to obtain the licensing rights that would enable him to bottle and distribute Seven-Up brand carbonated soft drinks ("CSDs") in territory formerly served by New York Bottling.

[*4] In the case at bar, plaintiffs seek judicial review of the FTC's decision to deny prior approval in part to Mr. Honickman's proposed acquisition of these rights. In an opinion letter dated November 16, 1992, the Commission determined, first, that this proposed acquisition was subject to a 1991 Consent Order settling other litigation between Mr. Honickman and the FTC and, second, that the acquisition would likely have an anticompetitive impact on the market for CSDs in parts of Manhattan, the Bronx, and Westchester Counties, in violation of Section 7 of the Clayton Act, *15 U.S.C. § 18*, and *Section 5* of the Federal Trade Commission Act ("FTC Act"), *15 U.S.C. § 45*. AR 6044-6065. Accordingly, the FTC denied his request for prior approval with respect to those areas. [4] Plaintiffs contend that these decisions are arbitrary and capricious, and that the FTC's rejection of Mr. Honickman's application for prior approval also violates his due process rights and substantive ***antitrust law***.

[*5] *BACKGROUND*

Mr. Honickman's previous efforts to acquire rights to distribute Seven-Up in the metropolitan New York area and his involvement with the FTC in that connection are recounted in detail in Judge Revercomb's Memorandum Opinion in *DPSU I* and need not be repeated at length here. *See* *DPSU I, 798 F. Supp. at 764-68*. It suffices to say that Mr. Honickman's acquisition of the franchise rights and assets of Seven-Up Brooklyn was the subject of an administrative complaint brought by the FTC on November 2, 1989. *See* *id. at 765*. [5] Subsequently, Mr. Honickman and the FTC entered into an "Agreement Containing Consent Order" ("the Settlement Agreement") in January,

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1 *DPSU I* was heard and decided by the late Judge George H. Revercomb. The case at bar was also originally assigned to Judge Revercomb, who heard oral argument on the instant cross-motions on June 7, 1993. The case was reassigned to this Court after Judge Revercomb's death. In addition to reviewing the extensive Administrative Record ("AR") and the briefs, the Court has also reviewed the transcript of the June 7 hearing.

2 Citations to the administrative record in this case are given herein as "AR ."

3 Prior to its demise in October, 1991, New York Bottling's franchise territory covered Manhattan, the Bronx, and Westchester counties in New York, nine counties New Jersey, and parts of Connecticut. AR 6827. Apart from Seven-Up, New York Bottling also held distribution franchises for RC Cola (Royal Crown), Barq's, Perrier, Hawaiian Punch, and Crush (Cadbury-Schweppes). *Id.;* AR 5288.

4 The Commission approved Mr Honickman's application for the following New Jersey counties: Morris, Union, Somerset, Middlesex, Sussex, Hudson, Essex, Bergen, and Passaic. AR 6044.

5 Mr. Honickman first acquired Seven-Up Brooklyn in 1987. *See* *DPSU I, 798 F. Supp. at 764*. After the FTC commenced its investigation of that acquisition, but before it filed its administrative complaint, Mr. Honickman sold most of his interests in the company. *See* *id. at 765*.

1991, to settle this litigation. *See id.;* AR 1442-1462. The Settlement Agreement became final on July 25, 1991. *See* 798 F. Supp. at 765.

[*6] The Consent Order portion of the Settlement Agreement contained the following provision in Paragraph II:

> that for a period of ten (10) years after the date this order becomes final, respondents shall not, without prior approval of the Commission, acquire directly or indirectly all or any part of the stock of, share capital of, equity interest in, assets of or rights relating to any Bottling Operation in any county in the New York Metropolitan Area where at the time of such acquisition any Existing Honickman Bottling Operation distributes CSDs directly using company-owned or equity distributors to supermarkets.

AR 1444. The Consent Order defined the term "Bottling Operation" as follows:

> "Bottling Operation" means any business, person, or other entity that distributes and sells CSDs directly using company-owned or equity distribution to supermarkets pursuant to a franchise, license, distribution contract, or other similar agreement; provided, however, a Bottling Operation shall not include any business, person or other entity that distributes and sells CSDs only by warehouse delivery or through a beer distributor that does not hold a CSD franchise, license or similar distribution **[*7]** agreement.

AR 1443. Thus, according to this definition, Seven-Up Brooklyn -- the assets of which were at issue in *DPSU I* -- was a Bottling Operation and subject to the prior approval provisions of the Consent Order. Under the terms of Paragraph II of that Order, therefore, Mr. Honickman was required to make an application for and obtain the Commission's approval before he could proceed to reacquire Seven-Up Brooklyn's assets and franchise rights. The FTC's denial of that application constituted the agency action reviewed by the court in *DPSU I. See* 798 F. Supp. at 764, 765-66.

Having been in financial difficulty for some time, New York Bottling ceased operations -- including all bottling and selling of soft drinks -- in October 1991. AR 6000. [6] On October 24, 1991, Mr. Honickman filed with the FTC a "Request For a Declaration Or in the Alternative For Approval to Obtain Certain Assets of New York Seven-Up" ("the Application"). AR 6000-6009. The Application informed the Commission that New York Bottling had ceased its operations and that Mr. Honickman wished to acquire "certain licensing rights, currently held by New York Seven-Up Bottling Company." **[*8]** AR 6000. The Application also sought FTC permission for Honickman to distribute Seven-Up in the former New York Bottling territory on an interim basis. AR 6001. [7]

[*9] With regard to the acquisition of these licensing rights, Mr. Honickman's Application made three arguments which are reasserted in plaintiffs' instant summary judgment motion. First, Mr. Honickman argued that the prior approval provisions of the Consent Order did not apply to the proposed transaction, which involved the acquisition of licensing rights directly from DPSU rather than from New York Bottling. AR 6003. DPSU -- a concentrate manufacturer -- was and is not a Bottling Operation within the meaning of Paragraph II of the Consent Order. Moreover, because New York Bottling had ceased operations entirely, DPSU planned to terminate the license of New York Bottling, thereby extinguishing its legal right to bottle and distribute Seven-Up brand products. AR 6004. In other words, according to the Application, "the transaction does not involve an acquisition of the assets of a

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[6] The precise date on which operations ceased is unclear from the record. Mr. Honickman's Application and various Commission memoranda give October 24, 1991 as the date. *See* AR 6000, 5164, 5288. An article from *New York Newsday,* attached to Mr. Honickman's Application, indicates that New York Bottling shut its doors on October 21, 1991. *See* AR 6010. A memorandum in aid of FTC consideration of Mr. Honickman's Application, submitted by plaintiffs and dated June 24, 1992, gives October 18, 1991 as the date on which New York Bottling "abruptly closed its doors." AR 6514. Virtually all of plaintiffs' filings in this case refer to the October 18 date. Whatever the precise date, however, it is undisputed that Mr. Honickman's Application was filed *after* New York Bottling ceased operations.

[7] On December 16, 1991, the Commission partially approved and partially denied Mr. Honickman's request for interim distribution, permitting interim distribution in the nine New Jersey counties, but not in the three New York counties. AR 6239-6246. Plaintiffs thereafter applied for emergency injunctive relief to compel the FTC to grant interim distribution in Manhattan, the Bronx, and Westchester County, which Judge Revercomb denied by Order dated December 19, 1991. *See Dr Pepper/Seven-Up Companies, Inc. v. Federal Trade Comm'n,* Civ. A. No. 91-2712-GHR (D.D.C. Dec. 19, 1991).

'Bottling Operation,' as that term is defined in the Consent Order." *Id.* Thus, Mr. Honickman asked in the first instance for a declaration that the Consent Order's prior approval provision did not apply to "a vertical assignment of a new license from the franchisor, DPSU." *Id.*

Second, Mr. Honickman argued **[*10]** -- as he had in *DPSU I* -- that the proposed acquisition would be procompetitive because economies in distribution and marketing could be achieved by linking Seven-Up brands to a large scale distribution system. AR 6005; *DPSU I, 798 F. Supp. at 765-66*. Such economies of scale were necessary to compete effectively in a major metropolitan area such as New York. AR 6005-6006. Finally, Mr. Honickman argued -- again, as he had in *DPSU I* -- that, even if the proposed transaction were not considered procompetitive, it would nevertheless satisfy the requirements of the "failing company defense." AR 6006; *DPSU I, 798 F. Supp. at 766*. Indeed, as the Application pointed out, New York Bottling was not merely a failing firm, but a failed firm, with no prospects for reorganizing and with Mr. Honickman as the only available and viable purchaser. AR 6007-6008.

By the time Mr. Honickman submitted the Application to the FTC, he and DPSU were involved in the Brooklyn Seven-Up litigation before Judge Revercomb. Plaintiffs attempted to wrap the New York Bottling transaction together with the Brooklyn case by seeking leave to amend their **[*11]** complaint, which Judge Revercomb denied by Order dated January 13, 1992. *See Dr Pepper/Seven-Up Companies, Inc. v. Federal Trade Comm'n,* Civ. A. No. 91-2712-GHR (D.D.C. Jan. 13, 1992). This same Order dismissed all New York Bottling claims from the Brooklyn case on ripeness grounds, in view of the fact that the FTC had yet to rule on Mr. Honickman's October 24, 1991 Application. *Id.* The Seven-Up Brooklyn and New York Bottling cases henceforth proceeded on separate tracks.

The Commission placed the Application on the public record for comment, as is required by Section 2.41(f) of its Rules of Practice. *See* *16 C.F.R. § 2.41(f)*; AR 6083. Numerous public comments were submitted, *see* AR 6083-6235, including many submissions from Mr. Honickman and DPSU. AR 6134-6149, 6321-6322, 6323-6348, 6351-6478, 6508-6509, 6510-6558B, 6571-6572, 6591-6598, 6601-6604, 6606-6607, 6613-6614, 7108-7115. Mr. Honickman and representatives from DPSU also met on numerous occasions with FTC staff, *see* AR 6672-6673, 6674-6675, 6676-6679, 6680-6681, 6724-6730, 6735-6736, 6748-6749, 6750-6752, 6756-6758, 6770-6773, 6775-6826, 7451-7452, 7453-7455, and individually with each FTC Commissioner. **[*12]** AR 6584-6590, 6653-6662, 6663-6666.

On November 16, 1992, the Commission issued its opinion letter granting in part and denying in part Mr. Honickman's request for prior approval. AR 6044-6065. This lawsuit followed.

ANALYSTS

The threshold issue, and the issue that most differentiates this case from *DPSU I,* is whether the prior approval provision of the Consent Order applies at all to the proposed transaction. As a preliminary matter, the FTC contends that this Court lacks jurisdiction to consider the question of Consent Order coverage. According to the Commission, the scope of the Consent Order would not be ripe for judicial review until the FTC actually sought to enforce it in a civil penalty action pursuant to *15 U.S.C. § 45(1)*. In support of this contention, the FTC relies heavily on *Flowers Industries, Inc. v. Federal Trade Commission,* and two other cases. *See* *849 F.2d 551, 553 (11th Cir. 1988)* (citing *Floersheim v. Engman, 161 U.S. App. D.C. 30, 494 F.2d 949, 952 (D.C. Cir. 1973)*; *see also* *Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (2d Cir. 1975).* **[*13]** Thus, says the Commission, Mr. Honickman would have to acquire New York Bottling's assets, await FTC enforcement of the Consent Order in a civil penalty action, and then assert non-coverage as a defense. Only then could a district court review the coverage issue. The implication of this argument is that the Court should *assume* that coverage is proper and proceed to analyze the merits of the FTC's decision. *See* Def.'s Mem. in Supp. of Summ. J. at 17-19.

This argument would have some force were the FTC's opinion letter of November 16, 1992 merely advisory or otherwise not a final agency action under the APA. *See* *5 U.S.C. § 704*. A careful reading discloses that to have been the case in each of the cases relied upon by the Commission. In *Flowers Industries,* for example, what was at issue was an FTC letter approving the sale of two bakeries to a third party under the terms of a modified consent order. *See* 849 F.2d at 552-53. The letter in question was not self-implementing and the FTC had taken no action to enforce it at the time the plaintiff sought declaratory and injunctive relief. *See* id. at 552. **[*14]** *Brown & Williamson Tobacco* concerned the reviewability of FTC letters to tobacco companies stating that the Commissioners agreed with staff conclusions that the plaintiffs had violated consent orders pertaining to the Surgeon General's warning concerning the hazards of smoking and that the Commission intended to commence an action for civil penalties. *See* 527 F.2d at 1117. At the time the plaintiffs filed their complaints, however, the FTC had not commenced civil penalty actions against them. *See* id. at 1117-18. Similarly, *Floersheim v. Engman* involved an FTC determination that certain "skip-tracer" forms sold by the plaintiff to creditors and debt-collection agencies did not comply with the terms of a cease-and-desist order. *See* 494 F.2d at 951. Plaintiff thereupon filed suit seeking a declaration that the forms did comply and to stop the FTC from bringing a civil penalty action. *See id.* Each of these cases, in other words, involved an attempt to review an FTC determination concerning the scope of consent or cease-and-desist orders *before* the Commission undertook the agency **[*15]** action made reviewable under 15 U.S.C. § 45(1) and 5 U.S.C. § 704.

This case is different, because the FTC determination as to the scope of the Consent Order was made in conjunction with agency action that is most assuredly reviewable by this Court. That agency action was the FTC'S decision to deny Mr. Honickman's application for prior approval made pursuant to the terms of the Consent Order and the FTC's regulations. *See* AR 6044-6065; 15 U.S.C. § 2.41(f). ***HN1***[] Prior approval provisions in FTC consent orders such as the one at bar have been held to give the Commission a veto over proposed acquisitions or divestitures. *See* DPSU I, 798 F. Supp. at 771 (citing United States v. Louisiana-Pacific Corp., 569 F. Supp. 1141, 1147 (D. Or. 1983); and West Texas Transmission L.P. v. Enron Corp., 1989-1 Trade Cas. (CCH) P 68,424, at 60,333-34 (W.D. Tex. 1988), *aff'd,* 907 F.2d 1554 (5th Cir. 1990), *cert. den'd, 111 S. Ct. 1105 (1991))*. As both **[*16]** the district court and the court of appeals made clear in *DPSU I,* the FTC's exercise of that veto with respect to a prior approval application is an adjudication within the meaning of the APA, falling within "the residual category of 'informal adjudication,' to which apply the minimal procedural requirements of Section 555 of the APA," and as such is reviewable as final agency action. DPSU I, 798 F. Supp. at 773, 776, *aff'd in part and rev'd in part,* 991 F.2d at 862-63. A predicate for the lawful exercise of that veto power is that the prior approval provisions of the Consent Order govern the proposed transaction in the first place; if they do not govern, as plaintiffs persuasively argue, then the exercise of that veto in the denial of an application is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Having determined that consideration of the coverage issue is now proper, the Court will turn to the interpretation of the Consent Order with regard to Mr. Honickman's proposed transaction. Our court of appeals has provided **[*17]** the following succinct guidance on the interpretation of consent decrees:

> ***HN2***[] "We read [a] Decree essentially as we would a contract. *See* United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37, 43 L. Ed. 2d 148, 95 S. Ct. 926 . . . (1975); United States v. Western Elec. Co., 797 F.2d 1082, 1089 (D.C.Cir. 1986) . . ., *cert. denied, 480 U.S. 922 . . . (1987)*. Thus, while the meaning of [a] Decree's terms 'must be discerned within its four corners,' United States v. Armour & Co., 402 U.S. 673, 682, 29 L. Ed. 2d 256, 91 S. Ct. 1752 . . . (1971), our inquiry is guided by conventional 'aids to construction,' including 'the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties . . .' ITT Continental Baking Co., 420 U.S. at 238 United States v. Western Elec. Co., 894 F.2d at 1390.

United States v. Western Elec. Co., 283 U.S. App. D.C. 299, 900 F.2d 283, 293 (D.C. Cir. 1990). This principle -- that a consent order should be interpreted as a contract would be -- is particularly **[*18]** appropriate here, when the issue involves the interpretation of terms contained in the Consent Order itself, as opposed to procedural questions implicating the Consent Order but on which the Order itself is silent (as was the case in *DPSU I). See* DPSU I, 798 F. Supp. at 769-70.

Plaintiffs argue that New York Bottling's cessation of all bottling and distribution activities prior to the filing of Mr. Honickman's Application with the FTC had two practical consequences that rendered the Consent Order's prior approval clause inapplicable. First, they contend that New York Bottling's shut-down in October, 1991 meant that it was no longer a "Bottling Operation" as defined in the Consent Order, because that definition limits the term "Bottling Operation" only to a "business, person, or other entity" that *presently* distributes and sells CSDs directly to supermarkets. AR 6003-6004. The term, plaintiffs argue, does not apply to entities that *formerly* distributed CSDs but ceased doing so prior to Mr. Honickman's proposed acquisition of licensing rights. AR 6584, 6592, 6593-6594, 6654-6655. Moreover, they contend, "by ceasing to distribute soft drinks, New **[*19]** York [Bottling] breached its license agreements to distribute 7-Up and other beverages." AR 6654-6655. The Seven-Up licenses were then suspended by DPSU pursuant to a Termination Agreement dated November 9, 1991, and effectively terminated by the bankruptcy court on November 6, 1991. AR 6274; Pls.' Mem. at 17 n.14. [8] Thus, although New York Bottling's Seven-Up license may have remained "vested" in the defunct firm during the pendency of Mr. Honickman's Application, the suspension of the licenses effectively terminated New York Bottling's ability legally to bottle and distribute Seven-Up. *See* Pls.' Op. at 11. In short, not only had New York Bottling ceased to be a Bottling Operation, it "had" nothing for Mr. Honickman to acquire.

Second, and following from the preceding analysis, plaintiffs contend **[*20]** that Mr. Honickman sought to acquire the Seven-Up licenses not from New York Bottling but directly from DPSU, the parent company. Because DPSU does not sell its products to supermarkets, it is not a Bottling Operation within the meaning of the Consent Order. They contend, moreover, that acquisition of licensing rights directly from the franchisor and owner of the Seven-Up trademark is a "vertical" transaction that is beyond the scope of the Consent Order, which applies only to "horizontal" transactions, or acquisitions by Mr. Honickman of the rights or assets of other bottlers. For these reasons, plaintiffs' argue, the Consent Order's prior approval clause simply does not apply to the direct acquisition of rights by vertical assignment.

Although the question is a close one, the Court on balance finds plaintiffs' arguments to be persuasive for the following reasons. First, the FTC's contentions as to the breadth of the "directly or indirectly . . . rights relating to" language in Paragraph II of the Consent Order are undermined by other language in the Order and by extrinsic evidence from the Order's negotiating history. While it may be true the "related to" language in Paragraph II **[*21]** is not limited by a verb with either a present or past tense -- as in "rights that *are* related to" or "rights that *were* related to" -- the term "Bottling Operation," which modifies the references to assets or rights, is unambiguously defined as an entity that presently distributes and sells CSDs to supermarkets, and does not include entities that formerly did so. The negotiating history of the Consent Order clearly shows, moreover, that FTC staff first proposed, and Mr. Honickman rejected, language requiring prior approval for the acquisition of "assets located in the New York metropolitan area used in *or previously used in (and still suitable for use in)* the soft drink products business." AR 7690-7691 (emphasis added). The language finally agreed to by Mr. Honickman and the FTC limited prior approval to the acquisition of assets or rights related to a Bottling Operation, which is defined solely in the present tense as "any business, person, or other entity that *distributes and sells* CSDs directly using company-owned or equity distribution to supermarkets pursuant to a franchise, license, distribution contract, or other similar agreement." AR 11 (emphasis added). To **[*22]** accept the FTC's interpretation of "rights related to," in other words, would not only contravene the plain meaning of the Consent Order but also expand that phrase to encompass meanings clearly rejected by the parties during negotiations.

The record also clearly shows that, prior to the Commission's final acceptance of the Consent Order, FTC staff members who had participated in negotiations with Mr. Honickman believed that the final language of Paragraph II did not apply to the vertical assignment of licensing rights directly from DPSU and so advised the Commission. AR 1413, 1418, 1427. Indeed, the Commission was advised by the Assistant Director of the Bureau of Competition that when FTC staff had "suggested to Honickman that we cover the vertical franchise award explicitly, he turned us down." AR 1427. FTC staff appear to have changed their view of the expansive application of the prior approval provision only after Mr. Honickman submitted the Application on October 24, 1991. AR 6892 (memorandum to the Commission from Bureau of Competition staff, dated June 15, 1992, interpreting the "rights related to" language to cover the proposed transaction). While the views of FTC staff **[*23]** do not necessarily reflect the understanding of

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[8] The record shows that New York Bottling's licenses to distribute Barq's and Crush brand soft drinks were terminated and reverted to their respective franchisors when New York Bottling closed its doors. AR 6898, 6900.

Commission members themselves, the Court believes that the opinions expressed in staff memoranda prior to final acceptance of the Consent Order are probative of the parties' intent as regards the coverage issue at the time the Order was negotiated.

Finally, as was explained by Judge Revercomb in his Memorandum Opinion in *DPSU I* and as the FTC argued in that case, the parties expressly agreed that the Commission's 1989 administrative complaint against Mr. Honickman could be used to construe the terms of the Consent Order. *See* *DPSU I, 798 F. Supp. at 772*. Examination of that complaint shows that it was premised on the theory that Mr. Honickman's acquisition of the assets of another Bottling Operation (Seven-Up Brooklyn) would likely reduce competition by, among other things, eliminating direct competition from a competitor. AR 6 (P 22). The facts alleged in that complaint describe potential harm to competition from horizontal transactions. AR 0-9 (PP 2-16, 21, 22). As such, it reinforces the impression given by the staff memoranda discussed above that the Consent Order as negotiated and agreed to by the **[*24]** parties gave the FTC a veto over future Honickman acquisitions of the assets or rights of other bottlers, such as those of Seven-Up Brooklyn, but not over vertical acquisitions of rights directly from concentrate manufacturers. The Court is convinced in this case that the more expansive interpretation of the Consent Order urged by the FTC is thus inconsistent with record evidence of the intentions of the parties and "'the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties . . .'" *United States v. Western Elec. Co., 900 F.2d at 293* (quoting *ITT Continental Baking Co., 420 U.S. at 238*).

The Court concludes, therefore, that Mr. Honickman's proposed acquisition from DPSU of a license to bottle, distribute and sell Seven-Up in parts of the territory formerly covered by the now defunct New York Bottling Company is not subject to the Consent Order he entered into with the FTC in 1991. It follows that the Commission's decision to the contrary, and its denial of prior approval of the transaction necessarily based on that decision, are arbitrary and capricious **[*25]** under the APA. Because the coverage question is dispositive, it is unnecessary to address the parties' arguments regarding the substantive merits of the FTC's decision or the procedures it employed in reviewing Mr. Honickman's Application.

Accordingly, the Court will this day enter an Order granting plaintiffs' Motion for Summary Judgment, denying defendant FTC's motion for summary judgment, declaring that Mr. Honickman's proposed acquisition of a new soft drink license from DPSU is not a transaction covered by or subject to the prior approval provision of the 1991 Consent Order, and enjoining the FTC from taking a position to the contrary. This Order, of course, is strictly limited to the question of Consent Order coverage and in no way affects any other actions that the FTC may deem appropriate in the lawful exercise of its discretion vis-a-vis the proposed transaction or the soft drink market in metropolitan New York.

September 30, 1993,

DATE

JUNE L. GREEN

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons stated in the accompanying Memorandum Opinion issued this day, it is

ORDERED, that plaintiffs' Motion for Summary Judgment is GRANTED; and, it is

FURTHER ORDERED, that **[*26]** defendant's Motion for Summary Judgment is DENIED; and, it is

FURTHER ORDERED, that the proposed acquisition by plaintiff Harold A. Honickman of a new license to bottle, distribute and sell Seven-Up brand carbonated soft drinks in Manhattan, the Bronx and Westchester Counties from plaintiff Dr Pepper/Seven-Up Companies, Inc. is declared not to be subject to the prior approval provision contained in the 1991 Consent Order otherwise regulating Mr. Honickman's acquisition of soft drink bottling assets in the metropolitan New York market; and, it is

FURTHER ORDERED, that defendant Federal Trade Commission is herein permanently enjoined from enforcing the Consent Order's prior approval provision with regard to plaintiff Harold A. Honickman's proposed acquisition of such a license directly from Dr. Pepper/Seven Companies, Inc.

Sept 30, 1993

DATE

JUNE L. GREEN

UNITED STATES DISTRICT JUDGE

KLM Royal Dutch Airlines v. Amber Air Int'l, Ltd.

United States District Court for the Northern District of Illinois, Eastern Division

September 30, 1993, Decided ; October 1, 1993, Docketed

No. 89 C 4953

Reporter
1993 U.S. Dist. LEXIS 13878 *; 1993 WL 390371

KLM ROYAL DUTCH AIRLINES, a Dutch Corporation, Plaintiff and Counter-defendant v. AMBER AIR INTERNATIONAL, LTD., an Illinois Corporation, Defendant, Counter-plaintiff, and Third party plaintiff, v. PRI-POSTE RESTANT INTERNATIONAL, Ltd., et al., Third Party Defendants.

Core Terms

remail, monopolize, reconsideration motion, Memorandum, conspiracy, pricing, Postal

Judges: **[*1]** GUZMAN

Opinion by: RONALD A. GUZMAN

Opinion

MEMORANDUM OPINION AND ORDER

BACKGROUND FACTS

KLM Royal Dutch Airlines ("KLM") filed suit against Amber Air International, Ltd. (Amber Air) in March of 1989, seeking payment from Amber Air for postage, handling and other charges related to KLM's provision of certain remail services to Amber Air in Chicago, as well as divisions of Amber Air located in Boston and Los Angeles.

In response to KLM's complaint, Amber filed its initial counterclaim against KLM on August 8, 1989, alleging numerous violations of Federal and State of Illinois Antitrust laws. Count I of the Second Amended Counterclaim charges KLM with engaging in a contract combination or conspiracy in restraint of trade. Specifically, Amber charged KLM with engaging in a predatory pricing conspiracy with remail competitors of Amber for the purpose of excluding Amber as a competitor in the Midwest remail market. In Count II, Amber alleges that KLM actually monopolized the Midwest remail market; in Count III KLM is alleged to have attempted to monopolize this same market and in Count IV, KLM is alleged to have entered into an unlawful contract, combination or conspiracy to maintain this **[*2]** alleged monopoly. Counts V-VII are based upon claimed violations of the Illinois antitrust laws.

On October 2, 1992, this Court granted KLM's motion for summary judgment on Counts I-VII of Amber Air's Second Amended Complaint. Amber Air now moves the court to reconsider its October 2, 1992 Memorandum Opinion and Order.

DISCUSSION

Motions for reconsideration are not a matter of routine practice in this jurisdiction. *Settino v. City of Chicago, 642 F. Supp. 755, 759 (N.D.Ill. 1986)*. Nor are they authorized under the Federal Rules of Civil Procedure. *National Union Fire Ins. Co. of Pittsburgh v. Continental Ill. Corp., 116 F.R.D. 252, 253 (N.D. Ill. 1987)*. However, this district has consistently held that such motions are appropriate under rare circumstances such as "a controlling or significant change in the law or facts since the submissions of the issue to the Court. *Quaker Alloy Casting Co. v. Gulfco Indus. Inc., 123 F.R.D. 282, 288 (N.D.Ill. 1988)*. A motion to reconsider may also be appropriate where "the Court has patently misunderstood a party, or has made a decision outside the **[*3]** adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension." *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.,* 99 F.R.D. at 101. In short, a motion to reconsider will not be granted where "counsel's memorandum has simply rehashed the same arguments advanced in the original briefing and found inadequate by the Court. *" Settino, 642 F. Supp. at 760*.

Amber insists that the Court has misidentified the relevant product market by stating that the market is "the retail market for providers/consumers of corporate and printed matter international remail services." Amber still claims that the correct market is the "wholesale market".

As previously stated it is undisputed that the market Amber sought access to was the retail market rather than the wholesale market, and the case law consistently provides that it is not error to define the relevant market as the market to which access was sought. *See e.g. Otter Tail Power Co. v. United States, 410 U.S. 366, 369, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*; *City of Mishawaka v. American Electric Power Co., 465 F. Supp. 1320, 1325-26 (N.D. Ind. 1979)*, **[*4]** aff'd in relevant part, *616 F.2d 976 (7th Cir. 1980) cert. denied 449 U.S. 1096*, rehearing denied by *450 U.S. 960 (1981)* and *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th Cir. 1984) cert. denied 470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758 (1985)*. (In the all of the above cases the relevant market was that to which access had allegedly been foreclosed by the challenged conduct, not the market for similar business opportunities.) Further, even if this court were to adopt Amber's argument that the relevant market was the wholesale market Amber is still not capable of overcoming KLM's Motion for Summary Judgment on the Section 2 claim. As previously concluded on pages 34-36 of the Memorandum Opinion consumers who needed to ship mail internationally had the option of dealing directly with the United States Postal Service, KLM's PDS Service, TNT (from mid 1985 forward) or using consolidators such as Amber, Advance Presort Service or Telerad. If the consumer was a consolidator it would have the option of using KLM's PDS Service, the United States Postal **[*5]** Service, TNT or independent airlines, i.e. United Airlines and placing the product in the hands of an independent sort house for further handling and dissemination to the appropriate postal authorities.

The fact that KLM had an existing relationship with Dutch PTT and the Dutch Customs Department for the clearing of magazines and remail does not automatically as a matter of law establish that KLM provided an essential service for the period of January of 1984 through the third quarter of 1985. *American Academic Suppliers v. Beckley-Cardy, 922 F.2d 1317, 1320 (7th Cir. 1991)*. As both parties agree the international remail market was a completely new market due to the fact that the United States had relaxed its definition of what constituted remail. As soon as this occurred companies both domestically and intentionally attempted to establish market share. Thus, the true barrier that initially restricted access was the United States Postal Authority and its regulations. To be sure, it appears that initially KLM enjoyed a substantial market share in 1984 and early 1985 but this does not as a matter of law establish that KLM had a monopoly on the international **[*6]** remail market. As KLM has argued "to have a monopoly and to monopolize are two separate things. The offense of monopolization is the acquisition of monopoly by improper methods". *American Suppliers v. Beckley-Cardy, 922 F.2d 1317, 1320 (7th Cir. 1990)*.

Further, it is also undisputed that others such as Advance Presort, Curtis, Hassett, Yellow Stone, DHL and TNT easily gained access and market share thus bolstering this conclusion that KLM was not engaging in monopolistic type activity. In fact according to Amber's own statistics on page two of its Memorandum In Support of its Motion to Reconsider we see that in one year's time TNT had earned revenues which equalled 56% of the market. Even if, for the sake of reconsideration Amber's is correct that this court erred when it concluded that competitors of KLM could use independent airlines and sort houses Amber has still failed to raise a genuine issue of fact because they clearly neglect the substantial share of the market that the United States Postal Service possessed. Likewise, Amber's assertion that the testimony of James Reckert confirms its theory that there were no competitive options available to **[*7]** KLM's wholesale services in the midwest geographic market is not supported by the record. Mr. Reckert's own testimony makes clear that he had minimal knowledge of the market outside the east coast. Further, the deposition testimony of Irv Rosenberg reflects that Aeromail was not using KLM's overseas sorting facility subsequent to late 1984, although it did use KLM to carry the mail overseas. Finally, as explained in this Court's opinion at page 26, the essential facility cases, "also seems to contemplate a second condition that must be satisfied to be considered essential in addition to the power to eliminate competition. The power to eliminate competition must not be momentary, but must be at least relatively permanent." *MCI Communications Co. v. AT&T, 708 F 2d 1081, 1133 (7th Cir. 1986)*, *cert. denied, 480 U.S. 934 (1987)*. By Amber's own admission competitors were quickly entering the market and gaining market share and the practice complained of took place for the period January of 1984 through the third quarter of 1985. This certainly cannot be considered monopolistic behavior of a relatively permanent nature. Thus, **[*8]** it is impossible to conclude that KLM was a monopolist or was attempting to engage in monopolistic type activity. Therefore, Amber has presented no new facts or law which would provide a basis for reconsideration as to KLM's Motion for Summary Judgment on Counts, II, III & IV.

As to Amber's Section 1 predatory price conspiracy claim for the period of 1987 to 1989, Amber complains that the court in reaching it conclusion inadvertently mis-identified KLM's expert as Amber's. Amber contends that the court erred in concluding that the predatory pricing took place only for three months rather than a year and a quarter. Amber points out that Professor Tollison based his opinion on undisputed evidence comprised of a 100% sample of KLM's own revenues/expenses covering fifteen months, in two periods, the first being the six month from April to September 1988 and the second month being the six months from January to June of 1989. Amber claims that these statistics are sufficient under any Section 1 standard.

As indicated in this Court's opinion today predatory pricing is generally analyzed under the antitrust laws as illegal monopolization or an attempt to monopolize under Section 2 of the Sherman **[*9]** Act, or sometimes as a violation of Section 2 of the Clayton Act. *See* Hovenkamp, Economics and Federal ***Antitrust Law***, § 6.7, page 172 (2d Ed. 1985) and this court is confused as to why Amber insists that this is a Section 1 claim. In fact, as KLM points out Amber has failed to cite any law supporting its position that the per se Section 1 standard is the correct standard to be applied. In general, the per se offense will apply when "the practice facially appears to be the one that would always tend to restrict competition and decrease output . . ." *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551* ; see also *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 104, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* ("Per se rules are invoked when surrounding circumstances make the likelihood of anti-competitive conduct so great as to render unjustified further examination of the challenged conduct.") Obviously, the facts of this case certainly do not support the standard that the alleged practice KLM engaged in appears to be one that would always tend to restrict competition and decrease output. As KLM has argued there **[*10]** is no evidence in the record that there was an agreement between KLM and Interex to set retail prices. Further, a pricing conspiracy does not make sense in light of the overall development of the market. In fact by October, 1987, TNT, DHL and IPA and ISAL all substantially exceeded the volume of the remail product provided by KLM and/or Interex in the midwest market. Thus, the behavior complained of on KLM's part could not be concluded to be one that should be analyzed under a per se standard because it is obviously not behavior that would always or almost always tend to restrict competition. Therefore, even if the court did mis-identify Amber's expert this was solely with respect to the Section 1 per se standard which this court clearly concluded was not the correct standard for purposes of this case. Further this court is not going to reanalyze this case from an illegal tying perspective because this theory was not raised during the summary judgment stage. Thus, summary judgment was appropriate as to Counts I and V.

CONCLUSION

For the foregoing reasons, Amber's Motion to Reconsider is denied.

Respectfully submitted,

RONALD A. GUZMAN

United States Magistrate Judge

[*11] DATE: SEPTEMBER 30, 1993

[GMC v. N.Y. State Elec. & Gas Corp.](#)

United States District Court for the Western District of New York

October 1, 1993, Decided ; October 1, 1993, Filed

91-CV-716A

Reporter
1993 U.S. Dist. LEXIS 21444 *

GENERAL MOTORS CORPORATION, Plaintiff, vs. NEW YORK STATE ELECTRIC AND GAS CORPORATION, Defendant, and NEW YORK POWER AUTHORITY, Nominal Defendant.

Subsequent History: Adopted by, Summary judgment granted by, Complaint dismissed at *GMC v. N.Y. State Elec. & Gas Corp., 1994 U.S. Dist. LEXIS 21656 (W.D.N.Y., July 11, 1994)*

Disposition: Magistrate recommended that defendant's motion for summary judgment dismissing complaint be granted.

Core Terms

electricity, load, splitter, antitrust, customers, argues, cogeneration, Resale, commodity, contracts, metering, anticompetitive, parties, immune, Recommendation, allotment, billing, state policy, Donnelly Act, monopolization, transmission, industrial, alleges, utilize, anti trust law, Clayton Act, supervision, state action, territory, tied product

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Clayton Act > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 14*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Public Enforcement, State Civil Actions**

See N.Y. Gen. Bus. Law § 340.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] Motions to Dismiss, Failure to State Claim

A defendant will succeed on a motion to dismiss, only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN5[] Summary Judgment, Burdens of Proof

Summary judgment is appropriate where there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. The non-moving party must demonstrate to the court the existence of a genuine issue of material fact. In fact, the non-moving party must come forward with enough evidence to support a jury verdict, and the motion will not be defeated merely on the basis of conjecture or surmise.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN6[] Exemptions & Immunities, Parker State Action Doctrine

Private parties may be immune from antitrust attack for anti-competitive actions that result from state action where a challenged restraint is clearly articulated and affirmatively expressed as state policy and the state supervises actively any private anticompetitive conduct.

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN7[] Electric Power Industry, State Regulation

See N.Y. Pub. Auth. Law § 1005(13).

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN8[] Electric Power Industry, State Regulation

See *N.Y. Pub. Auth. Law § 1009*.

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN9[] **Utility Companies, Rates**

See N.Y. Comp. Codes R. & Regs. tit. 16A, § 455.

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN10[] **Utility Companies, Rates**

See N.Y. Comp. Codes R. & Regs. tit. 16A, § 455.2.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN11[] **Exemptions & Immunities, Parker State Action Doctrine**

The law does not require that the state compel the complained-of conduct to immunize it from antitrust attack under the state action doctrine. The focal point is the source of the anticompetitive policy, rather than whether the challenged conduct was compelled. Moreover, a state policy that expressly permits, but does not compel, anticompetitive conduct, may be "clearly articulated." Thus, compulsion is not a prerequisite to a finding of state action immunity. It is clear that anticompetitive conduct permitted, but not required, by the state can be immune from antitrust attack.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Scope, Monopolization Offenses**

To prove the offense of monopolization under *§2* of the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must prove: the possession of monopoly power in the relevant market; and … the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of superior product, business acumen or historic accident. A relevant market must comprise both a product and geographic market.

Antitrust & Trade Law > Clayton Act > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN13[] **Antitrust & Trade Law, Clayton Act**

In the context of claims of monopolization in violation of *§ 2* of the Sherman Act, courts frequently employ the concept of cross elasticity of demand between products to assess the proper market for consideration. At base this idea asks the question how easy is it to find a substitute in the event there is a price rise in one product. It is a function of one product's ability to substitute, and thus fill the purpose, of another.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

HN14[] **Attempts to Monopolize, Elements**

To succeed on a claim of attempted monopolization in violation of *§ 2* of the Sherman Act, the plaintiff must prove: (1) anticompetitive or exclusionary conduct.; (2) specific intent to monopolize; and (3) a "dangerous probability" that the attempt would have succeeded.

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN15[] **Pipelines & Transportation, Electricity Transmission**

Electricity is a commodity for the purposes of the Robinson-Patman Act. The antitrust laws should not be given a restrictive interpretation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN16[] **Tying Arrangements, Clayton Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different, or tied, product. A plaintiff must prove five specific elements: first, a tying and a tied product; second, evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; and fifth, a not insubstantial amount of interstate commerce in the tied product market. There can be no tying arrangement unless two separate product markets have been linked.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN17[] **Antitrust & Trade Law, Sherman Act**

Claims under the Donnelly Act and the Sherman Act are analyzed similarly. It is apparent that New York's Donnelly Act proscribes the same kind of conduct prohibited by the federal Sherman Act, and it has been so held.

Counsel: [*1] For General Motors Corporation, PLAINTIFF: Algird F White, Jr. Esq, Couch, White, Brenner, Howard & Feigenbaum, Albany, NY USA. Kevin A Ricotta, Esq, Connors & Vilardo, Buffalo, NY USA.

For New York State Electric & Gas Corp, DEFENDANT: John D Draghi, Esq, Huber, Lawrence & Abell, New York, NY USA. Morgan Jones, Esq, Earl, Delange, May, Jones & Ottaviano, Lockport, NY USA.

For The Power Authority of the State of New York, DEFENDANT: Jacqueline J Kmiotek, Esq, Charles M Pratt New York Power Authority, New York, NY USA. Sharon M Porcellio, Esq, Lippes, Silverstein, Mathias & Wexler, Buffalo, NY USA.

Judges: Edmund F. Maxwell, United States Magistrate Judge.

Opinion by: Edmund F. Maxwell

Opinion

REPORT and RECOMMENDATION

This matter was referred to the undersigned by the Hon. Richard J. Arcara to hear and report on all dispositive motions pursuant to *28 U.S.C. 636(b)*. Presently before me is the motion to dismiss by defendant New York State Electric and Gas, or in the alternative, to grant summary judgment. [1]

[*2] BACKGROUND AND FACTS

The plaintiff, General Motors ("GM"), has filed this complaint alleging that the defendant New York State Electric and Gas ("NYSEG") has violated the antitrust laws of the United States and the State of New York. It also claims breach of a 1989 Expansion Power Agreement signed by all three parties to this action.

NYSEG is a New York corporation which transmits and receives electric power to and from other utilities in New York State, other states and from Canada. Pursuant to New York State statute, NYSEG provides retail electric

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[1] The New York Power Authority has been named a defendant in this action and has filed an answer. Dismissal of the action as against NYSEG would result in the dismissal against NYPA. NYPA has taken no action in this lawsuit and no position on this motion.

service to all applicants in its exclusive franchise area. (Complaint, P4). In this capacity, the New York State Public Service Commission supervises the operations of NYSEG.

The New York Power Authority (NYPA) is a public benefit corporation which generates hydroelectric power at its Niagara Power Project in Niagara Falls, New York. Under *New York Public Authorities Law § 1005(13)*, NYPA is authorized to provide inexpensive hydroelectric power to industrial customers in the Niagara Falls region. This power is referred to as "Expansion Power". Since 1961 NYPA has entered into contracts with NYSEG **[*3]** in which NYPA has agreed to supply expansion power to eligible industrial customers utilizing the transmission facilities owned by NYSEG. [2] NYSEG resells that expansion power to those eligible industrial customers at a rate lower than NYSEG is able to charge other customers. In 1961, NYSEG began providing NYPA expansion power to GM's Lockport facility.

[*4] GM owns and operates the Harrison Radiator Division in Lockport, New York. This manufacturing plant is located in NYSEG's exclusive franchise territory. As indicated above, GM began receiving an allotment of expansion power in 1961, and receives that cheaper power through NYSEG's transmission lines. From 1961 to 1989, the arrangement for the delivery of the expansion power between NYPA, NYSEG and GM was governed by contracts colloquially known as the "old wheeling agreements". Complaint, P16. [3]

When GM first became eligible for the expansion power in 1961, it was allotted by contract 10,000 kilowatts of power. In 1973 its allocation was increased to 14,300 kilowatts of power.

Apparently, because of the difficulty in measuring exactly where the expansion power was destined and used at GM's Lockport facility, NYPA, NYSEG and GM agreed, in an Expansion Power Billing Arrangement **[*5]** (Separate Metering Agreement) in January 1973, to utilize a surrogate for the measurement of expansion power. Thus:

> The Power Authority of the State of New York has made available to (NYSEG) 14,300 kilowatts of Expansion power to be resold to Harrison Radiator Division, General Motors Corporation. (NYSEG) has elected to bill (GM) for such power on the basis of separate metering. Since separate metering of all such Expansion Power would be impracticable, it is agreed that for billing purposes only, such loads will be deemed to be equal to the following loads…

(Exhibit 2 to Affidavit I of Dennis Wickham, submitted in support of Defendant's Motion for Dismissal, or for Summary Judgment, Docket Entry 6). [4] The agreement specified certain electrical breakers that would act as the de facto measure of expansion power. This agreement remained in effect at least until 1989, when the parties entered into further agreements governing the sale, transmission and billing of the Expansion power.

[*6] In February 1989, NYPA and NYSEG entered into a Contract for Sale and Resale of Expansion Power (Resale Agreement) [5] controlling the wheeling of expansion power to eligible industries in NYSEG's exclusive franchise territory. (Complaint, P21-A). The contract read:

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[2] NYPA generates electric power in Niagara Falls. *New York Public Authorities Law § 1005(13)* authorizes NYPA to allocate a portion of that power to "businesses within the state located within thirty miles of the Niagara project switchyard…" Eligibility for the "expansion power" is based in part, through contracts negotiated by NYPA, on the businesses consuming expansion power to maintain certain levels of employment. See, e.g., Expansion Power Allocation and Service Agreement, Schedule B, Appendix A, executed by GM, NYSEG and NYPA, wherein GM agreed to a base employment level of 8000. (Attached to complaint as Exhibit B). *§ 1005(13)(a)* spells out thirteen separate criteria governing eligibility for expansion power

§ 1005(13) also provides for the allocation by NYPA of expansion power for "Revitalization". *§ 1005(13)(b)* sets forth five separate criteria. Basically, such cheap power is intended to keep businesses operating that would otherwise close or curtail operations.

[3] For convenience, I have attached an appendix listing each contract between the parties and a brief description of its subject matter.

[4] Mr. Wickham also submitted a further affidavit, Docket Entry 15. The first Wickham affidavit will be referred to as Wickham I, the second Wickham affidavit will be referred to as Wickham II.

> Metering. Where practical Expansion Power shall be separately metered for each Expansion Power Customer. Where such separate metering is not practical, the methodology to determine the Expansion Power portion of the total measured demand and energy through one set of meters will be as set forth in Service Tariff No. 46, Exhibit 1, Schedule B. Such a procedure shall not preclude the Expansion Power Customer from requesting separate metering either initially or subsequently.

(Complaint, Exhibit A, p. 12). That Service tariff is referred to by all the parties as the "load splitter". The load splitter sets forth one method for billing the "Expansion Power Customer" (GM) based on a ratio of its expansion power allocation and its overall electricity usage. The Resale agreement also provided that:

> The (New York Power) Authority shall not allocate Expansion Power to displace existing electric load of the **[*7]** Company (NYSEG) unless (i) the allocation of Expansion Power is made for revitalization purposes in accordance with the criteria set forth in subdivision 13 of *Section 1005* of the Public Authority's (sic) Law, or (ii) the Company consents in writing to such allocation. The term "existing electric load" in the preceding sentence shall mean the average of the peak demands of the Company's customer, recorded during the twelve (12) months preceding a proposed allocation to such customer…

(Id. p. 5).

In April 1989, GM, NYPA, and NYSEG entered into a contract governing the availability of expansion power to GM. This "Expansion Power Allocation and Service Agreement" provided:

> This agreement supersedes all previous contracts providing for, among other things, resale of Expansion Power by the Company (NYSEG) to the Customer (GM), **[*8]** but only to the extent such contracts concern Expansion Power service and including but not limited to the contract(s) dated January 1, 1973. [6]

(Complaint, Exhibit B, p. 6). The Expansion Power Agreement expressly adopted and incorporated the Resale Agreement entered into by NYPA and NYSEG, including the agreement between NYPA and NYSEG regarding metering. (Complaint, P25; Complaint, Exhibit B, Schedule A). The contract also provided that:

> The amount of firm power which the customer (GM) requests, which the Authority (NYPA) agrees to make available to the Company (NYSEG) at (NYPA)'s Niagara Project switchyard and which (NYSEG) agrees to accept for resale to (GM) pursuant to the Resale Agreement is 14,300 kilowatts.

(Complaint, P22; Complaint, Exhibit B, Article 1.1).

[*9] In the interim, GM has constructed a cogeneration qualifying facility (QF), to supplant its previous demand for NYSEG power. This facility, which was scheduled to begin operation in October 1992, would produce power cheaper than NYSEG power, but more expensive than NYPA Expansion power. (Complaint, P31). According to GM, after this cogeneration facility begins operation, all of GM's demand for electricity would be satisfied by the expansion power and the cogeneration facility. Only in the event of some unspecified emergency would GM purchase NYSEG power. (Complaint, P32).

ARGUMENTS OF THE PARTIES

GM filed this complaint alleging various antitrust violations: the Sherman Antitrust Act, *15 U.S.C. §§ 1-7*; the Clayton Antitrust Act, *15 U.S.C. §§ 12-14, 21-22and 27*; and, New York State's ***antitrust law***, the Donnelly Act, *New York General Business Law § 340*. GM also alleged a breach of the 1989 Expansion Power Agreement.

GM alleges first that NYSEG's use of the above-described load splitter forecloses competition in the market of providing electricity to industrial customers in NYSEG franchise territory, **[*10]** in violation of *§ 2 of the Sherman Antitrust Act.* [7] GM's theory is twofold. First, the use of the load splitter forces GM to purchase a combination of

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[5] The Agreement has a front page date of December 13, 1988, but was signed February 22, 1989 after being approved by Governor Mario M. Cuomo. See discussion at p. 16, infra.

[6] There is some dispute between the parties as to what contract this language supersedes. GM argues that it supersedes the Separate Metering Agreement, dated January 17, 1973. NYSEG argues that the Separate Metering Agreement was not superseded.

NYPA and NYSEG power such that GM is not able to take its full allotment of expansion power under the Resale and Expansion Power Agreements. This, GM alleges, forecloses NYPA from competing with NYSEG, and has harmed GM. Second, NYSEG's actions foreclose competition from GM's cogeneration facility, and thus monopolize in the same market. GM claims that because the relative cost of the cogeneration power is less than the average cost of NYSEG and NYPA power billed through the load splitter, GM will "purchase" all its requirements from the cogeneration facility. And, since NYSEG is required by law to purchase excess energy generated by facilities such as GM's cogeneration facility, as GM will then use only cogeneration power, leaving less for resale to NYSEG, NYSEG forecloses competition by GM. Under the same factual allegations, GM alleges that NYSEG is attempting to monopolize the same market, in violation of the Sherman Antitrust Act. And, regarding both Sherman Act claims, GM asserts that NYSEG has the market power to enforce or **[*11]** achieve its monopoly.

Third, GM alleges that NYSEG's installation of the load splitter illegally ties the sale of two products, thereby violating *§ 3 of the Clayton Antitrust Act*. [8] Specifically, GM alleges that the use of the load splitter compels GM to purchase NYSEG power as a condition of obtaining the less expensive expansion power. In GM's view, NYSEG system power and NYPA Expansion power are distinct commodities. GM alleges that these actions illegally tie the sale of one to the purchase of the other, in violation of the Clayton Act.

[*12] Fourth, GM argues that all of the facts alleged constitute a violation of New York's ***Antitrust law***, the Donnelly Act. [9]

Lastly, GM argues that NYSEG's conduct violates the 1989 Expansion **[*13]** Power Agreement. GM thus asserts a pendent breach of contract claim.

In response, NYSEG filed a motion to dismiss the complaint, or in the alternative, for summary judgment. First, NYSEG argues that all that it has done in utilizing the load splitter is take lawful action pursuant to a properly negotiated and presently enforceable contract. NYSEG recognizes that the 1989 Expansion Power Agreement between the GM, NYPA and NYSEG contains language that supersedes all previous agreements. See discussion

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[7] § 2 of the Sherman Antitrust Act, set out at *15 U.S.C. § 2* reads as follows:

> ***HN1***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…

[8] § 3 of the Clayton Antitrust Act is set out at *15 U.S.C. § 14*, and reads, in part, as follows:

> ***HN2***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, to … make a sale or contract for sale of … commodities … on the condition, agreement or understanding that the … purchaser thereof shall not use or deal in the … commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

[9] The Donnelly Act is set forth at *New York General Business Law § 340* and reads as follows:

> 1. ***HN3***[] Every contract, agreement, arrangement or combination whereby
>
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
>
> For the purpose or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against the public policy, illegal and void.

at p. 5, supra. But, NYSEG argues, the 1989 agreement did not supersede the Separate Metering Agreement because the 1989 agreement did not alter GM's allotment of NYPA power.

It claims that any dispute between the parties arose because each interprets the relevant contracts differently, and this case should be, if anything, an action for breach of contract. It contends that if GM has any problem with NYSEG's actions, it is one actionable under the contracts, but not cognizable in an antitrust action.

Moreover, NYSEG argues, the contracts are the result of state action, and thus immune from attack under the antitrust laws. See ***Parker v. Brown,*** *317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943).* **[*14]** The defendant has also claimed that its actions are protected by the Noerr - Pennington doctrine, immunizing it from antitrust attack because NYSEG was petitioning the government for relief and advantage. [10]

NYSEG argues that even if NYSEG's conduct was not protected by the government action defense, GM has failed to allege a relevant geographic and product market as required under the Sherman Antitrust Act. And, as an additional line of defense to the Sherman Act claims, NYSEG asserts that GM has failed to allege injuries of any type actionable **[*15]** under ***antitrust law***.

NYSEG argues that GM's Clayton Act claim alleging an illegal tying of two products, should be dismissed. It claims initially that electricity is not a commodity within the meaning of *§ 3 of the Clayton Act*. See footnote 8, supra. Even if it were a commodity, NYSEG claims it is not tying two separate products or commodities. NYSEG argues that it is impossible to be liable under ***antitrust law*** for tying the sale of electricity to the sale of electricity. Additionally, it contends that GM has not alleged a sufficient amount or type of commerce affected to be cognizable under the Clayton Act.

NYSEG argues that GM's Donnelly Act claim should be dismissed because Donnelly Act claims are analyzed similarly to Sherman Act claims. Once the Sherman Act claims are dismissed, the Donnelly Act claim should likewise follow. And, even if the Court were to proceed on the Donnelly Act claims, it should be dismissed on its own because the Donnelly Act requires a conspiracy. GM has alleged only unilateral conduct.

Finally, NYSEG argues generally that it has not breached the relevant contracts, and thus the Court should dismiss GM's final claim for relief.

Simply stated, GM claims **[*16]** that NYSEG's application of the load-splitter violates *§ 2 of the Sherman Antitrust Act in* that it is a monopolization and attempted monopolization of the generation and transmission of electricity in NYSEG's franchise territory. The same events allegedly constitute an unlawful tie-in of two separate products or commodities in violation of *§ 3 of the Clayton Antitrust Act. Again, the* same events constitute an antitrust violation of New York's ***Antitrust law***, the Donnelly Act. Finally, GM argues that NYSEG violated various contracts to which both are a party. For antitrust purposes, then, GM complains only of the application of the load splitter.

DISCUSSION

HN4[] A defendant will succeed on a motion to dismiss, "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief". ***Citibank, N.A. v. K-H Corp.,*** *968 F.2d 1489, 1494 (2nd Cir. 1992)*, citing, ***Austern v. Chicago Bd. Options Exch., Inc.,*** *898 F.2d 882, 885 (2nd Cir. 1990)*.

HN5[] Summary judgment is appropriate where there are no issues of material fact in dispute, and the moving party is entitled to judgment as **[*17]** a matter of law. See ***Trans Sport, Inc. v. Starter Sportswear, Inc.,*** *964 F.2d*

[10] ***Eastern Railroad Presidents Conference v. Noerr Motor Freight,*** *365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; ***United Mine Workers v. Pennington,*** *381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. The Noerr - Pennington doctrine basically immunizes from antitrust attack the actions of a party engaged in petitioning the government for relief which would have anticompetitive effects.

186, 188 (2nd Cir. 1992) citing ***Bryant v. Maffucci,** 923 F.2d 979, 982 (2nd Cir. 1991)*. The non-moving party must, "demonstrate to the court the existence of a genuine issue of material fact". ***Lendino v. Trans Union Credit Information, Co.,** 970 F.2d 1110, 1112 (2nd Cir. 1992)*, **citing** ***Celotex Corp. v. Catrett,** 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. In fact, "the non-moving party must come forward with enough evidence to support a jury verdict … and the … motion will not be defeated merely … on the basis of conjecture or surmise". ***Trans Sport, supra,** 964 F.2d at 188*, quoting ***Bryant v. Maffucci, supra.***

NYSEG's Defense of State Action

NYSEG argues at the outset that it is immune from antitrust attack because its usage of the load splitter is the result of state action. See ***Southern Motor Carriers Rate Conference, Inc. v. United States,** 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*; **[*18]** See also ***Parker v. Brown,** 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. As a corollary, it argues that it cannot be attacked on antitrust grounds because its actions are a variety of petitions to the state for relief under the Noerr - Pennington doctrine. [11]

In Southern Motor Carriers, the Supreme Court set forth the standards in which ***HN6***[] private parties may be immune from antitrust attack for anti-competitive actions. Thus:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy". Second, the State must supervise actively any private anticompetitive conduct.

***Southern Motor Carriers, supra,** 471 U.S. at 57*, quoting ***California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.,** 445 U.S. 97, 104, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1984)* (opinion of BRENNAN, J.).

NYSEG argues that both prongs of **[*19]** the Southern Motor Carriers test are satisfied by the facts presented in this case. First, NYSEG asserts that the Resale Agreement was adopted pursuant to a clearly articulated state policy. While the relevant New York State statutes do not specifically require or authorize the use of a load splitter, NYSEG argues that the load splitter, as embodied in the Resale Agreement, is the logical outgrowth of a clearly expressed state policy.

NYSEG argues that there is an express state policy to allot expansion power so eligible industrial customers will expand or retain their operations in the Niagara region, thereby employing more people. NYSEG looks to *New York Public Authorities Law § 1005(13)* as evidence of this policy. [12] That section, while allotting expansion power to encourage job creation, also allows for the allotment of expansion power, in certain circumstances, for the retention of existing jobs.

[*20] NYSEG argues in addition that the prior contract (designated NS 11) between NYPA and NYSEG, which governed expansion power in NYSEG's exclusive franchise territory, also incorporated that state policy and included the load splitter. Contract NS 11 created a ratio of expansion power and normal system power to bill expansion power customers. See NYSEG Reply Memorandum, pp. 18 - 19. And, that contract contemplates different methods of billing. Id. Finally, in contract NS 11:

> The Authority (NYPA) reserves the right to withdraw … any allotment of expansion power …

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[11] See footnote 10, supra.

[12] *Public Authorities Law § 1005(13)* reads, in part:

> ***HN7***[] Contracts entered into pursuant to this subdivision shall be long term and shall contain reasonable provisions providing for the partial or complete withdrawal of the power in the event the recipient fails to maintain mutually agreed levels of employment…

See also Expansion Power Agreement wherein GM agreed to a base employment level of 8000. (Exhibit B, attached to complaint).

(b) if the customer fails to expand its operations pursuant to arrangements made by it and the Authority (NYPA).

Id. I believe that there is a sufficient expression of a state policy, in Contract NS 11, *Public Authorities Law § 1005(13)* and in the agreements themselves, to satisfy the first half of the test enunciated in*Southern Motor Carriers.* It is apparent that expansion power was to be utilized to encourage "expansion". NYPA understood it to be so when it entered into NS 11 in 1961. This policy was expressly adopted by the New York State legislature in 1987. Moreover, the original **[*21]** NS 11 included provisions pertaining to billing customers not dissimilar from the load splitter at issue here. It is apparent that the load splitter incorporated into the agreements is an expression of state policy. It is clearly intended to aid in carrying out the mandate of *PAL § 1005(13)* to create and preserve industrial jobs in the Niagara region. NYPA and NYSEG clearly contemplated the application of the load splitter in their Resale Agreement. Finally, GM, in executing the Expansion Power Agreement agreed to the possible usage of the load splitter.

Under the second half of the*Southern Motor Carriers* test the state must "actively supervise" the anticompetitive restraint. NYSEG argues that New York State actively supervises the load splitter for a number of reasons. It cites to *Public Authorities Law § 1009*. [13] The Resale Agreement survived all the hurdles *PAL § 1009* requires of it. For example, Mario M. Cuomo, Governor of the State of New York, apparently adopted the Resale Agreement in a letter dated February 17, 1989. In it, the Governor stated:

> I have also received the proposed contracts between the [New York] Power Authority and the … New York **[*22]** State Electric and Gas Corporation … for the sale of 250 MW (megawatts) of expansion power.
> … Accordingly, each of these contracts is approved.

Wickham II, P6 and Exhibit C. Included in the Resale Agreement, and thus subject to scrutiny under *PAL § 1009*, was the load splitter of NYPA Tariff No. 46.

[*23] Moreover, the adoption of the load splitter in Tariff No. 46 was subject to similar administrative proceedings. [14] Such notice, comment and hearing proceedings before adoption of a regulation -- in this instance, the Service

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[13] That section reads:

1. ***HN8***[] After agreement upon the terms of any such contracts shall have been reached by the authority (NYPA) and its co-party or co-parties, the authority shall promptly transmit a copy of such proposed contract to the governor, the speaker of the assembly, the minority leader of the assembly, the chairman of the assembly committee on ways and means, the temporary president of the senate, and the minority leader of the senate and the chairman of the senate finance committee and shall hold a public hearing or hearing upon the terms thereof. Copies of proposed contracts shall be available for public inspection … at the office or offices of the authority and at such other places throughout the state as it may designate…

2. When such contract or contracts are finally agreed upon in terms satisfactory to the authority and its co-party or co-parties, and which the authority believes to be in the public interest, the authority shall thereupon report the proposed contract or contracts, together with its recommendations and the record of the public hearings thereon, to the speaker of the assembly, the chairman of the assembly committee on ways and means, the temporary president of the senate, the chairman of the senate finance committee and the governor. The governor shall, within sixty days thereafter, indicate his approval and give his reasons there for.

[14] See 16A NYCRR § 455:

Section 455.1 … (a) … ***HN9***[] Whenever the authority (NYPA) proposes to undertake any of the following actions, notice shall be given as provided in subsections (b) and (c) of this section:

(1) amendment of any rate schedule or tariff for the sale of power and/or energy …

(b) At least 45 days prior to adoption of any action included in subdivision (a) of this section, or prior to any hearing thereon, the secretary shall:

Tariff -- is enough to say that New York State actively supervised the load splitter. The Supreme Court does not require active supervision where the actor is a municipality. But:

> In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.

Hallie v. Eau Claire, *471 U.S. 34, 46, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1984), n. 10* (citations omitted). Though GM complains of actions taken by NYSEG, the load splitter is attributable to NYPA, a state agency. GM's argument that no evidence of state supervision is evident (GM memorandum of law, pp. 15-16) is wrong as a matter of law.

[*24] Further, ***HN11***[] the law does not require that the state compel the complained-of conduct to immunize it from antitrust attack. Though GM cites ***Goldfarb v. Virginia State Bar,*** *421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)* for that proposition, Goldfarb has not been interpreted that way. "The focal point of the Goldfarb opinion was the *source* of the anticompetitive policy, rather than whether the challenged conduct was *compelled."* ***Southern Motor Carriers, supra,*** *471 U.S. at 60* (emphasis original). "Moreover, a state policy that expressly *permits,* but does not compel, anticompetitive conduct, may be 'clearly articulated.'" ***Id.,*** *at 61* (emphasis original, citation omitted). Thus, "compulsion (is not) a prerequisite to a finding of state action immunity". Id. It is clear that anticompetitive conduct permitted, but not required, by the state can be immune from antitrust attack.

I therefore conclude that the NYSEG is immune from antitrust attack and is entitled to judgment as a matter of law. The NYPA load splitter is clearly an outgrowth of state action. As one court stated: **[*25]**

> In exercising its power to construct and maintain projects and distribute the resulting electrical power, the (New York Power) Authority is exercising delegated governmental power for the performance of a state function, albeit the Authority operates independently from the state itself…"

In Re White, *222 N.Y.S.2d 208, 213, 31 Misc. 2d 644, 649 (1961)*. In my estimation, there are no material facts in dispute that question the state action pursuant to which NYSEG was acting. See ***Southern Motor Carriers, supra.***

NYSEG has also argued that its actions are immune from antitrust attack under the Noerr - Pennington doctrine. [15] Because I believe its actions are immune from antitrust liability under the state action doctrine, there is no need to address this claimed defense.

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(1) cause to have published notice of the proposed action or hearing in the State Register in accordance with subdivision (c) of this section and, when appropriate in the judgment of the authority, publish notice of the proposed action in such newspaper or newspapers or general circulation as the authority may select;

(2) provide notification to any person or agency which has filed a written request … for notice of proposed action or hearing which may affect that person or agency …

(3) make available to the public a copy of the complete text of the proposed action …

(c) Notice to be published in the State Register shall:

(1) cite the statutory authority under which the authority proposes to take action;

(2) give the date, time and place of any public hearing …

(4) either state the express terms of the proposed action, or describe the subject, purpose and substance of the proposed action…

455.2 Notice of Adoption. ***HN10***[] Upon completion of any action listed in subdivision (a) of section 455.1 of this Part, the secretary shall file a copy of such action with the Secretary of State … and submit a notice of adoption to be published in the State Register.

[15] ***Eastern Railroad Presidents Conference v. Noerr Motor Freight,*** *365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*; ***United Mine Workers v. Pennington,*** *381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*.

[*26] However, even were I to conclude that the application of the load splitter was not the result of state action, and thus immune from antitrust attack, I would rule that NYSEG has violated neither the Sherman nor Clayton Antitrust Acts.

Sherman Act Claims

As outlined earlier, GM has alleged that NYSEG has monopolized some relevant market. In its complaint, GM asserted that the load splitter has excluded both NYPA and GM, through its cogeneration facility, from competing in the market for "generation and transmission of electricity in the Western District".

HN12[] To prove the offense of monopolization under *§ 2 of the Sherman Act* (*15 U.S.C. § 2*; see footnote 7, supra), the plaintiff must prove:

> the possession of monopoly power in the relevant market; and … the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of superior product, business acumen or historic accident.

Nat. Ass'n of Pharmaceutical Mfrs. v. Averest Lab., *850 F.2d 904, 914 (2nd Cir. 1988)*; citing ***Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,*** *472 U.S. 585, 596, n. 19, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985).* **[*27]** A relevant market must comprise both a product and geographic market. See ***Seattle Totems Hockey Club, Inc. v. National Hockey League,*** *783 F.2d 1347 (9th Cir. 1986)*.

GM has amended its allegations of the appropriate product market from the generation and transmission of electricity to the sale of electricity to industrial customers. Compare Complaint, P44 with GM memorandum of law, p. 36. GM alleges essentially that NYSEG and NYPA are in competition against each other to provide electricity to industrial customers and that NYSEG's use of the load splitter, by limiting the amount of expansion power GM could purchase, prevented NYPA from "competing" in that relevant market. I find nothing in the record to support this contention.

HN13[] Courts frequently employ the concept of cross elasticity of demand between products to assess the proper market for consideration. At base this idea asks the question how easy is it to find a substitute in the event there is a price rise in one product. It is a function of one product's ability to substitute, and thus fill the purpose, of another. See ***United States v. E.I. DuPont de Nemours & Co.,*** *351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956).* **[*28]** Thus, to the extent that electricity produced by NYPA and electricity produced by NYSEG serve the same purpose, and are interchangeable, they are both in the same market. While I can accept the assertion that electricity, regardless of the source, performs the same function, I fail to see how NYSEG and NYPA compete in the sale of electricity to industrial customers in the NYSEG franchise territory.

NYSEG has a exclusive franchise to retail electricity to customers in its franchise area. By statute, and as a natural monopoly by economics, it cannot compete with anyone in that franchise. And while NYPA supplies electricity to industrial customers within the exclusive franchise, it does not compete with NYSEG. By statute, the legislature directed that NYPA make available 250 megawatts of power to customers meeting specific criteria. See New York Public Authorities *§ 1005(13)*. But that does not place the two in competition. GM's entitlement to NYPA expansion power arises from NYPA's application of express state policy. The fact that NYPA and NYSEG supply power to GM, and others, does not automatically mean they compete for business. Moreover, there is nothing in the record, other than **[*29]** the plaintiff's assertions, that NYPA has been harmed. Nor has NYPA claimed any harm.

GM also asserted in its original complaint that the NYSEG's use of the load splitter would foreclose competition from the co-generation facility (QF, as a "qualifying facility within the meaning of PURPA") it was then constructing. Upon completion of the cogeneration facility, NYSEG would be compelled by federal law to purchase electricity therein produced in excess of the on-site demand. See *16 U.S.C. § 824*. However, that facility would produce electricity cheaper than the cost of electricity billed by the load splitter (a combination of expansion power and more expensive NYSEG system power). GM claims it would not then be able to sell as much cogeneration electricity because it would consume the cogeneration electricity first, rather than use the combined NYSEG system and

NYPA power. This would prevent the cogeneration facility from competing. GM's preference would be to utilize the expansion power first, then resort to the cogeneration facility, and utilize only NYSEG system power in the event of some unspecified emergency. See Complaint, P32.

NYSEG has assured GM that **[*30]** upon completion of the cogeneration facility, GM can "purchase all of its power requirements from the QF and NYPA. GM will not have to purchase any power from NYSEG, except for back-up power requested in the event the QF is unable to supply GM's load." Wickham II, P7. This statement indicates to me that, at least after the QF begins operations, GM is entitled to the NYPA power before it utilizes any other. To the extent this entire dispute is whether GM can utilize the NYPA power first, before NYSEG system power, this statement by NYSEG would seem to moot the entire controversy. Ultimately, though, this question is one of contract interpretation, and one best left, as set forth infra, to the New York courts.

I would note also that there is no real competition between the cogeneration facility and NYSEG. Federal law requires that NYSEG purchase the cogeneration facility's surplus power. NYSEG has already indicated that it had every intention of abiding by that obligation.

The second element of a monopolization claim -- that the possession of monopoly power be maintained by some willful or intentional act -- is not present either. See ***Nat. Ass'n of Pharmaceutical Mfrs., supra*****;** **[*31]** see also ***Apollo Air Passenger Computer Reservation System,*** *720 F. Supp. 1068 (S.D.N.Y. 1989)*. NYSEG's complained-of conduct consisted simply of taking action pursuant to a duly executed contract, one signed by the plaintiff. Such actions can hardly be categorized as willful. And, even if taken pursuant to an erroneous interpretation of the agreement, they would not constitute the basis for an antitrust violation.

GM also complains that the actions of NYSEG constitute the offense of attempted monopolization in violation of *§ 2 of the Sherman Act. To* ***HN14***[] succeed on such a claim, the plaintiff must prove:

> (1) anticompetitive or exclusionary conduct.; (2) specific intent to monopolize; and (3) a "dangerous probability" that the attempt would have succeeded.

Nat. Ass'n of Pharmaceutical Mfrs. supra, *850 F.2d at 914*, quoting ***International Distrib. Centers v. Walsh Trucking Co.,*** *812 F.2d 786, 790 (2nd Cir. 1987)*. As discussed above, in my view neither NYPA nor GM, through its cogeneration facility, are in competition with NYSEG, in any market that GM has alleged. As such, any conduct of which GM complains could **[*32]** not be either anticompetitive or exclusionary. Additionally, NYSEG's acts do not evidence the requisite specific intent, as they were taken pursuant to duly executed contracts. GM's claims of attempted monopolization must fail as well.

Clayton Act Claims

As I indicated above, the degree of state involvement in the complained-of anticompetitive actions warrants dismissal of the antitrust claims. See ***Southern Motor Carriers Rate Conference, Inc. v. United States,*** *471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985)*. However, even if I were to rule that the state action here did not immunize the complained-of acts from antitrust attack, I would still dismiss plaintiff's Clayton Act claim.

As outlined above, GM argues that the use of the load splitter is an unlawful tie-in under § 3 of the Clayton Antitrust Act, *15. U.S.C. § 14*. See footnote 8, supra. It claims that NYSEG, by using the load splitter, has conditioned the sale of expansion power on the purchase of NYSEG system power. In GM's view, expansion power and NYSEG system power are separate commodities within the meaning of the Clayton Act. NYSEG responds that electricity **[*33]** is not a commodity under the Clayton Act, that GM has not alleged two tied products, and that the complaint alleges an insubstantial amount of commerce.

Before turning to the elements of a tying claim, I must address NYSEG's argument that electricity is not a commodity within the meaning of the Clayton Act. The Clayton Act proscribes tying arrangements in the "sale of goods, wares, or merchandise, machinery, supplies, or other commodities…" *15 U.S.C. § 14*. Both parties cite a series of cases that have addressed the question of whether electricity is a commodity within the meaning of the antitrust laws. I am satisfied that the better view is expressed by those cases determining that it is a commodity. The cases cited by the parties address the meaning of the term "commodity" in the context of the *Robinson-Patman Price Discrimination Act*, *15 U.S.C. § 13a*. None rules squarely on Clayton Act grounds. NYSEG relies primarily on ***City of Groton v. Connecticut Light & Power Co.,*** *497 F. Supp. 1040 (D.Conn. 1980)*. There, the Court ruled that, "electricity is not a commodity for purposes of the Act." ***Id.,*** *497 F. Supp. at 1052, fn. 14*, **[*34]** citing ***City of Newark v. Delmarva Power & Light Co.,*** *467 F. Supp. 763, 774 (D.Del. 1979)*. The Newark court reached its conclusion based on its interpretation that the *Robinson-Patman Act* was concerned with "manufactured products and consumer goods". ***Id.,*** *467 F. Supp. at 774*.

I believe the better view is that expressed by those courts that have determined that electricity is a commodity. The Eighth Circuit stated:

> Though the*Robinson-Patman Act* does not cover sales of real property, intangibles, or services, electricity does not fall into any of these categories. Electric power can be felt, if not touched. It is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities. We hold that ***HN15***[] electricity is a commodity for purposes of the *Robinson-Patman Act.* The antitrust laws should not be given a restrictive interpretation.

City of Kirkwood v. Union Elec. Co., *671 F.2d 1173, 1181-82 (8th Cir. 1982)* (citations omitted) (emphasis added). Other courts have ruled that electricity is a commodity because of the similarity in the distribution of it, to the similarity **[*35]** of the distribution system, 'which prompted legislative concern over price discrimination". ***Town of Concord, Mass. v. Boston Edison Co.,*** *676 F. Supp. 396, 398 (D.Mass. 1988)*. Cf. ***City of Gainesville v. Florida Power & Light Co.,*** *488 F. Supp. 1258, 1281 (S.D.Fla. 1980)* ("The amendments to *Section 2* were designed to eliminate the anticompetitive price discrimination encouraged by abuses in the manufacturer-wholesaler-retailer system of marketing.").

As to the merits of GM's Clayton Act claim, ***HN16***[] a tying arrangement is an, "agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product". ***Yentsch v. Texaco, Inc.,*** *630 F.2d 46, 56 (2nd Cir. 1980)*, quoting ***Northern P. R. Co. v. United States,*** *365 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. The plaintiff must prove five specific elements:

> first, a tying and a tied product … second, evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product … third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product **[*36]** … fourth, anticompetitive effects in the tied market … and fifth, a "not insubstantial" amount of interstate commerce in the tied product market…

Yentsch, supra, *630 F.2d at 56-57* (citations omitted). GM argues that NYSEG has tied the sale of expansion power (tying product) to the purchase of NYSEG system power (tied product).

There can be no tying arrangement, "unless two separate product markets have been linked." ***Jefferson Parish Hospital District No. 2 v. Hyde,*** *466 U.S. 2, 21, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. As NYSEG and NYPA power both perform the same function, and are utilized for the same purpose, there is little to distinguish them. GM apparently rests its assertion that there are two separate markets simply on the difference in price. That is not enough. As the Eighth Circuit stated:

> The City argues that the relevant product is "economical electric energy," i.e. that produced with the aid of a government subsidy, rather than electric power generally. But it showed nothing to indicate that the industry or consumers consider this "product" distinct from all other electric energy … except, that is, **[*37]** to the extent that "economical energy" may be cheaper than other electricity.
>
> It would be a strange antitrust doctrine indeed that would place a product in its own market or submarket simply because, though indistinguishable in any other way, it cost less.

City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-op, *838 F.2d 268, 279 (8th Cir. 1988)*. I simply do not see separate and distinct markets for Expansion and NYSEG system power.

GM may be able to demonstrate the second and third elements of a tying claim. The evidence of actual coercion by the seller (NYSEG) to accept the tied product (NYSEG system power) would be provided by the load splitter. NYSEG would have sufficient market power in the tying power (NYPA power) by virtue of its control over transmission lines to GM. However, "the anticompetitive effects in the tied market," ***Yentsch, supra,*** *630 F.2d at 57*, are not apparent to me. The tied market, NYSEG system power, is a monopoly in NYSEG's franchise territory by state law. NYSEG has absolute market power regardless of any presumed tying arrangement.

There is a "not insubstantial" amount of commerce affected by the restraint. **[*38]** NYSEG relies on ***Fortner Enterprises, Inc. v. United States Steel Corp.,*** *394 U.S. 495, 504, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*: "Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." NYSEG wheels expansion power to other customers within its franchise territory. See Wickham II, P13. And the amount of commerce at stake is enough. NYSEG's contends that a simple allegation of $ 1,000,000 damages is not enough. But, "the volume of commerce must be 'substantial enough in terms of dollar-volume so as not to be merely de minimis'". ***Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia,*** *815 F.2d 1407, 1419 (11th Cir. 1987)*, quoting ***Fortner, supra,*** *394 U.S. at 501*. $ 10,091.07 satisfied the court in Tic-X-Press, and the amount alleged by GM does so here.

However, in light of GM'S failure to allege any facts from which a jury could find separate and distinct product markets, or anticompetitive effect in a tied market, I do not believe that the Clayton Act claim **[*39]** is viable.

Donnelly Act claims

Because I am recommending dismissal of plaintiff's federal antitrust claims, dismissal of the Donnelly Act claims is appropriate also. ***HN17***[] Claims under the Donnelly Act and the Sherman Act are analyzed similarly. See ***Uniroyal Inc. v. Jetco Auto Serv., Inc,*** *461 F. Supp. 350, 357 (S.D.N.Y. 1978)*: "It is apparent that New York's Donnelly Act proscribes the same kind of conduct prohibited by the federal Sherman Act, and it has been so held." Citing ***State v. Mobil Oil Corp.,*** *38 N.Y.2d 460, 464, 381 N.Y.S.2d 426, 428, 344 N.E.2d 357, 359 (1976)*. See also ***Empire Volkswagen, Inc. v. World Wide Volkswagen Corp.,*** *814 F.2d 90, 98, n. 4 (2nd Cir. 1987)*; and ***Volmar Distributors, Inc. v. The New York Post Co., Inc.,*** *825 F. Supp. 1153 (S.D.N.Y. 1993)*.

Contract claims

The parties both agree that there are contracts governing at least part of this dispute. GM has asserted that NYSEG violated the 1989 Expansion Power Agreement by failing to make available its full allotment of expansion power. NYSEG asserts that it was in fact GM that violated an earlier agreement, **[*40]** the Separate Metering Agreement, by increasing the equipment hooked to the meter measuring an agreed-to surrogate for expansion power. In NYSEG's view it must bill GM for all power provided to it, and the contracts provide only two options: separate metering or the load splitter. In addition, there is some dispute over whether GM could, or did, (or both), displace NYSEG system power in favor of its expansion power allotment.

There is pending a declaratory judgment action in New York State Supreme Court, New York County, seeking to declare the parties rights under these agreements. See Wickham I, P14, Exhibit 5. To my knowledge, that action remains undecided. I think it proper to allow the New York Supreme Court to resolve those issues in view of my recommendation that the antitrust causes of action be dismissed.

CONCLUSION

Based on the foregoing it is recommended that summary judgment be entered in favor of the defendant NYSEG and that the plaintiff's complaint be dismissed against both parties.

Respectfully submitted,

Edmund F. Maxwell

United States Magistrate Judge

DATED: Buffalo, New York

October 1st, 1993

Pursuant to *28 U.S.C. § 636* ***[*41]*** *(b)(1)*, it is hereby

ORDERED that this Report and Recommendation be filed with the Clerk of this Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within (10) days of receipt of this Report and Recommendation in accordance with the above statute, *Rule 72(b) Fed.R.Civ.P.* and Local *Rule 30*.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the *District Court's Order.* ***Thomas v. Arn,*** *474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; ***Wesolek, et al v. Canadair Limited, et al,*** *838 F.2d 55 (2nd Cir.1988)*.

Let the Clerk send a copy of this order and a copy of the Report and Recommendation to the attorneys for the plaintiff and the defendants.

So ordered.

Edmund F. Maxwell

United States Magistrate Judge

DATED: Buffalo, New York

October 1st, 1993

APPENDIX

As noted in the body of the decision, this is a list and short description of the contracts that are either at issue, or are referred to by the parties.

1. CONTRACT **[*42]** NS 11, between NYPA and NYSEG, effective from 1961 through 1988.
This contract governed the relations between NYPA and NYSEG with regards to the transmission of Expansion Power from both the Niagara Project, and NYPA's St. Lawrence River operations. [16] (Complaint, P16-A).
Neither party has provided a copy of this contract to the court. NYSEG has referred to it in their memoranda of law.

2. Various unidentified agreements among NYPA, NYSEG and GM. (Complaint, P16-B).

3. EXPANSION POWER BILLING ARRANGEMENT, between NYPA, NYSEG and GM, dated January 17, 1973. Referred to in my Report and Recommendation as the SEPARATE **[*43]** METERING AGREEMENT.
This agreement sets out that GM is entitled to 14,300 kilowatts of expansion power, but that separate metering would be impracticable. The parties then agreed to utilize a surrogate as a measure for expansion load.

[16] For a partial discussion of NS 11, see ***N.Y. State Elec. Gas Corp. v. Fed. Energy Reg.,*** *638 F.2d 388 (2nd. Cir. 1980)*. For a history of the Niagara Power Project and NYPA's involvement, see ***Occidental Chemical Corp. v. Power Authority,*** *786 F. Supp. 316 (W.D.N.Y. 1992)*, aff'd. *990 F.2d 726 (2nd Cir. 1993)*.

It is attached as Exhibit B to Defendant NYSEG's Motion to Dismiss, or in the Alternative, for Summary Judgment, Docket Entry 6.
4. CONTRACT FOR THE SALE AND RESALE OF EXPANSION POWER between NYPA and NYSEG, dated December 13, 1988, but signed February 22, 1989. Referred to in my Report and Recommendation as the RESALE AGREEMENT. The parties have referred to this in their papers by its complete title.

This contract basically replaced NS 11, and provided for the transmission of NYPA power and dealt with other factors such as billing.

It is attached as Exhibit A to the Complaint, Docket Entry 1.

5. 1989 EXPANSION POWER ALLOCATION AND SERVICE AGREEMENT, between NYPA, NYSEG and GM. Referred to in my Report and Recommendation as the EXPANSION POWER AGREEMENT.
This contract allotted GM 14,300 kilowatts of expansion power and addressed other matters such as transmission and billing.

It is attached as Exhibit B **[*44]** to the Complaint, Docket Entry 1.

Documents 1, 2 and 3, identified above, have been referred to as the "old wheeling agreements". Documents 4 and 5, identified above, have been referred to as the "new wheeling agreements".

Transphase Sys. v. Southern Cal. Edison Co.

United States District Court for the Central District of California

October 7, 1993, Decided ; October 7, 1993, Filed; October 12, 1993, Entered

CV 93-2552 KN (Ex)

Reporter

839 F. Supp. 711 *; 1993 U.S. Dist. LEXIS 19350 **; 1993-2 Trade Cas. (CCH) P70,392

TRANSPHASE SYSTEMS, INC., Plaintiff, v. SOUTHERN CALIFORNIA EDISON COMPANY and SAN DIEGO GAS AND ELECTRIC COMPANY, Defendants.

Core Terms

alleges, electricity, rebate, ratepayers, bidding, defendants', monopolization, customers, anticompetitive, competitor, motion to dismiss, antitrust claim, Sherman Act, resources, energy, monopoly power, technologies, monopolies, antitrust, resisting, savings, costs, funds, sham

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Federal Government > Claims By & Against

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

The state action doctrine places state sponsored restraints on competition beyond the reach of the Sherman Act in order to promote the principles of federalism and state sovereignty. The United States Supreme Court has set forth a two-pronged test for determining when actions taken by private parties, pursuant to a state regulatory regime, are immunized by the state action doctrine. First, the court must determine whether the challenged restraint is one clearly articulated and affirmatively expressed as state policy. Second, the state must supervise actively any private anticompetitive conduct. This supervision requirement is only satisfied if state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN2[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine protects the right of parties to petition the government even if the impact of their petition is likely to have an anti-competitive effect.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN3[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A complaint must include allegations of the specific activities, not protected by the Noerr-Pennington doctrine, which plaintiffs contend have barred their access to a governmental body.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN4[] **Antitrust & Trade Law, Sherman Act**

A defendant may not be found liable under the Sherman Act for monopolizing or attempting or conspiring to monopolize a market unless that defendant is a competitor in the relevant market and his conduct creates a dangerous probability that he will gain a dominant share of the market.

Judges: [1]** KENYON

Opinion by: DAVID V. KENYON

Opinion

[*713] *ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS*

This case comes before the Court on defendants Southern California Edison Company's ("SCE") and San Diego Gas and Electric Company's ("SDG&E") Motions to Dismiss Transphase System Inc's federal antitrust claims for failure to state a cause of action pursuant to Federal Rule 12(b)(6). Defendants allege, among other things, that Transphase's antitrust claims are barred by the "state action" doctrine and that SCE and SDG&E's participation in proceedings before the California Public Utilities Commission ("CPUC") is protected conduct under the *Noerr-Pennington* Doctrine. Defendant SDG&E also asserts that Transphase has failed to allege a claim under the antitrust laws because it has failed to adequately allege that the defendants were significant competitors in the relevant product market and that their conduct created a dangerous probability that they would monopolize that market. [1] The Court agrees with all of these contentions and therefore GRANTS SCE's and SDG&E's Motions to Dismiss Transphase's antitrust claims with prejudice. The Court also dismisses Transphase's pendent state law claims under the California **[**2]** Unfair Practices Act and the California Cartwright Act. The Court explains its reasoning briefly in the *Discussion* section below.

I. *INTRODUCTION*

Plaintiff Transphase Systems, Inc. ("Transphase") sells thermal energy storage ("TES") systems designed to shift electricity use from high demand periods (such as hot summer days) when electricity is more expensive to provide to lower demand times, typically at night. Transphase's particular TES system uses cooling tanks containing salt water that is frozen at night. Water is cooled as the tanks defrost during the day and is then circulated through a building's air conditioning system to provide cool **[**3]** air. Transphase's TES system is one of a variety of technologies in "demand-side management" ("DSM") which are designed to promote energy conservation and reduce the need for new power generation by shifting electricity use from high to low demand periods. DSM

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[1] Defendants' motions present several other arguments in favor of dismissing Transphase's complaint, including that Transphase has failed to allege any anticompetitive conduct or antitrust injury suffered by Transphase. Although these arguments are closely related to SDG&E's argument concerning the relevant product market, the Court does not directly address them.

resources like Transphase's TES system are supposed to benefit ratepayers by offsetting the need for utilities to build power plants or buy additional electric capacity from independent power producers at a higher unit cost than the ratepayers would need to pay for the DSM system.

Commercial electricity customers can reduce their electric bills by using Transphase's product to take advantage of lower nighttime off peak electricity rates. The drawback is that Transphase's TES technology is too expensive to make it commercially attractive; the typical commercial electric customer would find the "payback period" needed to recoup his initial capital investment to be too long to justify the initial expense of buying one of Transphase's systems. In order to remedy this problem and promote the use of energy conserving/load management technologies, the CPUC authorizes utility companies like SCE and SDG&E to provide rebates for electricity **[**4]** customers **[*714]** who utilize DSM technology. Both SCE [2] and SDG&E [3] provide such rebates for customers who decide to utilize DSM systems like that marketed by Transphase. The gist of Transphase's complaint is that SCE and SDG&E have conspired with one another and independently used their monopoly power over the energy supply in their respective service areas to hold down the rebate levels awarded to customers who utilize or desire to utilize DSM systems like that designed by Transphase. Plaintiffs allege that if the defendants had awarded consumers with the appropriate sized rebates, more customers would decide to buy TES systems and the value of Transphase's business would have increased by more than $ 50 million above its present value.

[5]** Transphase alleges two violations of Section 2 of the Sherman Act: Actual Monopolization (Comp. at PP 19-27) and Attempted Monopolization, including a conspiracy to attempt monopolization. In addition, Transphase also alleges a combination by SCE and SDG&E to restrain trade in violation of Section 1 of the Sherman Act. (Comp. at PP 40-43).

Transphase's actual monopolization claim alleges that the defendants enjoy monopoly power by "virtue of their ability to determine the prices of thermal energy storage systems and the electricity savings provided thereby to both the host customer and the DSM ratepayers." (Comp. at P 20). Transphase contends that the defendants have willfully acquired and maintained their monopoly power over the "TES retrofit and DSM resources" by (1) "arbitrarily establishing" rebates by refusing to consider new power plant costs when determining "avoided costs" and "manipulating" avoided costs; (2) controlling the amount of DSM funds to be budgeted for TES; and (3) controlling the "measuring and verifying" of whether the projected DSM savings are actually acquired. (Comp. at PP 20-22). In addition, the defendants are also accused of "actively resisting" competitive **[**6]** bidding between DSM and supply side options and thus preventing Transphase from competing directly against proposals to build additional generating facilities. *Id.* at P 22.

Transphase's Section 1 conspiracy claim alleges that the defendants have "conspired to restrain trade by establishing artificially low rebate levels for TES" and by establishing different measurement standards for themselves than those to be applied to independent DSM suppliers. In particular, Transphase alleges that the defendant utilities have "combined and conspired to restrain commerce among the various states by deliberately adjusting their avoided costs" and "appearing together before regulatory and other bodies" to oppose joint bidding between suppliers of supply-side management (SSM) and suppliers of DSM services like Transphase. (Comp. at PP 40-43.)

II. *DISCUSSION*

A. *State Action Doctrine*

Defendants contend that Transphase's antitrust claims are totally barred by the "state action" doctrine enunciated in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. ***HN1***[] The state action doctrine places state sponsored restraints **[**7]** on competition beyond the reach of the Sherman Act in order to promote the principles

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[2] Southern California Edison is one of the largest electric utilities in the United States and distributes and sells electricity to customers within a large segment of Los Angeles County and adjacent counties.

[3] SDG&E is an electric utility based in San Diego which distributes and sells electricity within a large area of Southern California, including San Diego County and portions of Orange County.

of federalism and state sovereignty. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 1349, 113 L. Ed. 2d 382 (1991). The Supreme Court has set forth a two-pronged test for determining when actions taken by private parties, pursuant to a state regulatory regime, are immunized by the state action doctrine. First, the Court must determine whether the challenged restraint is "one clearly articulated and affirmatively expressed as state policy." Southern Motor Carriers Rate Conf. v. U.S., 471 U.S. 48, 57, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985) (quoting Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 **[*715]** (1978). Secondly, "the State must supervise actively any private anticompetitive conduct." Southern Motor Carriers, at 57 (citing California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)). **[**8]** [4] This supervision requirement is only satisfied "if state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Patrick v. Burget, 486 U.S. 94, 101, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988).

After a thorough analysis of the complaint, the parties' briefs and documentary exhibits, the relevant sections of the California Public Utility Code, and the published opinions of the CPUC, the Court finds that both prongs of the *Midcal* test have been satisfied and, accordingly, holds that the defendants' **[**9]** allegedly anticompetitive actions are immunized by the state action doctrine.

Transphase's complaint alleges that defendants engaged in two basic anticompetitive acts: (1) failing to directly compare TES cost savings with the cost of supplying more electricity; and (2) suppressing both the total funds available for rebate subsidies and the rebate levels themselves. The CPUC decisions [5] cited by SCE and SDG&E clearly establish, however, that the form and extent of ratepayer funding for all DSM programs, including SCE's and SDG&E's, has been closely scrutinized, repeatedly modified, and ultimately approved by the CPUC.

[10]**

1. *California Has a "Clearly Articulated and Affirmatively Expressed" Policy to Displace Competition with Respect to DSM Bidding and the Ratemaking Process*

The Court's review of the California Public Utilities Code reveals that the California legislature has clearly articulated and expressed its desire to displace competition with respect to DSM bidding and the ratesetting process. Section 747 of the Public Utilities Code sets up a legislatively mandated bidding system for demand side services and mandates that the CPUC should establish a pilot program of "competitive bidding auctions for demand side services." Other sections of the code, *see e.g.,* § 701.1(c), set forth the criteria for determining the proper rebate for DSM services and prohibit the CPUC from changing any rate or altering "any classification, contract, practice, or rule as to result in a new rate, except upon a showing before the Commission and a finding by the Commission that

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[4] This second prong of the *Midcal* test prevents the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." Southern Motor Carriers, at 57 (citing Midcal, 445 U.S. at 106).

[5] Transphase objects to the defendants' submission of and citations to these reported CPUC decision and asserts that, if the Court decides to consider these decisions, defendants' motions would be transformed into motions for summary judgment, pursuant to Rule 56. The Court disagrees. The Court may take judicial notice of these decision under Federal Rule of Evidence 201(e) since their existence is a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(e). The Ninth Circuit held in Nugget Hydroelectric v. Pacific Gas and Electric, 981 F.2d 429, 435 (9th Cir. 1992), that a district court could take published decisions of the CPUC into account on a motion to dismiss in order to determine whether the state had "actively supervised" a defendant's allegedly anticompetitive conduct. The *Nugget* court ultimately found that the CPUC decision at issue, together with the applicable Guidelines, were sufficient to prove that the state actively supervised the defendant's conduct, thus satisfying the second prong of the *Midcal* test.

The Court therefore finds that it may properly consider the reported decisions of the CPUC in the context of the defendants' motion to dismiss. Since the Court's consideration of these decisions does not transform this into a motion for summary judgment under Rule 56, the Court DENIES Transphase's request to submit evidence on the second, "active supervision" prong of the *Midcal* test.

the new rate is justified." *Cal. Pub. Util. Code § 454(a)*. Taken as a whole, the Public Utility Code clearly articulates the state's policy of displacing competition in favor of a highly regulated system of ratesetting and bidding **[**11]** on alternative DSM systems.

2. *The CPUC Has "Actively Supervised" SCE's and SDG&E's DSM Activities*

Transphase's complaint alleges that defendants SCE and SDG&E control almost **[*716]** every aspect of the DSM ratesetting and bidding processes in their respective geographic markets. Transphase alleges, for example, that the defendants (1) have the power to decide whether DSM vendors like Transphase should be permitted to bid directly against supply side alternatives that can generate their own electric power (Comp. at P 20); (2) determine the amount of DSM funds to be budgeted for TES systems like Transphase's (Comp. at P 20); and (3) decide the ways in which "electricity savings projected from DSM technologies are measured and verified." *Id*. Finally, Transphase alleges that the defendant utilities "choose to conduct" the rebate programs and that "ratepayers cannot negotiate directly with Transphase, which must deal with the ratepayers through the utilities." (Comp. at P 15).

The reported decisions of the CPUC and the relevant sections of the California Utilities Code clearly establish that *all* of these allegations are false and unsupportable as a matter of law. In fact, the **[**12]** CPUC, not the defendant utilities, have the sole authority to (1) decide whether DSM vendors should be permitted to bid directly against supply side alternatives: [6] (2) establish the amount of DSM funds to be budgeted for TES systems; [7] and (3) decide the way in which electricity savings derived from DSM systems are measured and verified. [8] Moreover, the rebates provided to Transphase's customers are derived from ratepayer funds and cannot be collected or disbursed without the CPUC's explicit approval. *Cal. Pub. Util. Code §§ 451*, *454*. Transphase's sweeping allegations about the control exercised by the defendants are thus totally unfounded. Rather, a careful review of the CPUC's published opinions clearly establishes that the Commission actively supervises every aspect of SCE and SDG&E's DSM activities attacked by Transphase's complaint.

[13]** For the preceding reasons, the Court finds that the anticompetitive actions alleged to have been committed by defendants SCE and SDG&E in Transphase's complaint are immunized from federal antitrust liability by the "state action" doctrine.

B. *Defendants' Actions Are Immunized by the Noerr-Pennington Doctrine*

The defendants also assert that the "anticompetitive acts" which they are alleged to have committed in Transphase's complaint are protected by the *Noerr-Pennington* doctrine. ***HN2***[] The *Noerr-Pennington* doctrine protects the right of parties to petition the government even if the impact of their petition is likely to have an anti-competitive effect. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd., 542 F.2d 1076, 1080-81 (9th Cir. 1976)*, *cert. denied, 430 U.S. 940, at 1080, 51 L. Ed. 2d 787, 97 S. Ct. 1571 (1977)* ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.")

As noted above, Transphase has alleged that the defendants violated Section 1 of the Sherman Act by (1) appearing together **[**14]** before the CPUC to take positions that would disadvantage Transphase; (2) filing joint briefs before the CPUC; and (3) speaking "in unison before [the CPUC] to demand the fruits of their monopolies." These actions are clearly protected by the *Noerr-Pennington* doctrine and therefore cannot form the basis for a conspiracy claim under Section 1.

Transphase's claims for monopolization and attempted monopolization under Section 2 of the Sherman Act are also protected by the *Noerr-Pennington* doctrine. Transphase alleges that the defendants have maintained their monopoly power by "resisting meaningful changes" to their rebate programs and resisting competitive bidding

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[6] Indeed, the CPUC recently decided, after Transphase filed this complaint, to set up direct bidding between demand and supply side alternatives.

[7] *See 1988 GRC* at 475-477; *1992 GRC* at 144.

[8] *See Interim DSM Bidding Pilots* at 22.

between DSM and supply side options. Although the complaint does not explicitly describe how defendants resisted these changes, it is clear from the context of the allegations, that the defendants' alleged resistance was exercised by the defendants **[*717]** through the public positions they took in the CPUC proceedings. Thus, Transphase's claims under section 2 of the Sherman act are also barred by the *Noerr-Pennington* doctrine.

Transphase alleges in its Opposition to both SCE and SDG&E's Motions that it is relying on the **[**15]** "sham" exception to the *Noerr-Pennington* doctrine, but Transphase has failed to plead anywhere in its complaint that the defendants' conduct before the CPUC was a "sham". Thus, Transphase's complaint must be dismissed. The Ninth Circuit has held that ***HN3***[] "a complaint must include allegations of the specific activities, not protected by *Noerr,* which plaintiffs contend have barred their access to a governmental body." *Franchise Realty, supra, 542 F.2d at 1082*. Transphase has failed to meet this demanding pleading standard.

Transphase asserts in its Opposition, however, that it should be provided an opportunity to amend its complaint to allege that the defendants' actions before the CPUC were a "sham". The "sham exception" does not appear to extend to direct lobbying efforts seeking action by an administrative body (like the CPUC), however. *Franchise Realty, at 1080*. Therefore, Transphase's request to amend its complaint by alleging that defendants' conduct was a "sham" would be futile.

The Court thus finds that Transphase's antitrust claims against the defendants are barred by the *Noerr-Pennington* doctrine.

C. *Defendants SCE and SDG&E are* **[**16]** *Not Significant Competitors in the Relevant Product Market*

It is axiomatic in ***antitrust law*** that ***HN4***[] a defendant may not be found liable under the Sherman act for monopolizing or attempting or conspiring to monopolize a market unless that defendant is a competitor in the relevant market and his conduct creates a dangerous probability that he will gain a dominant share of the market. *Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884, 890-91 (1993)*; *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo, 791 F.2d 755, 759 (9th Cir. 1986)* (county government, which performed no health care services, could not be charged with having used its market power to exclude competition when it refused to license an ambulance service because it was not a competitor in the relevant product market). Defendant SDG&E contends that it cannot be found to have violated the Sherman Act because it is not a competitor in the relevant product market and Transphase's complaint neither alleges that SDG&E is a competitor in the relevant market nor that it's conduct creates a dangerous probability that it will monopolize **[**17]** that market. [9]

Transphase claims that the relevant product market "over which" the utilities exercise their monopoly power are "broadly speaking, DSM resources, and with specific respect to Transphase, retrofit thermal energy storage (TES) goods and services" like those supplied by plaintiff. (Comp. at P 17). SDG&E asserts, however, that Transphase acknowledges in its complaint that SDG&E and SCE are not really competitors in this *product* market; they merely exercise control over the DSM goods and services provided by others by virtue of their alleged power to control the bidding programs and rebate levels for those services. The Court agrees with SDG&E's argument and therefore GRANTS its Motion to Dismiss on these grounds.

Transphase's **[**18]** complaint clearly states that while SDG&E and SCE "have a monopoly over the furnishing of [DSM systems and, specifically, Transphase's TES services] to the ratepayers. . . [they] *are not themselves capable of supplying those goods and services to the ratepayers, only of preventing Transphase from so doing."* (Comp. at P 19)(emphasis added). In another paragraph, Transphase again alleges in a conclusory fashion that the defendants have monopolies over the provision of DSM services and have "willfully maintained" these monopolies; **[*718]** Transphase concedes in the very next phrase, however, that the utilities "basically do nothing to supply such DSM resources to the ratepayers of California but hire others and charge large administrative costs and

[9] Although SCE does not present this argument in its own motion to dismiss, the Court finds that this argument is applicable to SCE as well as SDG&E and thus dismisses Transphase's antitrust claims against SDG&E *and* SCE on the grounds presented in SDG&E's motion and Section C above.

profits" to do so. (Comp. at P 25). Transphase has also failed to allege that either SDG&E or SCE has significant market share in either the provision of DSM systems or in the TES systems marketed by Transphase.

Although the Court must assume that the allegations in a plaintiff's complaint are true when considering defendants' motion to dismiss, *N.L. Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*, **[**19]** the Court does not "need to accept as true conclusory allegations . . . or unreasonable inferences." Schwarzer, Tashima, and Wagstaffe, *Federal Civil Procedure Before Trial,* § 9:221 at page 9-41. The Court thus rejects Transphase's conclusory allegations of the defendants' market power within the relevant *product* market (as opposed to geographic market) since these allegations are directly contradicted by Transphase's unambiguous admission that the utilities "*do nothing to supply such DSM resources to the ratepayers of California but hire others" to supply these systems.* (Comp. at P 25) (emphasis added). Although Transphase alleges in its Opposition that "currently, SDG&E directly provides DSM resources to its ratepayers" and that Transphase "would never intimate that the defendant utilities are incapable of hiring someone to install" TES systems (Opposition at pages 14-15), the complaint itself clearly fails to allege either that (1) SDG&E or SCE competes with Transphase in the supply of DSM or TES systems; or (2) that the defendants' current activities create a dangerous probability that they will obtain a monopoly over, or even a dominant position, in the relevant product **[**20]** market. Transphase's complaint therefore fails to plead an actionable claim under the federal antitrust statutes. [10]

III. *CONCLUSION*

For the reasons discussed above, the Court GRANTS Defendants' Motions to Dismiss Transphase's federal antitrust claims. The Court also dismisses Transphase's pendent state law claims since all of plaintiff's federal claims have been dismissed. *See* *Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989)*.

IT IS SO ORDERED.

DATED: October 7, 1993

DAVID V. KENYON

[21]** UNITED STATES DISTRICT JUDGE

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[10] If there were no independent basis for dismissing Transphase's complaint, the Court would allow plaintiff leave to amend its complaint in the event that it could, in good faith, plead that the defendants are competitors in the *supply* or *distribution* of DSM or TES systems. Given that the Court has also decided to dismiss Transphase's antitrust claims on two independent grounds, however, the Court does not grant Transphase leave to amend at this time.

Los Angeles Land Co. v. Brunswick Corp.

United States Court of Appeals for the Ninth Circuit

July 12, 1993, Argued, Submitted, Pasadena, California ; October 13, 1993, Filed

No. 92-55134

Reporter
6 F.3d 1422 *; 1993 U.S. App. LEXIS 26608 **; 1993-2 Trade Cas. (CCH) P70,381; 93 Cal. Daily Op. Service 7595; 93 Daily Journal DAR 129711

LOS ANGELES LAND CO.; SIERRA PALM PARTNERS; WEST LANES INC., Plaintiffs-Appellees, v. BRUNSWICK CORPORATION, Defendant-Appellant.

Subsequent History: Certiorari Denied March 21, 1994, Reported at: *1994 U.S. LEXIS 2322*.

Prior History: [1]** Appeal from the United States District Court for the Central District of California. D.C. No. CV-88-5285-MRP. Mariana R. Pfaelzer, District Judge, Presiding.

Core Terms

bowling, competitors, monopoly power, prices, financing, barrier, power to exclude, relevant market, anti trust law, monopoly, centers, district court, anticompetitive, lenders, antitrust claim, incumbent, possessed, contends, entrants, argues, build, economic advantage, economic relations, directed verdict, power to control, tort claim, Sherman Act, antitrust

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Standards of Review, Substantial Evidence**

The standard for determining the propriety of a directed verdict or a judgment notwithstanding the verdict is the same for district and appellate courts: whether, viewing the evidence as a whole, there is substantial evidence present that could support a finding for the nonmoving party. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] **Trials, Judgment as Matter of Law**

In deciding an appeal from the denial of motions for directed verdict and judgment notwithstanding the verdict, the reviewing court reviews the evidence on the factual issues in the light most favorable to appellee and draw all reasonable inferences in its favor.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN3[] **Regulated Industries, Higher Education & Professional Associations**

The question whether a party possesses monopoly power is essentially one of fact. However, the question whether specific conduct is anticompetitive in violation of the Sherman Act is one of law which the reviewing court reviews de novo.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

The definition of monopoly power is clearly established in the case law. Monopoly power is the power to control prices or exclude competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5[] **Monopolies & Monopolization, Actual Monopolization**

A plaintiff can not establish a monopolization offense by a firm without market power solely on the basis of undesirable or even significantly anticompetitive behavior.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN6[] **Monopolies & Monopolization, Actual Monopolization**

Evidence of threatened competition can not rationally support an inference of power to exclude competition, particularly where a court has already determined that the acts in question were not exclusionary.

Counsel: Stephen M. Shapiro, Mayer, Brown & Platt, Washington, D.C., for the defendant-appellant.

Eliot G. Disner, Shapiro, Posell & Close, Los Angeles, California, for the plaintiff-appellee.

Judges: Before: Floyd R. Gibson, * Cynthia Holcomb Hall and Andrew J. Kleinfeld, Circuit Judges.Opinion by Judge Hall.

Opinion by: HALL

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* The Honorable Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

Opinion

[*1423] OPINION

HALL, Circuit Judge:

Brunswick Corporation ("Brunswick") appeals from the district court's judgment following a jury verdict awarding to Los Angeles Land Company ("L.A. Land") $ 15,168,000 under *section 2* of the Sherman Act, and, alternatively, one-third that amount under California common law governing tortious interference with prospective economic advantage. Brunswick contends that the district court should have granted its motions for directed verdict and judgment notwithstanding the verdict because L.A. Land failed to prove violations of federal ***antitrust law*** or state tort law. This case centers on the competing **[**2]** efforts of the two parties to build a bowling center in Palmdale in the Antelope Valley (a portion of Los Angeles County) at a time when Brunswick owned the only existing center in the Valley.

The district court had jurisdiction over the federal antitrust claims under *15 U.S.C. §§ 15*, *26*, and pendent jurisdiction over the state law claims. We have jurisdiction to review the district court's final judgment under *28 U.S.C. § 1291*. We reverse.

[*1424] I. FACTS AND PROCEEDINGS BELOW

Brunswick wholly owns two subsidiaries - one which manufactures and sells bowling equipment, and another which owns and operates bowling centers in the United States and abroad. One of the centers under the control of the latter subsidiary is the Sands Bowl in the Antelope Valley. In spring of 1988, the Sands Bowl was the only bowling center in the Antelope Valley, an area with a rapidly expanding population.

L.A. Land is a real estate development company which, among various other enterprises, owns and operates three bowling centers in Southern California. In 1987, L.A. Land set in motion a plan to build a bowling center in the Antelope Valley. **[**3]** In April 1988, it sent an order for equipment to Brunswick, with specified conditions. About that time, Brunswick itself developed an interest in opening a new bowling center in the Antelope Valley.

In 1986, Brunswick had formed an agreement with Deutsche Credit Corporation ("DCC") under which Brunswick helped its customers to obtain equipment financing from DCC by guaranteeing through a contingent repurchase arrangement that Brunswick rather than DCC would bear most of the risk of borrower default. The agreement required Brunswick to assume contingent liability for the loan, gather information for the loan application package and transmit the package to DCC, and prepare a market survey to help DCC assess the viability of any new bowling center. When L.A. Land sought to purchase equipment from Brunswick for its proposed Antelope Valley center, it also sought equipment financing from DCC. However, DCC refused to accept a loan application directly from L.A. Land and instead directed it to process the application through Brunswick. L.A. Land began attempting to arrange the financing through Brunswick sometime about April 1988.

Previous to the key events at issue in this case, L.A. Land **[**4]** opened a bowling center in San Dimas, California. It purchased the equipment for that center from Brunswick, financed the purchase through DCC, and contracted with Timberlake Construction Company ("Timberlake") to build the center. L.A. Land asked Timberlake to build its proposed center in the Antelope Valley, but Timberlake declined, citing a policy of not building in Brunswick market areas (i.e., areas where Brunswick owned and operated bowling centers.) As of 1988, Timberlake had for some time built all of Brunswick's new U.S. bowling centers.

By August of 1988 (and possibly earlier), Brunswick decided to go ahead with plans to build a new bowling center in the Antelope Valley. Brunswick had forwarded L.A. Land's equipment financing application to DCC at the end of July 1988. L.A. Land alleges that Brunswick delayed transmittal of the application so that Brunswick could get a head start on the construction of its own new bowling center in the Antelope Valley. Ultimately, DCC turned down

L.A. Land's financing application, Brunswick built a new bowling center in the Antelope Valley, and L.A. Land did not.

L.A. Land commenced this action on August 30, 1988, and immediately requested **[**5]** a temporary restraining order to enjoin Brunswick's construction of its new center arguing that "the market can adequately bear just one more bowling center"; the district court denied the request. At trial, L.A. Land contended that Brunswick committed three acts which violated federal ***antitrust law*** and constituted torts under California law: (1) Brunswick delayed transmission of L.A. Land's financial information to DCC; (2) Brunswick submitted to DCC an inaccurate market survey; and (3) Brunswick restricted Timberlake from building a bowling center in the Antelope Valley for L.A. Land.

Brunswick moved for a directed verdict after L.A. Land presented its case in chief and at the end of trial. The district court denied those motions and sent the case to the jury, which rendered a verdict in favor of L.A. Land. The court also denied Brunswick's motion for judgment notwithstanding the verdict, and entered a judgment awarding **[*1425]** L.A. Land the trebled sum of $ 15,168,000 on the antitrust claim or, alternatively, $ 5,056,000 on the tort claim, and $ 1,435,974.80 in attorneys' fees and costs. This appeal of that judgment followed.

II. STANDARD OF REVIEW

HN1[] The standard for determining the propriety **[**6]** of a directed verdict or a judgment notwithstanding the verdict is the same for district and appellate courts: "whether, viewing the evidence as a whole, there is substantial evidence present that could support a finding . . . for the nonmoving party." *Syufy Enters. v. American Multicinema, Inc., 793 F.2d 990, 992 (9th Cir. 1986)* (internal quotation omitted), *cert. denied, 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987)*. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*. (internal quotation omitted).

HN2[] In deciding this appeal from the denial of motions for directed verdict and judgment notwithstanding the verdict, we "review the evidence on [the] factual issues in the light most favorable to [L.A. Land] and draw all reasonable inferences in its favor." *Oahu Gas Service, Inc. v. Pacific Resources Inc., 838 F.2d 360, 364* (9th Cir.), *cert. denied, 488 U.S. 870, 102 L. Ed. 2d 149, 109 S. Ct. 180 (1988)*. ***HN3***[] The question whether a party possesses monopoly power is essentially one of fact. *Id. at 363*. However, the question whether **[**7]** specific conduct is anticompetitive in violation of the Sherman Act is one of law which we therefore review de novo. *Id. at 368*. Likewise, we review de novo the question whether specific conduct constitutes a tort under California law. *Salve Regina College v. Russell, 499 U.S. 225, 111 S. Ct. 1217, 1221, 113 L. Ed. 2d 190 (1991)* (a court of appeals should review de novo a district court's determination of state law).

III. DISCUSSION

A. Antitrust Claim

In a nutshell, L.A. Land's antitrust theory is that Brunswick monopolized the market for retail bowling services in Palmdale, and committed three specific acts in order to exclude L.A. Land from that market and thereby maintain its monopoly. At trial, L.A. Land had to prove three elements in order to establish a Sherman Act *§ 2* violation on its theory: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. *Pacific Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817* (9th Cir.), *cert. denied, 121 L. Ed. 2d 686, 113 S. Ct. 814 (1992)*; *Universal Analytics v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1257 (9th Cir. 1990)*. **[**8]** The relevant product and geographic markets were conclusively defined before trial as retail bowling services in the Antelope Valley and are not contested; otherwise, all three elements are disputed in this appeal.

We begin and end our inquiry with the question whether the record supports the jury's finding on the first element, i.e., that Brunswick possessed monopoly power in the relevant market. [1] We believe L.A. Land's whole antitrust claim founders on this issue. ***HN4***[] The definition of monopoly power is clearly established in the case law: "Monopoly power is the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. Viewing the evidence in the light most favorable to L.A. Land, the record simply does not support a finding that Brunswick had power to control prices or exclude competition.

[9]** Brunswick contends that, in order to prove monopoly power, L.A. Land relied solely on the fact that Brunswick owned the only existing retail bowling center in the Antelope Valley during the relevant time period. Brunswick argues that proof of its 100% market share does not demonstrate that it had the power to control prices or exclude competition in the absence of any evidence that it could prevent entry of other market participants. Case law supports this argument. **[*1426]** *See* *Oahu, 838 F.2d at 366* ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.") (internal citation omitted); *United States v. Syufy Enters., 903 F.2d 659, 664* & n. 6, 671 (9th Cir. 1990).

L.A. Land responds with several arguments. First, L.A. Land points out that the evidence presented to the jury showed that Brunswick's share of the relevant market increased over time until it reached 100%. Brunswick's market share increased because two competitors withdrew from the market. One bowling center **[**10]** closed in 1979 after a fire, and the other, a 10-lane bowling center in Lancaster, closed in Spring 1988. Neither case which L.A. Land cites supports its assertion that the jury could properly rely on this evidence of withdrawals from the market to infer that Brunswick possessed monopoly power. [2] One, *Oahu, 838 F.2d at 366*, does not discuss withdrawal; the other, *Greyhound Computer Corp. v. International Business Machines, 559 F.2d 488, 497 (9th Cir. 1977)*, *cert. denied, 434 U.S. 1040, 54 L. Ed. 2d 790, 98 S. Ct. 782 (1978)*, states that the fact that "two substantial competitors who met IBM in the marketplace . . . bowed out after sustaining heavy losses" helped support an inference of IBM's market dominance." In this case, however, L.A. Land does not suggest (and directs the court to no evidence which suggests) that the withdrawal of Brunswick's two competitors was in any way attributable to Brunswick's competitive conduct or any market conditions. Indeed, the evidence does not reveal any reason for their departures from the market, other than that one of the competitors chose not to reopen after a fire. Thus, we do not **[**11]** see how this evidence could support a finding of monopoly power.

Second, L.A. Land contends that the evidence showed that Brunswick charged monopoly prices. However, it points to no actual evidence of supracompetitive pricing, and the record reveals none. L.A. Land does point out that the prices Brunswick charged at the Sands Bowl (the single bowling center in the market before L.A. Land sought to enter) were "comparable" to prices Brunswick charged at bowling centers which **[**12]** were in better condition and which had automatic scorers. But L.A. Land cites no authority, and we are aware of none, which supports the notion that "comparable" prices may be considered supracompetitive, even considering some difference in quality.

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[1] L.A. Land contends that Brunswick failed to dispute the sufficiency of the evidence to support a finding of monopoly power in its motion for directed verdict, and therefore waived the right to raise this challenge on appeal. This contention is clearly spurious, as L.A. Land itself noted in court that Brunswick raised the question of market power in its argument on the directed verdict motion. R.T. at 1843.

[2] The jury instruction concerning monopoly power, to which Brunswick apparently did not object, did permit the jury to consider the departure of companies from the market as an indication of Brunswick's monopoly power. However, on review of a denial of a JNOV motion, this court applies the law truly controlling the case, regardless of the jury instructions. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd., 880 F.2d 176, 182-83 & n. 5 (9th Cir. 1989)*, *cert. denied,* ***493 U.S. 1058, 107 L. Ed. 2d 952, 110 S. Ct. 868 (1990)***.

The only other pricing evidence to which L.A. Land points concerns the fact that the average price [3] Brunswick charged at Vista Lanes (the bowling center it built in Palmdale after L.A. Land failed to enter the market) during its first 11 months of operation was higher than the prices it charged at any other center during that time. However, considering the record as a whole, this evidence does not support an inference of monopoly pricing. Testimony at trial, apparently uncontradicted, established that at least by the time of trial Vista's prices were lower than some and higher than others in the greater Los Angeles area, and indeed lower than the prices L.A. Land charged at its bowling center in San Dimas. Thus, the record does not support a conclusion that Brunswick had the power to control prices in the relevant market.

[13]** Third, L.A. Land asserts that the evidence established that Brunswick successfully excluded all competitors from the relevant market. We note that in order to prove Brunswick's possession of monopoly power, it was incumbent on L.A. Land to show that Brunswick had the power to exclude *competition* from the relevant market generally, **[*1427]** not just to exclude a particular *competitor*. Courts have consistently confirmed that the goal of the antitrust laws is to protect competition rather than competitors. *See Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884, 892 (1993)* (the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself"); *Syufy, 903 F.2d at 668* ("It can't be said often enough that the antitrust laws protect competition, *not* competitors.") (emphasis in original); *Oahu, 838 F.2d at 370* ("The goal of the antitrust laws . . . unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors."); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 927 (9th Cir. 1980)* **[**14]** ("Of course, it is free and open competition that the Sherman Act protects, and not any right of one competitor to be free of rough treatment at the hands of another."), *cert. denied, 450 U.S. 921, 67 L. Ed. 2d 348, 101 S. Ct. 1369 (1981)*. A key problem in this case is that rather than adducing evidence of Brunswick's ability to impair competition generally (such as evidence that Brunswick could prevent competitor access to necessary supplies from any provider), L.A. Land focussed primarily on proving particular anticompetitive acts. But ***HN5***[] a plaintiff can not establish a monopolization offense by a firm without market power solely on the basis of undesirable or even significantly anticompetitive behavior. 3 Areeda & Turner, ***Antitrust Law*** Par. 810 at 296 (1978).

The only evidence of power to exclude competition to which L.A. Land directs our attention concerns particular anticompetitive acts aimed at Harold Gelber in 1985, and others aimed at L.A. Land itself. The latter acts are the subject of this litigation; though these acts may arguably have been unjustifiable, it is not possible to ascertain whether they are related to the maintenance of monopoly power and therefore "exclusionary" **[**15]** in the antitrust sense without proof of market power. *See id*. Par. 813 at 301. In other words, evidence of these acts does not prove power to exclude competition. Assuming without deciding that the record fully supports findings that, as L.A. Land sought to prove at trial, Brunswick prepared a false or misleading market survey, delayed transmittal to DCC of L.A. Land's financing application, and prevailed upon Timberlake not to contract with L.A. Land, these findings only support the conclusion that Brunswick committed anticompetitive acts. Whether those acts maintained a Brunswick monopoly is a question which logically requires some other proof of monopoly power. If this assessment were not correct then "possession of monopoly power" and "willful acquisition or maintenance of that power," *Pacific Express, 959 F.2d at 817*, would not be separate elements of a *section 2* claim; rather, the latter would prove the former.

As to the Gelber evidence, even accepting L.A. Land's description of the evidence as accurate, it establishes no more than that Brunswick dissuaded Gelber from entering the market by threatening to compete (that is, by indicating that **[**16]** it intended to open a second bowling center in the market.) L.A. Land does not suggest that Brunswick set up any actual barriers to Gelber's entry into the market. *See Syufy, 903 F.2d at 668* (a strong competitor's ability to deter entry by others is not a "structural barrier to entry"). ***HN6***[] Evidence of threatened competition can not rationally support an inference of power to exclude competition, particularly where a court has already determined that the acts in question were not exclusionary - Gelber brought an antitrust suit based on these events and lost. Thus, this evidence does not support a finding of monopoly power.

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[3] Average price is a composite of all the different prices charged in a bowling center and does not represent the actual price paid by any consumer.

Finally, L.A. Land contends it proved that substantial barriers to entry existed in the relevant market. It argues that evidence of "Brunswick's systematic campaign to exclude competitors, such as L.A. Land and Gelber" readily supports a jury finding of high barriers to entry. We reject this argument for the simple reason that anticompetitive conduct by one firm against another is not an "entry barrier." Barriers to entry may be defined as either "additional long-run costs that were not incurred by incumbent firms but must be incurred **[**17]** by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn **[*1428]** monopoly returns." Areeda & Hovenkamp, ***Antitrust Law*** Par. 409' at 509-10 (1992 Supp.) (internal quotation omitted). [4] The evidence of Brunswick's behavior toward L.A. Land and Gelber fits neither definition.

L.A. Land also argues that the difficulty of obtaining financing for a new center's bowling equipment is a barrier to entry. This is a more serious proposition. There is some evidence in the record that lenders generally have **[**18]** trepidations about financing bowling equipment purchases. Though there was also evidence that some 19 different lenders have financed purchases of Brunswick equipment since 1986, the jury was entitled to find that bowling equipment financing is hard to obtain. However, the jury could not rationally construe this factor as a barrier to entry, as there was no evidence that the lenders who were willing to finance bowling equipment imposed higher financing costs on new entrants than on established firms. *See* note 4. The fact that many lenders do not understand the bowling market does not mean that the capital costs for new entrants and incumbents in the market differ, or that it is any more difficult for new entrants to obtain financing than incumbents. *Cf.* *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)* (a jury could not reasonably find cost of equipping a physician's office to be a significant entry barrier where evidence does not permit comparing that cost to potential competitors' resources or expected returns). The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier. **[**19]** *See* 2 Areeda & Turner, ***Antitrust Law*** Par. 409e at 303 ("The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm."). Thus, the record does not support a finding of significant entry barriers.

The fundamental problem in this case is that L.A. Land pursued a flawed theory, which the district court should not have sent to the jury. L.A. Land's antitrust theory was a source of considerable confusion and controversy throughout this litigation in the district court. Early on in the case, L.A. Land chose *not* to allege that Brunswick monopolized the market for bowling equipment - that is, L.A. Land specifically eschewed a supply monopoly theory; consequently, it was precluded from obtaining discovery on that theory. Throughout the litigation, the question surfaced whether L.A. Land could prove its case without showing monopolistic control over the supply of equipment and access to lenders and builders. The district court on several occasions expressed its doubt about L.A. Land's theory, [5] but sent **[**20]** it to the jury nonetheless. For example, in denying Brunswick's mid-trial directed verdict motion, the court stated:

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[4] The main sources of entry barriers are: (1) legal license; (2) control over an essential or superior resource; (3) entrenched buyer preferences for established brands or company reputations; and (4) capital market evaluations imposing higher capital costs on new entrants. Economies of scale may also be considered an entry barrier in some situations. 2 Areeda & Turner, ***Antitrust Law*** Par. 409b at 299-300 (1978). L.A. Land points to no evidence which fits in any of these categories.

[5] In its February 27, 1989 order denying Brunswick's first motion for summary judgment, the court stated the following:

On the present record, plaintiffs have not met their burden of submitting sufficient evidence to make out a prima facie case for all the elements of the alleged antitrust offenses. Nevertheless, the Court believes that plaintiffs should have more time to engage in discovery to support their claims. . . . The Court cautions plaintiffs, however, that the theory of their case is confused and problematic.

Despite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center. Moreover, plaintiffs must offer proof that Brunswick's position as a manufacturer of bowling equipment gives Brunswick control of the many banks from which plaintiffs could receive financing. There is already some evidence that Brunswick has no such power in the financial markets.

[21]** I have decided to deny the motion. However, in denying the motion, I do not want **[*1429]** to indicate that I think there is not any merit in what the defendants say. I think that there is enough to go to the jury, but I must tell you, Mr. Disner, that there are a couple of things in there that bother me tremendously and what bothers me is that . . . because there were other lenders and there were other builders available, you just wonder if they couldn't have gone to those builders or those lenders, and that has been a problem all during the time we were arguing the motion.

R.T. at 1648.

In the factual circumstances of this case, a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market. *Cf.* *Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1414 (7th Cir. 1989)*. [6] **[**23]** L.A. Land never alleged that Brunswick had power to exclude from the market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist. [7] A supply monopoly **[**22]** theory, if it could be substantiated, logically would have led to proof of Brunswick's power to exclude competition in the retail bowling market. The theory which L.A. Land did pursue, however, apparently led it to focus on proof of particular anticompetitive acts and leave unsatisfied the requirement that it show Brunswick possessed the power to control prices or exclude competition. Consequently, because the evidence does not support a finding of monopoly power, the antitrust claim must fail. *See* *Syufy, 903 F.2d at 671 n. 21* (plaintiff can not prevail on *section 2* claim without proof of defendant's power to exclude competition).

B. Tort Claims

L.A. Land's tort claims were based on Brunswick's alleged interference in L.A. Land's business relationships with DCC and Timberlake. In order to succeed at trial on its claims of tortious interference with prospective economic advantage, L.A. Land had to prove these elements: (1) an economic relationship containing the probability of future economic benefit to L.A. Land; (2) knowledge by Brunswick of the existence of the relationship; (3) intentional acts on the part of Brunswick designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to L.A. Land proximately caused by Brunswick's acts. *Buckaloo v. Johnson, 14 Cal. 3d 815, 122 Cal. Rptr. 745, 752, 537 P.2d 865 (Cal. 1975)*.

The jury specifically answered in the affirmative the question whether Brunswick "intentionally and improperly interfered, without justification or privilege, with any prospective economic advantage of" L.A. Land. The jury further replied **[**24]** affirmatively to the question whether "any such act of interference proximately caused damage" to L.A. Land. Because the form of verdict did not distinguish between Brunswick's alleged interference in L.A. Land's relationship with DCC and in its relationship with Timberlake, we consider both claims.

1. L.A. Land - DCC Relationship.

Because L.A. Land rejected a supply monopoly theory, it apparently never did offer proof that Brunswick, as a supplier, controlled all sources of financing.

[6] In *Indiana Grocery,* the court observed that "the output of the Indianapolis retail grocery market is, of course, groceries, *and Indiana Grocery concedes that Kroger could never control the supply of groceries in the Indianapolis retail market.* If so, it is very difficult to see how Kroger could ever restrict total market output and thereby raise prices." *Id*. (emphasis in original). The court further noted that "while market share may indicate market power in certain cases, the two are not necessarily the same. Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to curtail total market output." *Id*. By failing to prove a supply monopoly, L.A. Land essentially failed to prove that Brunswick controlled access to the productive assets of the retail bowling services market.

[7] The jury could have inferred from the evidence presented, however, that Brunswick was a desirable supplier at the relevant time.

Brunswick argues that, as a matter of law, L.A. Land's allegations fail to support a tort claim because Brunswick was not a stranger to the relationship between L.A. Land and DCC, and indeed had a financial stake in that relationship. Brunswick contends, relying on *Gianelli Distributing Co. v. Beck & Co., 172 Cal. App. 3d 1020, 219 Cal. Rptr. 203, 221 (Cal. Ct. App. 1985)*, that evidence in the **[*1430]** record must support a finding of an independent economic relationship between L.A. Land and DCC. Brunswick correctly asserts that evidence in the record instead shows that, because of its agreement with DCC, Brunswick was a necessary party to the prospective relationship between DCC and L.A. Land. *See, e.g.,* R.T. at 2275 (testimony by DCC official: "We weren't willing to make loans on new centers without some form of recourse guarantee[] from Brunswick **[**25]** so we wouldn't have made any of these loans without it."); R.T. at 2263 (testimony that DCC required Brunswick to prepare loan application packages for potential purchasers); R.T. at 2276 (testimony that DCC required Brunswick to prepare market surveys as part of loan packages because of Brunswick's superior knowledge of bowling industry).

L.A. Land does not point to any evidence which indicates an independent relationship between itself and DCC, or which contradicts evidence that DCC would not be in the business of financing equipment purchases by Brunswick's customers without Brunswick's financial participation and information-gathering. Instead, L.A. Land counters Brunswick's argument by asserting that Brunswick's defense that its interference was justified by its repurchase obligations under the DCC-Brunswick agreement is pretextual because there was no evidence that any perceived risks motivated Brunswick to discourage DCC from lending to L.A. Land. Apparently, L.A. Land fails to see that the issue is not Brunswick's motivation for interference as a matter of fact, but whether the tort claim falls as a matter of law because Brunswick was not a third party to the prospective relationship **[**26]** between L.A. Land and DCC. Brunswick could not have "interfered" if there was no independent economic relationship between DCC and L.A. Land in which to interfere. *See* *Kruse v. Bank of America, 202 Cal. App. 3d 38, 248 Cal. Rptr. 217, 234 (Cal. Ct. App. 1988)* ("The tort of intentional interference with economic advantage affords a remedy for wrongful interference with an economic relationship by a *third party*.") (emphasis in original), *cert. denied, 488 U.S. 1043, 102 L. Ed. 2d 993, 109 S. Ct. 869, 109 S. Ct. 870 (1989)*. [8] Thus, we conclude that Brunswick has the better argument on this issue.

[27]** L.A. Land also contends that Brunswick's argument is "moot" because Brunswick did not request the jury to be instructed on the issue of L.A. Land's independent relationship with DCC. L.A. Land cites no authority for this proposition, and we reject it on the basis of *Air-Sea Fowarders,* which holds that the truly applicable law rather than the jury instructions governs review of a denial of a directed verdict or judgment notwithstanding the verdict. *880 F.2d at 182-83* & n. 5. Finally, L.A. Land argues that Brunswick's defense does not apply because the jury implicitly found malicious conduct by awarding one dollar in punitive damages. The only authority which L.A. Land provides to support this contention is a "Cf." citation to a case, *Lowell v. Mother's Cake & Cookie Co., 79 Cal. App. 3d 13, 144 Cal. Rptr. 664 (Cal. Ct. App. 1978)*, which does not support its proposition either directly or inferentially. We are aware of no other authority which supports L.A. Land's argument.

2. L.A. Land - Timberlake Relationship.

Brunswick argues that because it and L.A. Land were competitors for the services of bowling center builders, the "privilege of competition" **[**28]** protects it from liability for the pressure it applied on Timberlake not to build for L.A. Land. *See* *Buckaloo, 122 Cal. Rptr. at 752* ("Perhaps the most significant privilege or justification for interference with a prospective business advantage is free competition."). Assuming without deciding that the record supports a finding that Brunswick prevailed upon Timberlake not to deal with its competitor, a number of authorities establish that Brunswick had the right under state law to do so.

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[8] Contrary to an assertion by L.A. Land in this appeal, Brunswick's reliance on *Kruse* does not mean that its argument rests on the premise that it and DCC were "identical." Given the evidence in the record that Brunswick was not a disinterested "third party" to the relationship between L.A. Land and DCC, *Kruse* merely supports the proposition that L.A. Land's allegations do not state a tort claim as a matter of law because Brunswick was not a third party.

In *A-Mark Coin Co. v. General Mills, Inc., 148 Cal. App. 3d 312, 195 Cal. Rptr. 859,* ***[*1431]*** *867 (Cal. Ct. App. 1983)*, the court held that a firm's interference with another's prospective economic relation falls within the privilege of competition as long as: (1) the relation concerns a matter involved in the competition between the firm and the other; (2) the firm does not employ wrongful means; (3) the firm's action does not create or continue an unlawful restraint of trade; and (4) the firm's purpose is "at least in part" to advance its interest in competing with the other. *Id.* (quoting *Restatement (Second) of Torts § 768*.) This court confirmed in *Pacific* **[**29]** *Express* that a firm's motive need only stem *in part* from a genuine competitive purpose. *959 F.2d at 819-20*. Because the record shows that L.A. Land's contractual relations with Timberlake were "merely contemplated or potential," Brunswick was free to "refuse to deal with third parties [e.g., Timberlake] unless they cease dealing with" L.A. Land. *A-Mark Coin, 195 Cal. Rptr. at 867* (internal quotation omitted); *see* *New Kids on the Block v. News America Publishing, Inc., 971 F.2d 302, 310 (9th Cir. 1992)*. L.A. Land points to no evidence in the record that shows Brunswick's sole motive in wedging itself between L.A. Land and Timberlake, if it did so at all, was other than to advance its own economic interest, or that otherwise suggests that the conditions for the privilege outlined above did not exist. [9]

[30]** In addition, L.A. Land's proposition is belied by the facts of *A-Mark Coin,* which did not involve competition for a customer, but rather for a particular good. In that case, the court held that the privilege of competition protected the actions of a successful bidder for a coin collection against an allegation by the unsuccessful bidder of intentional interference with prospective economic advantage. *A-Mark Coin, 195 Cal. Rptr. at 861-64*. Thus, Brunswick's conduct with respect to Timberlake is privileged.

IV. CONCLUSION

We conclude that the evidence regarding the antitrust claim does not support a finding that Brunswick possessed monopoly power. We further conclude that L.A. Land's claim that Brunswick interfered with its prospective relationship with DCC fails as a matter of law because Brunswick was not a stranger to that relationship. Also, the privilege of competition protected Brunswick's conduct with respect to the prospective relationship between L.A. Land and Timberlake. Therefore, we reverse the district court's judgment and remand with directions to enter judgment in favor of Brunswick on L.A. Land's claims of both monopolization and **[**31]** tort. Consequently, we deny L.A. Land's request for attorneys' fees on appeal.

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[9] An exception is that L.A. Land does assert (presumably relying on evidence pertaining to the antitrust claim) that the interference here created an unlawful restraint of trade. Because we reverse the district court's judgment on the antitrust claim, no basis for this assertion remains.

Lifemark Hosps. v. Liljeberg Enters.

United States District Court for the Eastern District of Louisiana

October 19, 1993, Decided ; October 19, 1993, Filed; October 20, 1993, Entered

CIVIL ACTION NO. 93-1794 SECTION: E/1, BANKRUPTCY NO. 93-10295

Reporter
161 B.R. 21 *; 1993 U.S. Dist. LEXIS 14830 **; 1993-2 Trade Cas. (CCH) P70,437

LIFEMARK HOSPITALS OF LOUISIANA, INC. v. LILJEBERG ENTERPRISES, INC.; IN RE: LILJEBERG ENTERPRISES, INC., Debtor

Subsequent History: Motion to strike denied by *Lifemark Hosps. v. Liljeberg Enters., 1997 U.S. Dist. LEXIS 23889 (E.D. La., Oct. 29, 1997)*

Core Terms

withdrawal, antitrust claim, antitrust, argues, non-bankruptcy, mandatory, interstate commerce, counterclaims, defenses, lease, anti trust law, federal law, statute of limitations, bankruptcy court, antitrust violation, de minimis, courts

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Venue > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Time Limitations

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

HN1[] **Procedural Matters, Venue**

See *28 U.S.C.S. § 157(d)*.

Bankruptcy Law > Procedural Matters > Venue > General Overview

HN2[] **Procedural Matters, Venue**

A court must withdraw the reference from the bankruptcy court when it is established that: (1) the proceeding in the bankruptcy court involves a substantial and material question of both title 11 and non-Bankruptcy Code federal law; (2) the non-Bankruptcy Code, *11 U.S.C.S. § 101 et seq.*, federal law has more than a de minimis effect on interstate commerce; and (3) the motion for withdrawal was timely filed. Withdrawal of reference, however, is intended to apply only to a limited class of proceedings and is not intended to be an escape hatch through which most bankruptcy matters could be removed to a district court. In determining whether mandatory withdrawal is appropriate, the court examines the above listed factors individually.

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

HN3[] **Procedural Matters, Jurisdiction**

To find that "substantial and material" consideration of non-bankruptcy laws is necessary, the court must determine that the motion to assume requires significant interpretation of such non-bankruptcy laws on the part of the court. Where application of non-bankruptcy federal law is merely speculative, mandatory withdrawal is not necessary. In addition, simple application of fixed legal standards provided by such non-bankruptcy laws to a given set of facts does not necessarily trigger mandatory withdrawal. Mandatory withdrawal of reference is appropriate only in cases where the bankruptcy judge must engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes.

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > Judgments > Enforcement & Execution > General Overview

Contracts Law > Defenses > Public Policy Violations

HN4[] **Sherman Act, Defenses**

Antitrust violations are a valid defense to the enforcement of a contract where the judgment of a court enforcing the contract would be enforcing the precise conduct made illegal by the antitrust laws. The antitrust defense is a narrow one, however, which is intended to avoid making the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act, *15 U.S.C.S. § 1 et seq.*

Contracts Law > Defenses > Public Policy Violations

HN5[] **Defenses, Public Policy Violations**

Where a contract may be substantially infected with antitrust illegality, the antitrust defense is appropriate.

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

HN6[] **Procedural Matters, Jurisdiction**

Not every validly stated antitrust claim in a bankruptcy proceeding automatically triggers mandatory withdrawal.

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

HN7[] **Procedural Matters, Jurisdiction**

Mandatory withdrawal of reference is not required where it seems that the case in issue will probably not require such interpretation of antitrust laws, but rather mere application of established antitrust principles to new facts.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN8[] **Jurisdiction, Exclusive Jurisdiction**

Jurisdiction over federal antitrust laws sits exclusively with the federal courts.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Contracts Law > Defenses > Illegal Bargains

Governments > Legislation > Statute of Limitations > General Overview

HN9[] **Private Actions, Remedies**

An antitrust cause of action accrues each time the defendant commits an act that injures the plaintiff. However, the mere acceptance of payments made pursuant to an illegal contract does not necessarily establish a continuing violation.

Bankruptcy Law > Administrative Powers > Executory Contracts & Unexpired Leases > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Executory Contracts

HN10[] **Administrative Powers, Executory Contracts & Unexpired Leases**

See *Fed. R. Bankr. P. 6006*.

Bankruptcy Law > Procedural Matters > Contested Matters

HN11[] **Procedural Matters, Contested Matters**

See *Fed. R. Bankr. P. 9014*.

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

HN12[] **Procedural Matters, Jurisdiction**

Antitrust claims, by their very nature, have a greater than de minimis effect on interstate commerce.

Judges: **[**1]** LIVAUDAIS, JR.

Opinion by: MARCEL LIVAUDAIS, JR.

Opinion

[*23] ***ORDER AND REASONS***

Lifemark Hospitals of Louisiana, Inc. ("LHL") moves pursuant to *28 U.S.C. § 157(d)* to withdraw from the bankruptcy court the reference of Debtor's Motion to Assume Executory Contract and LHL's defenses to such assumption. LHL argues that withdrawal is mandated under *28 U.S.C. § 157(d)* because resolution of the motion to assume will require substantial and material consideration of non-Bankruptcy Code federal laws. LHL's principal argument is that the contract the debtor seeks to assume violates federal antitrust laws. In the alternative, LHL argues that permissive withdrawal of the reference is proper under *28 U.S.C. § 157(d)* because the motion to assume involves consideration of "intertwined core and noncore issues," and allowing the bankruptcy court to review and decide these issues in the first instance may create a complex jurisdictional problem for a reviewing district court.

Liljeberg Enterprises, Inc. ("Liljeberg" or "debtor") argues that mandatory withdrawal of the reference is inappropriate because resolution **[**2]** of the motion to assume will not involve substantial and material consideration of non-bankruptcy laws. In addition, debtor argues that the antitrust claims (1) are barred by res judicata and/or collateral estoppel, (2) are barred by the statute of limitations, (3) are improperly asserted as counterclaims in a contested matter, and (4) can be asserted separately from the debtor's motion to assume the contract. Debtor further argues that permissive withdrawal is also inappropriate inasmuch as bankruptcy courts are better equipped to efficiently dispose of issues such as those raised in the motion to assume.

[*24] ANALYSIS

The Bankruptcy Code provides that

> ***HN1***[] The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on a timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d). The first sentence **[**3]** of *§ 157(d)* allows for "permissive" withdrawal of reference, while the second sentence provides for "mandatory" withdrawal.

I. Mandatory Withdrawal

HN2[] A court must withdraw the reference from the bankruptcy court when it is established that (1) the proceeding in the bankruptcy court involves a substantial and material question of both title 11 and non-Bankruptcy Code federal law, (2) the non-Bankruptcy Code federal law has more than a *de minimis* effect on interstate commerce, and (3) the motion for withdrawal was timely filed. *United States Gypsum Co. v. National Gypsum Co. (In re National Gypsum Co.),* 145 Bankr. 539, 541 (N.D. Tex. 1992); *see also Sibarium v. NCNB Texas National Bank,* 107 Bankr. 108, 111 (N.D. Tex. 1989). Withdrawal of reference, however, is intended to apply only to a limited class of proceedings and is not intended to be an "'escape hatch through which most bankruptcy matters [could] be removed to a district court.'" *In re National Gypsum Co., 145 Bankr. at 541* (citation omitted). In determining whether mandatory withdrawal is appropriate, the Court examines the above listed **[**4]** factors individually.

A. Substantial and Material Questions of Bankruptcy and non-Bankruptcy Laws

The parties acknowledge the need to consider substantial and material questions of bankruptcy law in the motion to assume, therefore the Court's primary focus is on the extent to which non-bankruptcy law is implicated. ***HN3***[] To find that "substantial and material" consideration of non-bankruptcy laws is necessary, the Court must determine that the motion to assume "requires 'significant interpretation' [of such non-bankruptcy laws] on the part of the Court." *Sibarium, 107 Bankr. at 111* (citation omitted). Where application of non-bankruptcy federal law is merely speculative, mandatory withdrawal is not necessary. *Id. at 113*. In addition, simple application of fixed legal standards provided by such non-bankruptcy laws to a given set of facts does not necessarily trigger mandatory withdrawal. *Dow Jones/Group W Television v. NBC, Inc.,* 127 Bankr. 3, 4 (S.D. N.Y. 1991) (requiring withdrawal of reference only in cases where bankruptcy judge must "'engage in significant interpretation, as opposed to **[**5]** simple application, of federal laws apart from the bankruptcy statutes'") (citation omitted).

Here, LHL argues that its antitrust claims are "substantial and material" to resolution of the motion to assume, and are neither speculative nor peripheral. LHL claims that determining the antitrust issues will require more than "rote application [] of federal law" and further states that "application of the antitrust laws is not routine." LHL's Response to Amended Mem. in Opposition to Mtn to Withdraw Reference 3, 4.

In support of its position that resolution of the antitrust claims is necessary for deciding the motion to assume, LHL argues that "the antitrust issues go to the heart of the Assumption Motion because their resolution will determine if a contract exists for the debtor to assume." LHL's Mem. in Support of Mtn to Withdraw Reference 8. ***HN4***[] Antitrust violations are a valid defense to the enforcement of a contract where the judgment of a court enforcing the contract would be enforcing the precise conduct made illegal by the antitrust laws. *Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 29 S. Ct. 280, 290-92, 53 L. Ed. 486 (1909)*. The antitrust defense is a narrow **[**6]** one, however, which is intended to avoid "'making the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act.'" *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards,* ***[*25]*** *Inc., 677 F.2d 1045, 1059 (5th Cir. 1982)*, *cert. denied, 459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983)* (quoting *Kelly v. Kosuga, 358 U.S. 516, 520, 79 S. Ct. 429, 432, 3 L. Ed. 2d 475 (1959))*. Thus, if the assumption of the lease contract would constitute implicit enforcement of the alleged antitrust violations, LHL's antitrust defense may be appropriate.

LHL argues that the lease contract between itself and the debtor consists of an illegal tying agreement. This argument is bolstered by statements of the state trial court judge who presided over a prior contract dispute between LHL and the debtor:

> The monopolistic intent of the Clinical Pharmacy agreement is clear from the claim asserted by Liljeberg Enterprises against Lifemark for the blood derivative products purchased from sources other than Liljeberg Enterprises. This fact alone seems to underscore the monopolistic effect of the Clinical Pharmacy Agreement.

[7]** *Liljeberg Enterprises, Inc. v. Lifemark Hospitals of Louisiana, Inc.,* No. 87-12474, Civ. Dist. Ct. Orleans, Reasons for Judgment, Oct. 10, 1990, at 4 (attached as debtor's Exh. "B" to Amended Mem. in Opposition to Mtn to Withdraw Reference). Thus, it appears that the antitrust violations alleged by LHL are not minor nor collateral aspects of the lease contract, and allowing assumption would be to implicitly enforce the alleged illegal provisions. In such circumstances, ***HN5***[] where a contract may be substantially infected with antitrust illegality, the antitrust defense is appropriate. *Kaiser Aluminum, 677 F.2d at 1059-60*. As a result, resolution of the antitrust issues is necessary to deciding the motion to assume.

LHL asserts that because antitrust issues are involved, withdrawal of the reference is necessary. In support of its assertion, LHL cites *Michigan Milk Producers Assoc. v. Hunter,* 46 Bankr. 214 (N.D. Ohio 1985). In *Michigan Milk Producers,* the court found that the Trustee's allegation that a supply agreement restrained interstate trade in milk products required "substantial and material consideration of federal **[**8]** antitrust" laws, thereby requiring withdrawal of the reference. *Id. at 216*. However, ***HN6***[] not every validly stated antitrust claim in a bankruptcy proceeding automatically triggers mandatory withdrawal.

In *Dow Jones/Group W,* the court found that ***HN7***[] mandatory withdrawal of reference was not required, because "as the record now stands, it seems that the case in issue will probably not require such interpretation [of antitrust laws], but rather mere application of established antitrust principles to new facts." *Dow Jones/Group W, 127 Bankr. at 5*. The *Dow Jones/Group W* opinion does not provide any development of the facts which led the court to its conclusion. The court did, however, cite the "wasting nature of the debtor's property [as] an additional factor militating against withdrawal." *Id.*

Absent a more developed record, and without examining the merits of the instant antitrust claims, the Court is unable to say that such claims require mere routine application of established antitrust principles to new facts. The exclusive dealing aspects of the contract do not in and of themselves constitute *per se* violations of **[**9]** the Sherman Act. *See* *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1558-60, 80 L. Ed. 2d 2 (1984)*. LHL claims that deciding its antitrust claims will require, among other things, definition of the relevant product and geographic market area, and determinations of whether competition was unreasonably restrained by a tying or exclusive dealing agreement, whether a particular hospital lease constituted a tying product, and whether debtor's conduct constituted an unfair trade practice. Determination of LHL's antitrust defenses to the motion to assume will involve more than "rote application" of established ***antitrust law***.

Because determination of the antitrust claims is necessary in determining whether a contract exists to be assumed in the first place, and because determination of these antitrust claims requires more than routine application of established law, the Court finds that "substantial and material" consideration of non-bankruptcy federal law is needed for the resolution of the motion to assume. However, the debtor argues that **[*26]** the Court need not consider the antitrust defenses and counterclaims raised by LHL for other reasons as well. Debtor argues **[**10]** that LHL's antitrust claims are improperly raised because they (1) are barred by *res judicata* and/or collateral estoppel, (2) are barred by the statute of limitations, (3) are improperly asserted as counterclaims in a contested matter, and (4) should be asserted separately from the debtor's motion to assume the contract. The Court addresses these contentions below.

1. Preclusion

Debtor argues that LHL is precluded in this action from raising antitrust claims because "Lifemark admitted that it could have and should have asserted the federal and state antitrust claims as a defense to the state court proceeding [for declaratory judgment and damages]." Debtor's Amended Mem. in Opposition to Mtn to Withdraw Reference 9. However, regardless of LHL's or debtor's belief that such claims "could have and should have" been brought in state court, they could not have been. ***HN8***[] Jurisdiction over federal antitrust laws suits exclusively with the federal courts. *15 U.S.C. § 15*; *see also* *Hayes v. Solomon, 597 F.2d 958, 984 (5th Cir. 1979)*, *cert. denied, 444 U.S. 1078, 62 L. Ed. 2d 761, 100 S. Ct. 1028 (1980)* ("federal courts have exclusive **[**11]** jurisdiction over federal antitrust claims"). In *Hayes,* the Fifth Circuit held that

> the . . . state court had no jurisdiction to consider the alleged federal antitrust violations arising out of the breach of the lease. Therefore, we hold that the state court suit is not a *res judicata* bar to this federal antitrust action.

Id. at 985. *See also* *Kurek v. Pleasure Driveway and Park District, 583 F.2d 378, 379 (7th Cir. 1978)*, *cert. denied, 439 U.S. 1090, 59 L. Ed. 2d 57, 99 S. Ct. 873 (1979)* (federal antitrust claims not precluded despite defendants' argument that they were adjudicated in state court because jurisdiction over federal antitrust suits is exclusively in federal courts). Similarly here, *res judicata* does not preclude the instant antitrust claims. Furthermore, because the antitrust issues were not--and could not have been--litigated in the state court action, collateral estoppel is inapplicable.

2. Statute of Limitations

Debtor next argues that LHL's antitrust claims are barred by the four-year statute of limitations provided by the Sherman Act because the lease which is the subject of the motion **[**12]** to assume was executed over four years ago. *15 U.S.C. § 15b*. LHL agrees that the four-year statute of limitations applies, but argues that there exists a continuing violation such that a cause of action accrues with each alleged violation, not just on the original execution of the lease.

The general rule in the Fifth Circuit is that "an ***HN9***[] antitrust cause of action accrues each time the defendant commits an act that injures [the] plaintiff." *Bell v. Dow Chemical Co., 847 F.2d 1179, 1186 (5th Cir. 1988)*. However, the mere acceptance of payments made pursuant to an illegal contract does not necessarily establish a continuing violation. *Kaiser Aluminum, 677 F.2d at 1052-53*. Whether the contract between LHL and the debtor, and the actions taken by the parties subsequent to execution of the contract, constitute continuing violations are questions going to the merits of the antitrust allegations and are not apparent from the face of the pleadings. This being so, the Court does not at this juncture find that the antitrust claims are barred by the statute of limitations.

3. Antitrust Claims are **[**13]** Improper Counterclaims

Debtor argues that LHL's antitrust claims are improperly raised as counterclaims to a contested matter. ***HN10***[] *Bankruptcy Rule 6006* provides that "[a] proceeding to assume . . . an executory contract, including an expired lease, . . . is governed by *Rule 9014*." *Fed. R. Bankr. P. 6006*. Debtor argues that the rule governing counterclaims in bankruptcy matters (Rule 7013) is not among those listed in *Rule 9014* as applying to contested matters, and therefore the antitrust claims should be dismissed. However, debtor appears to misunderstand the full nature of LHL's claims. LHL raises its antitrust claims not only in the form of counterclaims, but also in the form of *defenses* to the assumption motion. While *Rule 9014* states **[*27]** that no response is *required* [1] to a motion to assume, that does no mean that no response is *allowed.* Thus, *Rule 9014* does not operate to bar defenses to a motion to assume a contract. The Court is persuaded by LHL's argument that antitrust allegations tending to demonstrate the illegality of a contract are valid defenses to the assumption of that contract.

[14]** 4. The Antitrust Claims can be Asserted Separately

As discussed above, the antitrust claims advanced by LHL are not merely counterclaims, but are also defenses to the motion to assume. As such, they are integral to a consideration of the motion to assume. It is illogical that defenses to a motion could be brought separate and apart from the proceeding on the motion itself. Therefore, debtor's argument to that end must fail.

B. *Effect of non-Bankruptcy Laws on Interstate Commerce*

Courts generally hold that ***HN12***[] antitrust claims, by their very nature, have a greater than *de minimis* effect on interstate commerce. *See, e.g.*, *In re National Gypsum Co., 145 Bankr. at 542* ("if U.S. Gypsum's patent infringement claims raise an antitrust defense in response, then certainly--by implication at least--there is more than a *de minimis* effect on interstate commerce"); *Dow Jones/Group W, 127 Bankr. at 4* ("antitrust laws clearly do concern interstate commerce"). Accordingly, the Court finds that LHL's antitrust claims have a greater than *de minimis* effect on interstate commerce.

C. *Timeliness of LHL's Motion to Withdraw*

[15]** Debtor filed its motion to assume in the bankruptcy court on March 26, 1993. LHL filed its motion to withdraw the reference on May 17, 1993--fifty-two days after the motion to assume was filed, but prior to hearing on the motion to assume. The Court does not find this delay was unreasonable. Therefore, the filing of the motion to withdraw reference was timely.

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[1] ***HN11***[] *Bankruptcy Rule 9014* provides in pertinent part that "in a contested matter . . ., relief shall be requested by motion. . . . No response is required under this rule unless the court orders an answer to the motion." *Fed. R. Bankr. P. 9014*.

Having determined that "substantial and material" consideration of non-bankruptcy laws is necessary to resolution of the motion to withdraw reference, and because antitrust violations have a greater than *de minimis* effect on interstate commerce, and finding that such motion to withdraw was timely filed, mandatory withdrawal of reference pursuant to *28 U.S.C. § 157(d)* is required.

II. Permissive Withdrawal

Having found mandatory withdrawal necessary, the motion for permissive withdrawal is moot.

Accordingly,

IT IS ORDERED that LBL's motion for withdrawal of reference on the motion to assume (Rec. Doc. No. 1) be and is hereby **GRANTED.**

IT IS FURTHER ORDERED that counsel for the parties to the motion to assume attend a **STATUS CONFERENCE** in Chambers, C-405, on **FRIDAY [**16] OCTOBER 29, 1993 at 3:00 P.M.**

New Orleans, Louisiana, October 19, 1993.

MARCEL LIVAUDAIS, JR.

United States District Judge

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Willman v. Heartland Hosp. E.

United States District Court for the Western District of Missouri, Western Division

October 19, 1993, Decided ; October 19, 1993, Filed

No. 89-0785-CV-W-9

Reporter

836 F. Supp. 1522 *; 1993 U.S. Dist. LEXIS 16471 **; 1993-2 Trade Cas. (CCH) P70,412

CHARLES R. WILLMAN, M.D., Plaintiff, v. HEARTLAND HOSPITAL EAST, et al., Defendants.

Core Terms

conspiracy, medical staff, privileges, summary judgment, practices, staff, antitrust, conspire, monopoly, peer review, Sherman Act, competitors, peer review process, revoke, essential facilities doctrine, executive committee, member of the board, staff privileges, monopolization, general surgery, recommendation, internal medicine, optometrists, Credentials, facilities, leveraging, decisions, inferred, patients, anti trust law

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] **Summary Judgment, Motions for Summary Judgment**

Fed. R. Civ. P. 56(c) provides that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[ ] **Entitlement as Matter of Law, Appropriateness**

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. The summary judgment procedure is not a disfavored procedural shortcut. Rather, it is an integral part of the federal rules as a whole. Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3[ ] **Supporting Materials, Affidavits**

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4[ ] **Summary Judgment, Entitlement as Matter of Law**

A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The evidence favoring the nonmoving party must be more than merely colorable. When the moving party has carried its burden under *Fed. R. Civ. P. 56(c)*, its opponent must do more than simply show there is some metaphysical doubt as to the material facts. The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a verdict for that party.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Sherman Act, Claims**

The essential elements of a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, are: 1) a contract, combination or conspiracy; 2) affecting interstate commerce; 3) which imposes an unreasonable restraint of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN6[] **Per Se Rule & Rule of Reason, Per Se Violations**

No court applies a Sherman Act per se rule when an individual has been denied privileges.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Sherman Act, Claims**

In order to satisfy the first element of a Sherman Act, *15 U.S.C.S. § 1* claim, there must be a conspiracy between separate entities. The Sherman Act does not reach conduct that is wholly unilateral.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

The intra-corporate immunity doctrine applies to peer review proceedings.

Antitrust & Trade Law > Sherman Act > Penalties

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN9[] **Sherman Act, Penalties**

The decision to conduct the peer review process does not represent the sudden joining of independent economic forces that The Sherman Act, *15 U.S.C.S. § 1*, is designed to deter and penalize. There are not strong anti-trust concerns that would warrant a departure from the traditional concepts of agency since the hospital and medical staff, are not competitors.

Business & Corporate Law > Agency Relationships > Establishment > Consent

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Establishment > General Overview

Business & Corporate Law > ... > Establishment > Elements > Manifestation by Principal

Business & Corporate Law > ... > Establishment > Elements > Right to Control by Principal

HN10[] **Establishment, Consent**

A principal/agent relationship is established by showing manifestation of consent by one person to another that the other shall act on his own behalf, and subject to his control, and consent by the others so to act. In other words, the principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control.

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

HN11[] **Agency Relationships, Authority to Act**

The "personal stake" exception arises when the officers or agents were, at the time of the conspiracy, acting beyond the scope of their authority or for their own benefit.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

HN12[] **Antitrust & Trade Law, Sherman Act**

Because a fine line separates unlawful concerted action from legitimate business practices, an antitrust conspiracy cannot be inferred from highly ambiguous evidence.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Professional Review

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN13[] **Antitrust Actions, Facilities**

Because the purpose of peer review is to maintain quality patient care and because hospitals have an unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges, a peer review process that is at least as consistent with this lawful purpose as with an illegal conspiracy to restrain trade cannot support an inference of antitrust conspiracy and does not justify subjecting these health care provider defendants to the expense of a lengthy jury trial.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN14[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization of trade or commerce. The offense of monopoly under *§ 2* has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development of a superior product, business acumen, or historic accident. In order to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN15[] **Regulated Industries, Sports**

Under the bottleneck or essential facilities doctrine, those in possession of facilities, which cannot practically be duplicated must share the facilities with their competitors on fair terms. The elements of the essential facilities doctrine are: 1) control of an essential facility by a monopolist; 2) the inability to practically or economically duplicate the facility; and 3) the unreasonable denial of the use of the facility to a competitor when such use is economically and technically feasible. With regard to the third element, the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately. Applying this principle to a hospital's efforts to monitor the performance of staff doctors, several courts have found that the essential facilities doctrine is not applicable when a hospital facility is denied to a physician.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN16[] **Antitrust & Trade Law, Sherman Act**

It would be singularly inappropriate to apply a doctrine, which would prevent a hospital from keeping doctors it had adjudged unqualified off of its staff. Neither public policy nor the Sherman Act can countenance such a result. Consequently the essential facilities doctrine is inapplicable to hospital staff privileges decisions.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Professional Review

Healthcare Law > Business Administration & Organization > Hospital Privileges > Restrictions

HN17[] **Antitrust & Trade Law, Sherman Act**

The essential facilities doctrine is not applicable to cases involving hospital peer review decisions which revoke or limit a doctor's medical staff privileges.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN18[] **Antitrust Actions, Facilities**

Hospital decisions to revoke or limit staff privileges are essentially pro-competitive. The peer review process, by policing the competence and conduct of doctors, can enhance competition. By monitoring the quality of care received by patients at the hospital, the hospital improves its competitive position in the eyes of the health care consumer.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN19[] **Attempts to Monopolize, Elements**

Although the essential facilities doctrine has its own elements, it is still a claim under *§ 2* of the Sherman Act for either illegal monopoly or attempted monopoly. The second element of a monopoly claim is the willful acquisition or maintenance of monopoly power. In order to satisfy this element the plaintiff must show that a jury could find no valid business reason or concern for efficiency in the choice the defendant made. Specific intent is also required in an attempted monopoly.

Counsel: **[**1]** For CHARLES R WILLMAN, M.D., plaintiff: George M. Bock, Slagle, Bernard & Gorman, Kansas City, MO. David W. Harlan, Gallop, Johnson & Neuman, St. Louis, MO. Julian O. Von Kalinowski, Gibson, Dunn & Crutcher, Los Angeles, CA. J. Bennett Clark, Senniger, Powers, Leavitt & Roedel, St. Louis, MO.

For HEARTLAND HOSPITAL EAST, HEARTLAND HOSPITAL WEST, HEARTLAND HEALTH SYSTEM, INC., defendants: Thomas G Kokoruda, George E. Leonard, Shughart, Thomson & Kilroy, Kansas City, MO. For RICHARD CRAIG, M.D., ERNEST WEINAND, M.D., EDWARD ANDRES, M.D., JAMES MCMILLEN, M.D., ORLYN LOCKARD, JR, M.D., CHARLES MULLICAN, M.D., WALLACE MCDONALD, M.D., defendants: R. Dan Boulware, Watkins, Boulware, Lucas, Miner, Murphy & Taylor, St. Joseph, MO. For EDWARD BEHELER, M.D., defendant: Matthew R. Davis, Field, Gentry & Benjamin, P.C., Kansas City, MO. Reed O. Gentry, Field, Gentry & Benjamin, P.C., Kansas City, MO. R. Dan Boulware, Watkins, Boulware, Lucas, Miner, Murphy & Taylor, St. Joseph, MO. Michael L. Taylor, Watkins, Boulware, Lucas, Miner, Murphy & Taylor, St. Joseph, MO. For ROBERT STUBER, M.D., defendant: R. Dan Boulware, Watkins, Boulware, Lucas, Miner, Murphy & Taylor, St. Joseph, MO. Mark R. Woodbury, **[**2]** Michael L. Taylor, Watkins, Boulware, Lucas, Miner, Murphy & Taylor, St. Joseph, MO.

Judges: BARTLETT

Opinion by: D. BROOK BARTLETT

Opinion

[*1524] *ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON COUNTS I, II AND III, DISMISSING COUNT IV WITHOUT PREJUDICE AND DISMISSING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM*

Alleging a *per se* violation of the Sherman Antitrust Act, *15 U.S.C. § 1* (Count I), restraint of trade in violation of the Sherman Antitrust Act, *15 U.S.C. § 1* (Count II), monopoly leveraging and abuse of an essential facility in violation of the Sherman Antitrust Act, *15 U.S.C. § 2* (Count III) and intentional interference with business expectancy (Count IV), plaintiff Charles R. Willman seeks reinstatement of his admission privileges at defendant hospitals, costs of litigation, attorney fees and damages. Defendants Heartland Health Systems, Heartland Hospital East and Heartland Hospital West (hereafter "the defendant hospitals") and Richard Craig, Ernest Weinand, Edward Beheler, Edward Andres, Steven Krueger, James McMillen, Robert Stuber, Orlyn Lockard, Charles Mullican and **[**3]** Wallace McDonald (hereafter "defendant doctors") move for summary judgment on Counts I, II, III and IV of the Complaint.

In addition to denying the claims asserted by plaintiff, defendants have asserted a Counterclaim against plaintiff for abuse of process and malicious prosecution. Plaintiff moves for summary judgment against defendants on the Counterclaim.

I. *Facts*

Plaintiff Dr. Charles Willman began practicing medicine in St. Joseph in 1959. Plaintiff practiced general surgery and provided general medical services in Buchanan County, Missouri, and surrounding areas. Willman had endoscopy facilities in his office and planned to construct a one-day surgical center. Defendant hospitals also had endoscopy facilities.

Defendant Heartland Hospital East is a Missouri Corporation. Prior to June 26, 1985, it operated under the name St. Joseph Hospital. Defendant Heartland Hospital West is also a Missouri corporation. Prior to June 26, 1985, it operated under the name Methodist Medical Center. In 1983 the Hospitals created a corporation, Heartland Health Affiliates, to coordinate the operation and services of the hospitals. Defendant Heartland Health System, Inc. is the successor to **[**4]** Heartland Health Affiliates.

Defendant Richard Craig, M.D. practices general surgery. Craig was Chief of the Department of Surgery at Methodist Hospital and was a member of the Executive Committee.

Defendant Ernest Weinand, M.D. practices general surgery. Weinand was a member of Methodist's credentials Committee and of St. Joseph's Executive Committee.

Defendant Edward Beheler, M.D. practices general surgery. Beheler was a member of Methodist's Critical Care Committee, Methodist's Board of Trustees and of St. Joseph's Executive, Credentials and Critical Care Committees.

[*1525] Defendant Edward Andres, M.D. practices General Surgery. He was a member of St. Joseph's Critical Care, Ad Hoc and Credentials Committees.

Defendant Steven Krueger, M.D. practices primary care/internal medicine. He was a member of Methodist's Credentials and Critical Care Committees and of St. Joseph's Executive, Credentials and Critical Care Committees.

Defendant James McMillen, M.D. practices primary care/internal medicine. He was a member of Methodist's Executive and Credentials Committees and was President of General Staff at Methodist. McMillen also participated in proceedings before the St. Joseph Hospital Board **[**5]** of Trustees.

Defendant Robert Stuber, M.D. practices internal medicine/primary care. He was a member of Methodist's Critical Care and Executive Committees and the Board of Directors of St. Joseph Hospital.

Defendant Orlyn Lockard, M.D. practices endoscopy. He was a member of Methodist's and St Joseph's Executive Committee. He was also president of the General Staff at St. Joseph's.

Defendant Charles Mullican, M.D. practices primary care/internal medicine. He was a member of Methodist's Executive and Critical Care Committees and of St. Joseph's Executive Committee.

Defendant Wallace McDonald, M.D. practices primary care/internal medicine. He was a member of Methodist's Executive Committee.

In February 1982, the Critical Care Committee of Methodist Hospital reviewed Willman's care of patient Bobby Fanning. After this review, Willman's privileges were limited by adding a consultation requirement. Willman's privileges were suspended at Methodist Hospital in February 1983. A hearing was held in June 1983, that resulted in a recommendation to the Board of Trustees at Methodist to revoke Willman's privileges. The Board suspended his privileges in July 1983. The Board denied Willman's reapplication **[**6]** for privileges in 1984 and a new application for privileges in 1986.

St. Joseph Hospital reviewed the Fanning case in 1983. In May 1983, the Credentials Committee recommended revocation of Willman's privileges and the recommendation was approved by the executive committee in June 1983. The Board of Trustees voted to revoke Willman's privileges. At Willman's request, the Circuit Court of Buchanan County in 1983 issued a writ of mandamus requiring St. Joseph Hospital to restore his privileges. Willman practiced general surgery at St. Joseph Hospital for slightly less than 15 months, until the writ was dissolved in 1985. St. Joseph Hospital denied Willman's 1985 application for privileges for the year 1986.

In 1983 or 1984, Willman applied for privileges at Atchison Hospital, but was told that he should consider withdrawing his application because of the suspension of privileges at Methodist and St. Joseph Hospitals.

Willman applied for privileges at Spelman Memorial Hospital in 1985 and his application was rejected after Spelman received a copy of the Ad Hoc committee report dated October 19, 1983, from St. Joseph Hospital.

Willman's malpractice insurance with Momedico was cancelled **[**7]** in July 1982. Willman was insured by St. Paul Fire & Marine from 1982 to August 17, 1985. St. Paul cancelled Willman's insurance because his privileges had been suspended at Methodist and St. Joseph Hospitals.

II. *Standard for Summary Judgment*

HN1[] *Rule 56(c), Federal Rules of Civil Procedure*, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970)*; *Inland Oil and Transport Co. v. United States, 600 F.2d 725, 727-28* **[*1526]** (8th Cir.), *cert. denied, 444 U.S. 991, 62 L. Ed. 2d 420, 100 S. Ct. 522 (1979)*.

HN2[] If there is no genuine issue about any material fact, summary **[**8]** judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning, 610 F.2d 528, 531 (8th Cir. 1979)*; *United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978)*. The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986)*; *see also* *City of Mt. Pleasant v. Associated Electric Cooperative, Inc., 838 F.2d 268, 273 (8th Cir. 1988)*. Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex, 106 S. Ct. at 2553*.

HN3[] The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the *absence* of genuine issues of material **[**9]** fact. However, the moving party *is not required* to support its motion with affidavits or other similar materials *negating* the opponent's claim. *Id.* (emphasis added).

The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*.

HN4[] A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id. at 2511*. When the moving party has carried its burden under *Rule 56(c)*, its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)* **[**10]** (footnote omitted).

The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a verdict for that party. *Anderson v. Liberty Lobby, 106 S. Ct. at 2511*.

In applying these rules to a case brought under *15 U.S.C. § 1*, the Sherman Antitrust Act, the Eighth Circuit Court of Appeals cautions that "because a fine line separates unlawful concerted action from legitimate business practices, an antitrust conspiracy cannot be inferred from 'highly ambiguous evidence.'" *Lovett v. General Motors Corp., 998 F.2d 575, 577*, (quoting *Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. "Conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Essentially, the question in ruling on a motion for summary judgment and on a motion for directed verdict is whether the evidence presents a sufficient disagreement to require submission **[**11]** to a jury or whether it is so one-sided that one party must prevail as a matter of law. *106 S. Ct. at 2512*.

III. *Discussion*

A. *Counts I and II*

In Counts I and II of the Complaint, plaintiff alleges violations of *15 U.S.C. § 1*, the Sherman Antitrust Act. ***HN5***[] The essential elements of a claim under *§ 1* of the Sherman Act are:

1) a contract, combination or conspiracy;

2) affecting interstate commerce;

3) which imposes an unreasonable restraint of trade.

White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495 (6th Cir. 1983) (citations omitted).

[*1527] In Count I of the Complaint, plaintiff alleges a *per se* violation of the Sherman Act, *15 U.S.C. § 1*. ***HN6***[] "No court has applied a *per se* rule when an individual has been denied privileges." Julian O. Von Kalinowski, 6 *Antitrust Laws and Trade Regulations* § 52.03[1] (1992). In *Flegel v. Christian Hospital Northeast-Northwest, 4 F.3d 682, 1993 WL 345593 (8th Cir. 1993)*, the plaintiff, an osteopath, alleged that a hospital and doctors from the medical staff conspired with one another to boycott the plaintiff **[**12]** from obtaining privileges in violation of *Section 1* of the Sherman Act. The Eighth Circuit Court of Appeals held that a *per se* analysis was not applicable to a medical staff privilege case because "the exclusion from staff privilege in this case arguably falls within the category . . . 'industry self regulation' and is consequently not appropriate for per se analysis." *Id.* at * 5 (citing *Weiss v. New York Hospital, 745 F.2d 786 (3d Cir. 1984)*.

Similarly, in this case industry self-regulation is involved because Willman was excluded from staff privileges as the result of peer review. Therefore, plaintiff's *per se* theory must fail. Summary judgment will be granted to all defendants on Count I, the claim for a *per se* violation of the Sherman Antitrust Act.

Even if a *per se* claim were available in a case involving exclusion from the medical staff of a hospital, summary judgment on Counts I and II would be granted because Willman has failed to present facts from which a reasonable jury could conclude that a contract, combination or conspiracy existed. Therefore, plaintiff has not demonstrated that he can satisfy the first element of a **[**13]** *§ 1* claim.

Willman alleges that some of the doctors on the medical staff both conspired among themselves and with the defendant hospitals to revoke his hospital privileges and to deny his reapplication for privileges in violation of *15 U.S.C. § 1*. ***HN7***[] In order to satisfy the first element of a *§ 1* claim, there must be a conspiracy "between *separate* entities. It [the Sherman Act] does not reach conduct that is 'wholly unilateral.'" *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* (emphasis in original). "Independent action is not proscribed." *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*.

The Eighth Circuit Court of Appeals has not yet determined whether a hospital can conspire with its medical staff. *Flegel v. Christian Hospital Northeast-Northwest, 4 F.3d 682, 1993 WL 345593 n.3 (8th Cir. 1993)*. There is a split among the Circuits on whether a hospital is capable of conspiring with its medical staff to violate antitrust laws. *See* cases cited in *Flegel,* F.3d at , 1993 WL 345593 n.3. I believe that the better-reasoned **[**14]** decisions recognize that ***HN8***[] the intracorporate immunity doctrine applies to peer review proceedings.

For instance, in *Okansen v. Page Memorial Hospital, 945 F.2d 696, 703 (6th Cir. 1991)*, *cert. denied, 117 L. Ed. 2d 137, 112 S. Ct. 973 (1992)*, the plaintiff contended that during the peer review process the medical staff conspired with the hospital and members of the medical staff conspired among themselves to revoke his hospital privileges. Based on the principle of intercorporate immunity articulated in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* *Okansen,* held that the staff is incapable of conspiring with the hospital.

> In effect, the medical staff was working as the Board's agent under an 'internal agreement to implement a single unitary firm's policies' of evaluating the conduct and competence of those to whom the hospital extended privileges.
>
> This type of delegation of authority does not implicate the concerns of section one of the Sherman Act. ***HN9***[] The decision to conduct the peer review process does not represent the sudden joining of independent economic forces that section one **[**15]** is designed to deter and penalize. 'There are not strong anti-trust concerns that would warrant a departure from the traditional concepts of agency since the hospital and medical staff are not competitors.' Far from being a competitor with the hospital, the medical staff was in fact a natural component of the hospitals management structure.

[*1528] *945 F.2d at 703* (quoting *Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605 (6th Cir. 1990)*.

Plaintiff responds relying on *Steele v. Armour & Co., 583 F.2d 393, 398 (8th Cir. 1978)*. Plaintiff argues that an agency relationship does not arise solely because the hospitals controlled the final decision.

HN10[] "A principal/agent relationship is established by showing manifestation of consent by one person to another that the other shall act on his own behalf, and subject to his control, and consent by the others so to act." *Montague v. Heater, 836 F.2d 422, 424 n.3 (8th Cir. 1988)* (citing *Leidy v. Taliaferro, 260 S.W.2d 504, 505 (Mo. 1953))*. In other words, "the principal must in some manner indicate that the agent is to act for him, **[**16]** and the agent must act or agree to act on the principal's behalf and subject to his control." *Restatement of Agency 2d § 1 cmt. a*. (1958).

Here, the hospital boards delegated to the medical staff the responsibility for conducting the initial peer review pursuant to a procedure adopted by each Board. After the medical staff performed its part of peer review, the board of each hospital made the final decision with regard to staff privileges. In the peer review process, the staffs participating in the hospitals' peer review procedures were acting as agents of the hospitals. As stated in *Okansen,* "this type of delegation of authority does not implicate the concerns of section one of the Sherman Act." *Okansen, 945 F.2d at 703*.

Plaintiff argues that, even if the medical staffs were agents of the hospitals, the "personal stake" exception to intercorporate immunity applies because the staff doctors conducting the peer review were competitors of the plaintiff. Of the approximately 65 doctors who participated in the peer review process at the hospitals, 43 practiced either general surgery, primary care/internal medicine, gynecology/urology or endoscopy. One **[**17]** of Willman's expert witnesses has concluded that Willman competed with physicians who practice general surgery (Willman's specialty) as well as urology, gynecology, gastroenterology and internal medicine. Therefore, Willman asserts that the physicians who reviewed his performance were his competitors and that a reasonable inference arises that they acted against him with an anti-competitive motive.

HN11[] The "personal stake" exception "arises when the officers or agents were, at the time of the conspiracy, acting beyond the scope of their authority or for their own benefit." *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc, 531 F.2d 910, 917 (8th Cir. 1976)* (citing *Greenville Pub. Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974))*.

In *Okansen,* this same argument was made and rejected. There, two competitors of Dr. Okansen were involved in the peer review, although one of the competitors was not accepting new patients:

> In any event, the more important aspect of *Greenville* for the purposes of peer review is the degree of control the officer or agent with the independent interest exercised over **[**18]** the defendant firm's decision making process. If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis. *See* P. Areeda, ***Antitrust Law***, P 1471d & g (1986). In *Greenville,* the individual who had an interest in another firm was also the defendant company's president, director, and shareholder. Consequently, he could control the defendant company's decisions.
>
> Here, by contrast, the medical staff had no such control. 'To give advice when asked by the decision maker is not equivalent to being the decision maker itself.' *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248, 259 (3d Cir. 1984)*. The Board of Trustees at Page Memorial requested and encouraged the medical staff to take corrective action against Okansen. The Board in the end retained authority over staff privilege decisions at Page Memorial. Because the challenged decision was subject to review by the hospital and because decision making authority in Dr. Okansen's case was dispersed among a number of individuals, the personal stake exception is inapplicable.

[19]** *Okansen, 945 F.2d at 705*.

In the present case, the final decision on questions of staff privileges rested with the **[*1529]** Boards of the defendant hospitals. On July 22, 1983, the Board of Trustees of Methodist Medical Center met and voted unanimously by secret ballot to suspend Willman's privileges through December 31, 1983. Two of the thirteen Board members present at this meeting were physicians. Neither physician is a defendant in this case. On May 17, 1984, the Board of Trustees for Methodist met and considered the recommendation from the medical staff executive committee to deny Willman's application for reappointment. Four of the 16 Board members present were physicians. One of the physicians is a defendant. Fourteen votes were cast to deny Willman's application with two abstentions. Beheler, the defendant who was present, abstained. On December 18, 1985, the Board of Methodist voted unanimously to approve the decision of the executive committee of the medical staff which denied Willman's request for appointment to the staff. Five of the 14 Board members present were physicians. Only one physician Board member is a defendant in this case.

At St. Joseph, **[**20]** the executive committee of the Board of Directors on August 25, 1982, directed the medical staff to review the action taken at Methodist restricting Willman's privileges. No defendants were present. The Board met again on November 7, 1983, with 15 members present. Three of the Board members were physicians, but only one defendant was present. At this meeting, Willman's privileges at St. Joseph Hospital were revoked by a unanimous vote. At the November 27, 1985, Board meeting, the Board unanimously voted to deny Willman's application for appointment to the medical staff. Eleven Board members were present, three of whom were physicians. Only one physician defendant was present.

At each of the crucial Board meetings in both hospitals, physicians made up a small percent of the voting Board members and only some of these physicians are defendants. At no meeting did the doctor members of either Board provide the determining votes. Therefore, no reasonable jury could conclude that the defendant doctors actually controlled the Board's decision regarding Willman's staff privileges.

Although the hospitals here could not conspire with their staff doctors, members of the medical staff could conspire **[**21]** with each other and theoretically could coerce the Hospital Board to take action consistent with the objective of the conspiracy. "A medical staff can be comprised of physicians with independent and at times competing economic interests. As a result, when these actors join together to take action among themselves, they are unlike a single entity and therefore they have the capacity to conspire as a matter of law." *Okansen, 945 F.2d at 706*.

In the present case, Willman has not shown that the defendant doctors, who allegedly competed with Willman, did anything other than meet with other doctors during the peer review process. Willman seems to believe that "the fact the medical staff met and took action against him through the peer review process proves the existence of a conspiracy." *Id.* But just as in *Okansen,* this is not enough. "There must be something more such as a conscious commitment by the medical staff to coerce the hospital into accepting its recommendation." *Id.*

Here, each board member has presented an affidavit stating that he/she made the final decision and that he/she acted independently of the staff. "Denial of the conspiracy **[**22]** by defendant's affidavits is sufficient, under *Rule 56(e)*, to shift the burden to plaintiff to establish a factual question by the offering of evidence of the conspiracy." *Pontius v. Children's Hospital, 552 F. Supp. 1352, 1375 (W.D. Pa. 1982)* (citing *Daley v. St. Agnes Hospital, Inc., 490 F. Supp. 1309 (E.D. Pa. 1980)*; *see also Lamb's* *Patio Theatre, Inc. v. Unusual Film Exchanges, Inc., 582 F.2d 1068 (7th Cir. 1978))*. Plaintiff provides a couple of affidavits that state that hospital Boards defer to staff recommendations about staff privileges. Even if the Boards of the two hospitals did defer to staff recommendations, there is no evidence they did so because they were coerced. As the affidavits of the non-physician Board members state, the Board members exercised their independent judgment.

Therefore, because this case is closer to *Okansen* than *Greenville,* the personal stake exception is inapplicable. The doctrine of **[*1530]** intracorporate immunity prevents plaintiff from establishing that there was a conspiracy between separate entities; the hospitals and their medical staffs were a single **[**23]** entity.

If I assume that the doctors not only had the capacity to conspire with one another but that they did indeed conspire during the peer review process, this conspiracy would be meaningless in the context of the *§ 1* claims advanced by plaintiff "if the staff lacks the final authority to implement any agreement that it does reach." *Okansen, 945 F.2d at 706*. Because Willman has not presented facts from which a reasonable jury could conclude that the defendant doctors coerced the Boards of the hospitals to effectuate any agreement they had, his *§ 1* claim against defendant doctors must fail for lack of a causal connection between the assumed conspiracy and the action taken by the Board of each hospital on the several votes involving plaintiff's hospital privileges.

Even if a medical staff and a hospital can conspire to violate § 1 of the Sherman Act, Willman's claims as to Counts I and II would still fail because no reasonable juror could infer the existence of an antitrust conspiracy from the circumstantial evidence in this case. As stated by the Eighth Circuit Court of Appeals in Lovett v. General Motors Corp., 998 F.2d 575, 578 (8th Cir. 1993), **[**24]** **HN12**[] "because a fine line separates unlawful concerted action from legitimate business practices, an antitrust conspiracy cannot be inferred from 'highly ambiguous evidence.'" (quoting Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)). Although the court "view[s] the evidence and all reasonable inferences in the light most favorable" to the plaintiff, "the range of permissible inferences from ambiguous evidence is limited in a section one case." *Id.* (citing *(* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). "*Monsanto* does not permit a jury to infer the existence of a conspiracy from ambiguous evidence." Id. at 579. The court in *Lovett* also stated that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Id. "An inference of conspiracy must be 'reasonable in light of the competing inferences of independent action.'" Id. (quoting *Monsanto,* 475 U.S. at 588). Although *Lovett* was a review of a judgment as a matter **[**25]** of law, the standard for judging evidence on a motion for summary judgment parallels that of a directed verdict, the precursor to judgment as a matter of law. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

In the present case, Willman presents no direct evidence of a conspiracy. However, Willman argues that the existence of a conspiracy can be inferred from facts which he has presented. Therefore, I must "decide whether a reasonable juror could infer the existence of a conspiracy from the circumstantial evidence." Lovett, 998 F.2d at 578. The heart of Willman's conspiracy claim is his factual conclusion that competitors participated in the peer review process. Willman then concludes that the peer review process was a "sham" to cover up his competitors' intent to drive him out of the St. Joseph market.

Plaintiff cites Gibson v. Berryhill, 411 U.S. 564, 36 L. Ed. 2d 488, 93 S. Ct. 1689 (1973) for the proposition that competitors of a physician should not participate in peer review of that physician. *Gibson* involved licensing issues at the state level, not peer review. In *Gibson,* the Alabama Board of Optometry **[**26]** could only be composed of optometrists who were in private practice. Of the 192 optometrists in the state, 100 were in private practice and 92 were employed by others. There were no charges of substandard care in *Gibson.* "The aim of the Board was to revoke the licenses of all optometrists in the state that were employed by business corporations . . . and that these optometrists accounted for nearly half of all optometrists practicing in Alabama." Id. at 578. Driving half of the optometrists in the state out of business would have a direct, measurable effect on the business of the remaining private optometrists.

Here, Willman lists 43 physicians who he contends were competitors. One doctor's patients **[*1531]** divided among 43 physicians does not suggest the level of pecuniary interest that made the state licensure proceeding in *Gibson* a violation of due process. The insignificant competitive advantage to be gained by the alleged co-conspirators destroys the reasonableness of the inference Willman seeks to draw from the participation of his competitors.

In addition, Willman supports his argument that the peer review process was a sham by presenting expert **[**27]** testimony that the care he provided was proper. However, Willman's own medical experts, even if believed fully, do not establish that the peer reviewers were so misguided that one could conclude reasonably that the process was a sham. For instance, Dr. Miller, one of Willman's medical experts, testified that "some of the cases, you know, represent outer edges of what we perceive as standard of care." Miller depo. p 171, 1. 19-22. Also, Willman's own experts do not state that the peer review committees were unreasonable to be concerned about the issues they inquired about. If believed, Willman's experts establish that reasonable medical minds may differ about how seriously Willman's treatment departed from acceptable practice. This would not allow a reasonable jury to conclude that the process was a sham.

HN13[] Because the purpose of peer review is to maintain quality patient care and because hospitals have an "unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges," *(* Jefferson Parish Hosp. Dist. No. 12 v. Hyde, 466 U.S. 2, 30, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)), a peer review process that is at least as consistent with **[**28]** this lawful purpose as with an illegal conspiracy to restrain trade cannot support an inference of antitrust conspiracy and does not justify subjecting these health care provider defendants to the expense of a lengthy jury trial.

Bolt v. Halifax Hospital Medical Center, 891 F.2d 810, 821 (11th Cir. 1990), *cert. denied, 495 U.S. 924, 109 L. Ed. 2d 322, 110 S. Ct. 1960 (1990)*, relied on by plaintiff, demonstrates the deficiency in the factual record presented by plaintiff. In *Bolt,* the court concluded that a conspiracy could easily be inferred from expert testimony that no reasonable medical practitioner could have reached the same conclusion about a physician that was reached by the peer reviewers in that case. But none of Willman's experts state that a reasonable medical practitioner could not have concluded that Willman's work was substandard. The mere fact that Willman's experts may reach a different conclusion about the quality of care furnished by Willman is not sufficient to create an inference that the doctors and hospitals conspired in violation of ***antitrust law*** when they reached a different but nevertheless reasonable conclusion about the quality **[**29]** of care Willman's patients received.

Plaintiff points to the refusal by defendant doctors to consider Willman's performance during the 15 months in which Willman practiced at the hospitals pursuant to a court order from Buchanan County, Missouri, as evidence of improper motive. There was friction between the plaintiff and defendants. The defendants believed that they were maintaining practice standards that would benefit the hospitals' reputation and protect the public. Plaintiff believed that he was being treated unfairly. As a result, Willman secretly tape-recorded numerous conversations with physicians in St. Joseph. Also, he obtained a court order requiring St. Joseph Hospital to allow him to practice in that hospital. Under these circumstances, not considering plaintiff's performance in the hospital while under the court order was just as likely to be because of the friction between Willman and the members of the medical staff as because of any antitrust conspiracy.

Certainly, Willman has had a full opportunity to develop the evidence in this case. Over 100 days of depositions have been taken. The inferences Willman relies on to support his conspiracy theory conflict with economic **[**30]** reality because the hospitals had every incentive to include as many physicians as possible on their staffs. The more staff physicians a hospital has admitting and treating patients, the more revenue for the hospital.

Therefore, because the hospital and its medical staff do not have the capacity to conspire and because, even if they did have **[*1532]** this capacity, the plaintiff's evidence of conspiracy is not sufficient to create a genuine issue for trial, summary judgment will be granted on Counts I and II of the Complaint.

B. *Count III*

In Count III, plaintiff alleges a violation of *15 U.S.C. § 2*. According to the plaintiff "count III of Dr. Willman's complaint states a cause of action pursuant to *Section 2* of the Sherman Act (*15 U.S.C. § 2*) for two closely related theories: abuse of an essential facility and monopoly leveraging." Pl. Brief at 22.

HN14[] *Section 2* of the Sherman Act "prohibits monopolization and attempted monopolization of trade or commerce. The offense of monopoly under *section 2* has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of **[**31]** that power as distinguished from the growth or development of a superior product, business acumen, or historic accident." *City of Malden, Mo. v. Union Elec. Co., 887 F.2d 157, 160 n.3 (8th Cir. 1989)* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. In order to "demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*.

HN15[] "Under the 'bottleneck' or essential facilities doctrine, those in possession of facilities which cannot practically be duplicated must share the facilities with their competitors on fair terms." *City of Malden, 887 F.2d at 160*. (citations omitted). The elements of the essential facilities doctrine are: 1) control of an essential facility by a monopolist; 2) the inability to practically or economically duplicate the facility; and 3) the unreasonable denial of the use of the facility to a competitor **[**32]** when such use is economically and technically feasible. *Id.*

With regard to the third element, "the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992-93 (D. C. Cir. 1977)*, *cert. denied, 436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)* (footnote omitted). Applying this principle to a hospital's efforts to monitor the performance of staff doctors, several courts have found that the essential facilities doctrine is not applicable when a hospital facility is denied to a physician. In *Pontius v. Children's Hospital, 552 F. Supp. 1352, 1371 (W.D. Pa. 1982)*, the court stated:

> We believe ***HN16***[] it would be singularly inappropriate to apply a doctrine which would prevent a hospital from keeping doctors it had adjudged unqualified off of its staff. Neither public policy nor the Sherman Act can continence such a result. Consequently we now hold that the essential facilities doctrine is inapplicable to hospital staff privileges decisions.

In *Robles v. Humana Hospital Cartersville, 785 F. Supp. 989, 996 (N.D. Ga. 1992)*, **[**33]** the court, after quoting this language from *Pontius,* concluded "this Court concludes that ***HN17***[] the essential facilities doctrine is not applicable to cases involving hospital peer review decisions which revoke or limit a doctor's medical staff privileges."

In *Castelli v. Meadville Medical Center, 702 F. Supp. 1201, 1209 (W.D. Pa. 1988)* the court granted summary judgement in a case involving an exclusive contract with a hospital because the court was "persuaded that the essential facilities doctrine is not appropriate for a hospital's decisions about professional services."

I agree with this conclusion. ***HN18***[] Hospital decisions to revoke or limit staff privileges are essentially pro-competitive. "The peer review process, by policing the competence and conduct of doctors, can enhance competition." *Okansen, 945 F.2d at 709*. By monitoring the quality of care received by patients at the hospital, the hospital improves its competitive position in the eyes of the health care consumer.

Even if the essential facilities doctrine were applicable, plaintiff's claim would still fail because the hospitals' concerns about **[*1533]** the care provided by **[**34]** Willman were not unreasonable. As previously discussed, even Willman's experts concede that the questions asked by the defendants during peer review were not unreasonable. Also, a Missouri state court has stated that one committee's decision to recommend revocation of Willman's privileges at St. Joseph's Hospital was reasonable. *Willman v. Dooner, 770 S.W.2d 275 (Mo. Ct. App. 1989)*. "This Committee was not on a witch hunt. They picked Willman for good reasons." *Id. at 278*. In light of these considerations, the essential facilities doctrine is not available in this hospital staff privileges case.

Furthermore, even if I were to hold that the doctrine is applicable to staff privileges cases, the plaintiff's claim would still fail because he fails to show that the control of the hospital facility carries with it the power to eliminate competition in the downstream market.

In *Alaska Airlines, Inc. V. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991)*, *cert. denied, 118 L. Ed. 2d 316, 112 S. Ct. 1603 (1992)*, the court held that the essential facility doctrine only applies to a monopolist **[**35]** if the monopolist's control over the facility carries with it the power to eliminate competition in the downstream market.

As stated in defendants' brief, the hospitals could not eliminate competition for general surgical services or any other medical services in St. Joseph:

> *Alaska* applies with equal force here. In this case, the "monopolist," Heartland, is incapable of ever eliminating competition in the market of general surgical services in St. Joseph, MO. plaintiff has not claimed, and could not claim, that surgery on persons in St. Joseph would cease to be performed if defendant refused to allow anyone to use its surgical facilities. Even if Heartland closed its doors to *all* surgeons (a *reductio ad absudum,* to be sure), Heartland could not prevent physicians from performing surgery for people in St. Joseph, although the site of that surgery might move from St. Joseph to some other location such as Liberty, North Kansas City, Kansas City, Cameron or Chillicothe. Thus, it is impossible for Heartland to ever monopolize the 'downstream' market of general surgery, and the essential facilities doctrine is not applicable to this *Section 2* claim.

Def. Brief at 6.

[36]** Additionally, ***HN19***[] although the essential facilities doctrine has its own elements, it is still a claim under *§ 2* of the Sherman Act for either illegal monopoly or attempted monopoly. The second element of a monopoly claim is "the willful acquisition or maintenance of" monopoly power. *United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. The Fourth Circuit Court of Appeals stated that in order to satisfy this element the plaintiff must show that a jury could find no valid business reason or concern for efficiency in the choice the defendant made. *White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 105 (4th Cir. 1987)* (citing *Aspen Skiing Co. V. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985))*. Specific intent is also required in an attempted monopoly. *Spectrum Sports, Inc. v. McQuillan, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*.

Although the plaintiff has presented expert testimony that the expert would not have revoked Willman's hospital privileges, these experts do not state that it was unreasonable for either hospital to revoke his privileges. Willman has been unable to present **[**37]** any evidence that the hospitals did not have valid business reasons for seeking to revoke the hospital privileges of a doctor who was believed reasonably to have rendered substandard care. Therefore, summary judgment will be granted as to the essential facilities claim of Count III.

Plaintiff also asserts a claim under *§ 2* of the Sherman Act for monopoly leveraging. Plaintiff relies on *Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*, *cert. denied, 444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*, and *Carleton v. Vermont Dairy Herd Improvement Association Inc., 782 F. Supp. 926 (D. Vt. 1991)* for the proposition that monopoly leveraging is a separate claim under *§ 2*. However, the Second Circuit Court of Appeals, after the **[*1534]** *Berkley Photo* decision, stated that the recognition of a claim for monopoly leveraging was dictum. Also, *Berkley Photo* was a case involving a tying claim, not a case involving the denial of essential facilities. *Twin Laboratories v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir. 1990)*. No tying claim has been alleged in this case.

In addition, **[**38]** the Ninth Circuit Court of Appeals has held that "monopoly leveraging" is not an independent theory for recovery under *§ 2* of the Sherman Act, it is just a claim for an attempted monopolization of a second market. *Alaska Airlines, 948 F.2d at 547*.

Therefore, because monopoly leveraging is just another way of alleging either monopolization or attempted monopolization, and because I have already determined that defendants are entitled to summary judgment on a claim of monopolization or attempted monopolization, summary judgment will be granted on all claims in Count III.

C. *Count IV and the Counterclaim*

Having granted summary judgement on Counts I, II and III, I decline to exercise supplemental jurisdiction as to the state law claims asserted in Count IV and the Counterclaim.

IV. *Conclusion*

Plaintiff is no stranger to litigation over the peer review proceedings that led to the revocation of his privileges at the hospitals. *See* *Willman v. Dooner, 770 S.W.2d 275 (Mo. Ct. App. 1989)*; *State ex rel. St. Joseph Hospital v. Fenner, 726 S.W.2d 393 (Mo. Ct. App. 1987)*; *State ex rel. Willman v. St. Joseph Hospital, 707 S.W.2d 828 (Mo. Ct. App. 1986)*; **[**39]** and *State ex rel. Willman v. St. Joseph Hospital, 684 S.W.2d 408 (Mo. Ct. App. 1984)*. The antitrust laws were not intended to be used to subject health care providers to protracted and expensive litigation over efforts to protect the public from substandard care when the evidence of defendants' acts is just as consistent with permissible self-regulation in the public interest as with an illegal conspiracy. *See* *Lovett v. General Motors Corp., 998 F.2d at 577*.

Accordingly, for the reasons stated, it is ORDERED that:

1) defendants are granted summary judgment as to Counts I and II of plaintiff's Complaint;

2) defendants are granted summary judgment as to Count III of plaintiff's Complaint; and

3) Count IV and the Counterclaim are dismissed without prejudice.

D. BROOK BARTLETT

UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

October 19, 1993.

Dr Pepper/Seven-Up Cos. v. FTC

United States District Court for the District of Columbia

October 21, 1993, Filed

Civil Action No. 92-2760 (JLG)

Reporter

151 F.R.D. 483 *; 1993 U.S. Dist. LEXIS 15053 **

DR PEPPER/SEVEN-UP COMPANIES, INC., et al., Plaintiffs, v. FEDERAL TRADE COMMISSION, Defendant.

Subsequent History: [1]** As Amended.

Core Terms

Bottling, consent order, rights, prior approval, license, distribute, acquisition, soft drink, staff, proposed acquisition, proposed transaction, metropolitan, coverage, parties, ceased, entity, terms, agency's action, supermarkets, negotiated, franchise, vertical, sells, civil penalty, plaintiffs', formerly, acquire, brand, words, veto

LexisNexis® Headnotes

Administrative Law > Agency Adjudication > Informal Agency Action

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Administrative Law > Agency Adjudication > General Overview

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN1[] **Agency Adjudication, Informal Agency Action**

Prior approval provisions in Federal Trade Commission (Commission) consent orders have been held to give the Commission a veto over proposed acquisitions or divestitures. The Commission's exercise of that veto with respect to a prior approval application is an adjudication within the meaning of the Administrative Procedure Act (APA), falling within the residual category of informal adjudication, to which apply the minimal procedural requirements of *§ 555* of the APA, *5 U.S.C.S. § 555*, and as such is reviewable as final agency action. A predicate for the lawful exercise of that veto power is that the prior approval provisions of a consent order govern the proposed transaction in the first place; if they do not govern, then the exercise of that veto in the denial of an application is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *5 U.S.C.S. § 706(2)(A)*.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Contracts Law > Contract Interpretation

HN2[] **Settlements, Consent Judgments**

The court reads a consent decree essentially as it would a contract. Thus, while the meaning of a consent decree's terms must be discerned within its four corners, the inquiry is guided by conventional aids to construction, including the circumstances surrounding the formation of the consent order and any technical meaning words used may have had to the parties.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Contracts Law > Contract Interpretation

HN3[] **Settlements, Consent Judgments**

The rule that a consent order should be interpreted as a contract is particularly appropriate when the issue involves the interpretation of terms contained in the consent order itself, as opposed to procedural questions implicating the consent order but on which the order itself is silent.

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Judges: GREEN

Opinion by: JUNE L. GREEN

Opinion

[*484] *MEMORANDUM OPINION*

This case concerns the bottling and distribution of Seven-Up brand soft drinks in the metropolitan New York City area. It is the second of two related lawsuits brought by plaintiffs Harold A. Honickman ("Mr. Honickman") and Dr. Pepper/Seven-Up Companies, Inc. ("DPSU") against the Federal Trade Commission ("FTC" or "the Commission"), challenging the Commission's refusal to approve proposed acquisitions by Mr. Honickman of certain soft drink bottling assets pursuant to a 1991 Consent Order. The earlier case, referred to here as *DPSU I* and presently on partial remand to the FTC, concerned Mr. Honickman's proposed acquisition of assets of the now defunct Brooklyn Bottling Company **[**2]** ("Seven-Up Brooklyn"). *Dr Pepper/Seven-Up Cos. v. FTC, 798 F. Supp. 762 (D.D.C. 1992)*, *aff'd in part and rev'd in part, 301 U.S. App. D.C. 150, 991 F.2d 859 (D.C. Cir. 1993)*. This case concerns distribution rights formerly held by the also defunct New York Seven-Up Bottling Company ("New York Bottling") and is now before this Court on cross-motions for summary judgment. [1] For the reasons set forth below, the Court will grant plaintiffs' motion for summary judgment and deny defendant's cross-motion.

THE PARTIES

Mr. Honickman owns interests in and controls **[**3]** all voting rights of the Canada Dry Bottling Company of New York and the Pepsi Cola Bottling Company of New York, Inc., which are bottlers and distributors of soft drinks in New York State. AR 4. [2] DPSU is a manufacturer of soft drink concentrate, in particular of "Seven-Up," a leading lemon-lime flavored soft drink brand. Like other major concentrate manufacturers, DPSU does not distribute Seven-Up directly to consumers, but rather grants exclusive territorial marketing rights to bottlers to do so. New York Bottling was one such franchisee, with rights to bottle and distribute Seven-Up and other soft drinks in a portion of the lucrative New York metropolitan market before it ceased operations in October 1991. AR 6000. [3] DPSU and Mr. Honickman now want the latter to obtain the licensing rights that would enable him to bottle and distribute Seven-Up brand carbonated soft drinks ("CSDs") in territory formerly served by New York Bottling.

[4]** In the case at bar, plaintiffs seek judicial review of the FTC's decision to deny prior approval in part to Mr. Honickman's proposed acquisition of these rights. In an opinion letter dated November 16, 1992, the Commission determined, first, that this proposed acquisition was subject to a 1991 Consent Order settling other litigation between **[*485]** Mr. Honickman and the FTC and, second, that the acquisition would likely have an anticompetitive impact on the market for CSDs in parts of Manhattan, the Bronx, and Westchester Counties, in violation of Section 7 of the Clayton Act, *15 U.S.C. § 18*, and *Section 5* of the Federal Trade Commission Act ("FTC Act"), *15 U.S.C. § 45*. AR 6044-6065. Accordingly, the FTC denied his request for prior approval with respect to those areas. [4] Plaintiffs contend that these decisions are arbitrary and capricious, and that the FTC's rejection of Mr. Honickman's application for prior approval also violates his due process rights and substantive ***antitrust law***.

[5]** *BACKGROUND*

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[1] *DPSU I* was heard and decided by the late Judge George H. Revercomb. The case at bar was also originally assigned to Judge Revercomb, who heard oral argument on the instant cross-motions on June 7, 1993. The case was reassigned to this Court after Judge Revercomb's death. In addition to reviewing the extensive Administrative Record ("AR") and the briefs, the Court has also reviewed the transcript of the June 7 hearing.

[2] Citations to the administrative record in this case are given herein as "AR *."*

[3] Prior to its demise in October, 1991, New York Bottling's franchise territory covered Manhattan, the Bronx, and Westchester counties in New York, nine counties New Jersey, and parts of Connecticut. AR 6827. Apart from Seven-Up, New York Bottling also held distribution franchises for RC Cola (Royal Crown), Barq's, Perrier, Hawaiian Punch, and Crush (Cadbury-Schweppes). *Id.;* AR 5288.

[4] The Commission approved Mr. Honickman's application for the following New Jersey counties: Morris, Union, Somerset, Middlesex, Sussex, Hudson, Essex, Bergen, and Passaic. AR 6044.

Mr. Honickman's previous efforts to acquire rights to distribute Seven-Up in the metropolitan New York area and his involvement with the FTC in that connection are recounted in detail in Judge Revercomb's Memorandum Opinion in *DPSU I* and need not be repeated at length here. *See* DPSU I, 798 F. Supp. at 764-68. It suffices to say that Mr. Honickman's acquisition of the franchise rights and assets of Seven-Up Brooklyn was the subject of an administrative complaint brought by the FTC on November 2, 1989. *See* id. at 765. [5] Subsequently, Mr. Honickman and the FTC entered into an "Agreement Containing Consent Order" ("the Settlement Agreement") in January, 1991, to settle this litigation. *See id.,* AR 1442-1462. The Settlement Agreement became final on July 25, 1991. *See* DPSU I, 798 F. Supp. at 765.

[6]** The Consent Order portion of the Settlement Agreement contained the following provision in Paragraph II:

> that for a period of ten (10) years after the date this order becomes final, respondents shall not, without prior approval of the Commission, acquire directly or indirectly all or any part of the stock of, share capital of, equity interest in, assets of or rights relating to any Bottling Operation in any county in the New York Metropolitan Area where at the time of such acquisition any Existing Honickman Bottling Operation distributes CSDs directly using company-owned or equity distributors to supermarkets.

AR 1444. The Consent Order defined the term "Bottling Operation" as follows:

> "Bottling Operation" means any business, person, or other entity that distributes and sells CSDs directly using company-owned or equity distribution to supermarkets pursuant to a franchise, license, distribution contract, or other similar agreement; provided, however, a Bottling Operation shall not include any business, person or other entity that distributes and sells CSDs only by warehouse delivery or through a beer distributor that does not hold a CSD franchise, license or similar distribution **[**7]** agreement.

AR 1443. Thus, according to this definition, Seven-Up Brooklyn -- the assets of which were at issue in *DPSU I* -- was a Bottling Operation and subject to the prior approval provisions of the Consent Order. Under the terms of Paragraph II of that Order, therefore, Mr. Honickman was required to make an application for and obtain the Commission's approval before he could proceed to reacquire Seven-Up Brooklyn's assets and franchise rights. The FTC's denial of that application constituted the agency action reviewed by the court in *DPSU I. See* DPSU I, 798 F. Supp. at 764-66.

Having been in financial difficulty for some time, New York Bottling ceased operations -- including all bottling and selling of soft drinks -- in October 1991. AR 6000. [6] On **[*486]** October 24, 1991, Mr. Honickman filed with the FTC a "Request For a Declaration Or in the Alternative For Approval to Obtain Certain Assets of New York Seven-Up" ("the Application"). AR 6000-6009. The Application informed the Commission that New York Bottling had ceased its operations and that Mr. Honickman wished to acquire "certain licensing rights, currently held by New York Seven-Up Bottling **[**8]** Company." AR 6000. The Application also sought FTC permission for Honickman to distribute Seven-Up in the former New York Bottling territory on an interim basis. AR 6001. [7]

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[5] Mr. Honickman first acquired Seven-Up Brooklyn in 1987. *See* DPSU I, 798 F. Supp. at 764. After the FTC commenced its investigation of that acquisition, but before it filed its administrative complaint, Mr. Honickman sold most of his interests in the company. *See* id. at 765.

[6] The precise date on which operations ceased is unclear from the record. Mr. Honickman's Application and various Commission memoranda give October 24, 1991 as the date. *See* AR 6000, 5164, 5288. An article from *New York Newsday,* attached to Mr. Honickman's Application, indicates that New York Bottling shut its doors on October 21, 1991. *See* AR 6010. A memorandum in aid of FTC consideration of Mr. Honickman's Application, submitted by plaintiffs and dated June 24, 1992, gives October 18, 1991 as the date on which New York Bottling "abruptly closed its doors." AR 6514. Virtually all of plaintiffs' filings in this case refer to the October 18 date. Whatever the precise date, however, it is undisputed that Mr. Honickman's Application was filed *after* New York Bottling ceased operations.

[7] On December 16, 1991, the Commission partially approved and partially denied Mr. Honickman's request for interim distribution, permitting interim distribution in the nine New Jersey counties, but not in the three New York counties. AR 6239-6246. Plaintiffs thereafter applied for emergency injunctive relief to compel the FTC to grant interim distribution in Manhattan, the

[9]** With regard to the acquisition of these licensing rights, Mr. Honickman's Application made three arguments which are reasserted in plaintiffs' instant summary judgment motion. First, Mr. Honickman argued that the prior approval provisions of the Consent Order did not apply to the proposed transaction, which involved the acquisition of licensing rights directly from DPSU rather than from New York Bottling. AR 6003. DPSU -- a concentrate manufacturer -- was and is not a Bottling Operation within the meaning of Paragraph II of the Consent Order. Moreover, because New York Bottling had ceased operations entirely, DPSU planned to terminate the license of New York Bottling, thereby extinguishing its legal right to bottle and distribute Seven-Up brand products. AR 6004. In other words, according to the Application, "the transaction does not involve an acquisition of the assets of a 'Bottling Operation,' as that term is defined in the Consent Order." *Id.* Thus, Mr. Honickman asked in the first instance for a declaration that the Consent Order's prior approval provision did not apply to "a vertical assignment of a new license from the franchisor, DPSU." *Id.*

Second, Mr. Honickman argued **[**10]** -- as he had in *DPSU I* -- that the proposed acquisition would be procompetitive because economies in distribution and marketing could be achieved by linking Seven-Up brands to a large scale distribution system. AR 6005; *DPSU I, 798 F. Supp. at 765-66*. Such economies of scale were necessary to compete effectively in a major metropolitan area such as New York. AR 6005-6006. Finally, Mr. Honickman argued -- again, as he had in *DPSU I* -- that, even if the proposed transaction were not considered procompetitive, it would nevertheless satisfy the requirements of the "failing company defense." AR 6006; *DPSU I, 798 F. Supp. at 766*. Indeed, as the Application pointed out, New York Bottling was not merely a failing firm, but a failed firm, with no prospects for reorganizing and with Mr. Honickman as the only available and viable purchaser. AR 6007-6008.

By the time Mr. Honickman submitted the Application to the FTC, he and DPSU were involved in the Brooklyn Seven-Up litigation before Judge Revercomb. Plaintiffs attempted to wrap the New York Bottling transaction together with the Brooklyn case by seeking leave to amend their **[**11]** complaint, which Judge Revercomb denied by Order dated January 13, 1992. *See Dr Pepper/Seven-Up Cos. v. FTC,* Civ. A. No. 91-2712- *GHR, 1992 U.S. Dist. LEXIS 1295 (D.D.C. Jan. 13, 1992)*. This same Order dismissed all New York Bottling claims from the Brooklyn case on ripeness grounds, in view of the fact that the FTC had yet to rule on Mr. Honickman's October 24, 1991 Application. *Id.* The Seven-Up Brooklyn and New York Bottling cases henceforth proceeded on separate tracks.

[*487] The Commission placed the Application on the public record for comment, as is required by Section 2.41(f) of its Rules of Practice. *See 16 C.F.R. § 2.41(f)*; AR 6083. Numerous public comments were submitted, *see* AR 6083-6235, including many submissions from Mr. Honickman and DPSU. AR 6134-6149, 6321-6322, 6323-6348, 6351-6478, 6508-6509, 6510-6558B, 6571-6572, 6591-6598, 6601-6604, 6606-6607, 6613-6614, 7108-7115. Mr. Honickman and representatives from DPSU also met on numerous occasions with FTC staff, *see* AR 6672-6673, 6674-6675, 6676-6679, 6680-6681, 6724-6730, 6735-6736, 6748-6749, 6750-6752, 6756-6758, 6770-6773, 6775-6826, 7451-7452, 7453-7455, and individually with each FTC Commissioner. AR 6584-6590, 6653-6662, 6663-6666.

[12]** On November 16, 1992, the Commission issued its opinion letter granting in part and denying in part Mr. Honickman's request for prior approval. AR 6044-6065. This lawsuit followed.

ANALYSIS

The threshold issue, and the issue that most differentiates this case from *DPSU I,* is whether the prior approval provision of the Consent Order applies at all to the proposed transaction. As a preliminary matter, the FTC contends that this Court lacks jurisdiction to consider the question of Consent Order coverage. According to the Commission, the scope of the Consent Order would not be ripe for judicial review until the FTC actually sought to enforce it in a civil penalty action pursuant to *15 U.S.C. § 45(1)*. In support of this contention, the FTC relies heavily on *Flowers*

Bronx, and Westchester County, which Judge Revercomb denied by Order dated December 19, 1991. *See Dr Pepper/Seven-Up Cos. v. FTC,* Civ. A. No. 91-2712- *GHR, 1991 U.S. Dist. LEXIS 19472 (D.D.C. Dec. 19, 1991)*.

Industries v. FTC, and two other cases. *See* Flowers Industries v. FTC, 849 F.2d 551, 553 (11th Cir. 1988) (citing Floersheim v. Engman, 161 U.S. App. D.C. 30, 494 F.2d 949, 952 (D.C. Cir. 1973); *see also* Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (2d Cir. 1975). Thus, says the Commission, Mr. Honickman **[**13]** would have to acquire New York Bottling's assets, await FTC enforcement of the Consent Order in a civil penalty action, and then assert non-coverage as a defense. Only then could a district court review the coverage issue. The implication of this argument is that the Court should *assume* that coverage is proper and proceed to analyze the merits of the FTC's decision. *See* Def.'s Mem. in Supp. of Summ. J. at 17-19.

This argument would have some force were the FTC's opinion letter of November 16, 1992 merely advisory or otherwise not a final agency action under the APA. *See* 5 U.S.C. § 704. A careful reading discloses that to have been the case in each of the cases relied upon by the Commission. In *Flowers Industries,* for example, what was at issue was an FTC letter approving the sale of two bakeries to a third party under the terms of a modified consent order. *See* Flowers Industries v. FTC, 849 F.2d at 552-53. The letter in question was not self-implementing and the FTC had taken no action to enforce it at the time the plaintiff sought declaratory and injunctive relief. *See* id. at 552. **[**14]** *Brown & Williamson Tobacco* concerned the reviewability of FTC letters to tobacco companies stating that the Commissioners agreed with staff conclusions that the plaintiffs had violated consent orders pertaining to the Surgeon General's warning concerning the hazards of smoking and that the Commission intended to commence an action for civil penalties. *See* Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d at 1117. At the time the plaintiffs filed their complaints, however, the FTC had not commenced civil penalty actions against them. *See* id. at 1117-18. Similarly, *Floersheim v. Engman* involved an FTC determination that certain "skip-tracer" forms sold by the plaintiff to creditors and debt-collection agencies did not comply with the terms of a cease-and-desist order. *See* Floersheim v. Engman, 494 F.2d at 951. Plaintiff thereupon filed suit seeking a declaration that the forms did comply and to stop the FTC from bringing a civil penalty action. *See id.* Each of these cases, in other words, involved an attempt to review an FTC determination concerning the scope of consent or cease-and-desist **[**15]** orders *before* the Commission undertook the agency action made reviewable under 15 U.S.C. § 45(l) and 5 U.S.C. § 704.

This case is different, because the FTC determination as to the scope of the Consent Order was made in conjunction with **[*488]** agency action that is most assuredly reviewable by this Court. That agency action was the FTC's decision to deny Mr. Honickman's application for prior approval made pursuant to the terms of the Consent Order and the FTC's regulations. *See* AR 6044-6065; 15 U.S.C. § 2.41(f). ***HN1***[] Prior approval provisions in FTC consent orders such as the one at bar have been held to give the Commission a veto over proposed acquisitions or divestitures. *See* DPSU I, 798 F. Supp. at 771 (citing United States v. Louisiana-Pacific Corp., 569 F. Supp. 1141, 1147 (D. Or. 1983); and West Texas Transmission L.P. v. Enron Corp., 1989 U.S. Dist. LEXIS 16305, 1989-1 Trade Cas. (CCH) P 68,424, at 60,333-34 (W.D. Tex. 1988), *aff'd,* 907 F.2d 1554 (5th Cir. 1990), *cert. den'd, 111 S. Ct. 1105 (1991)).* **[**16]** As both the district court and the court of appeals made clear in *DPSU I,* the FTC's exercise of that veto with respect to a prior approval application is an adjudication within the meaning of the APA, falling within "the residual category of 'informal adjudication,' to which apply the minimal procedural requirements of Section 555 of the APA," and as such is reviewable as final agency action. DPSU I, 798 F. Supp. at 773, 776; DPSU I, 991 F.2d at 862-63. A predicate for the lawful exercise of that veto power is that the prior approval provisions of the Consent Order govern the proposed transaction in the first place; if they do not govern, as plaintiffs persuasively argue, then the exercise of that veto in the denial of an application is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Having determined that consideration of the coverage issue is now proper, the Court will turn to the interpretation of the Consent Order with regard to Mr. Honickman's proposed transaction. Our court of appeals has provided the following succinct **[**17]** guidance on the interpretation of consent decrees:

> ***HN2***[] "We read [a] Decree essentially as we would a contract. *See* United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37, 43 L. Ed. 2d 148, 95 S. Ct. 926 . . . (1975); United States v. Western Elec. Co., 254 U.S. App. D.C. 415, 797 F.2d 1082, 1089 (D.C.Cir. 1986) . . ., *cert. denied, 480 U.S. 922 . . . (1987)*. Thus, while the meaning of [a] Decree's terms 'must be discerned within its four corners,' United States v. Armour &

> Co., 402 U.S. 673, 682, 29 L. Ed. 2d 256, 91 S. Ct. 1752 . . . (1971), our inquiry is guided by conventional 'aids to construction,' including 'the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties . . .' ITT Continental Baking Co., 420 U.S. at 238 . . . ." United States v. Western Elec. Co., 894 F.2d 1387 at 1390.

United States v. Western Elec. Co., 283 U.S. App. D.C. 299, 900 F.2d 283, 293 (D.C. Cir. 1990). This principle -- that **HN3**[] a consent order should be interpreted as a contract would be -- is particularly appropriate here, **[**18]** when the issue involves the interpretation of terms contained in the Consent Order itself, as opposed to procedural questions implicating the Consent Order but on which the Order itself is silent (as was the case in *DPSU I). See* DPSU I, 798 F. Supp. at 769-70.

Plaintiffs argue that New York Bottling's cessation of all bottling and distribution activities prior to the filing of Mr. Honickman's Application with the FTC had two practical consequences that rendered the Consent Order's prior approval clause inapplicable. First, they contend that New York Bottling's shutdown in October, 1991 meant that it was no longer a "Bottling Operation" as defined in the Consent Order, because that definition limits the term "Bottling Operation" only to a "business, person, or other entity" that *presently* distributes and sells CSDs directly to supermarkets. AR 6003-6004. The term, plaintiffs argue, does not apply to entities that *formerly* distributed CSDs but ceased doing so prior to Mr. Honickman's proposed acquisition of licensing rights. AR 6584, 6592, 6593-6594, 6654-6655. Moreover, they contend, "by ceasing to distribute soft drinks, New York [Bottling] breached **[**19]** its license agreements to distribute 7-Up and other beverages." AR 6654-6655. The Seven-Up licenses were then suspended by DPSU pursuant to a Termination Agreement dated November 9, 1991, and effectively terminated by the bankruptcy court on November **[*489]** 6, 1991. AR 6274; Pls.' Mem. at 17 n.14. [8] Thus, although New York Bottling's Seven-Up license may have remained "vested" in the defunct firm during the pendency of Mr. Honickman's Application, the suspension of the licenses effectively terminated New York Bottling's ability legally to bottle and distribute Seven-Up. *See* Pls.' Op. at 11. In short, not only had New York Bottling ceased to be a Bottling Operation, it "had" nothing for Mr. Honickman to acquire.

Second, and following from the preceding analysis, plaintiffs contend that Mr. Honickman sought **[**20]** to acquire the Seven-Up licenses not from New York Bottling but directly from DPSU, the parent company. Because DPSU does not sell its products to supermarkets, it is not a Bottling Operation within the meaning of the Consent Order. They contend, moreover, that acquisition of licensing rights directly from the franchisor and owner of the Seven-Up trademark is a "vertical" transaction that is beyond the scope of the Consent Order, which applies only to "horizontal" transactions, or acquisitions by Mr. Honickman of the rights or assets of other bottlers. For these reasons, plaintiffs' argue, the Consent Order's prior approval clause simply does not apply to the direct acquisition of rights by vertical assignment.

Although the question is a close one, the Court on balance finds plaintiffs' arguments to be persuasive for the following reasons. First, the FTC's contentions as to the breadth of the "directly or indirectly . . . rights relating to" language in Paragraph II of the Consent Order are undermined by other language in the Order and by extrinsic evidence from the Order's negotiating history. While it may be true the "related to" language in Paragraph II is not limited by a verb **[**21]** with either a present or past tense -- as in "rights that *are* related to" or "rights that *were* related to" -- the term "Bottling Operation," which modifies the references to assets or rights, is unambiguously defined as an entity that presently distributes and sells CSDs to supermarkets, and does not include entities that formerly did so. The negotiating history of the Consent Order clearly shows, moreover, that FTC staff first proposed, and Mr. Honickman rejected, language requiring prior approval for the acquisition of "assets located in the New York metropolitan area used in *or previously used in (and still suitable for use in)* the soft drink products business." AR 7690-7691 (emphasis added). The language finally agreed to by Mr. Honickman and the FTC limited prior approval to the acquisition of assets or rights related to a Bottling Operation, which is defined solely in the present tense as "any business, person, or other entity that *distributes and sells* CSDs directly using company-owned or equity distribution to supermarkets pursuant to a franchise, license, distribution contract, or other similar

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[8] The record shows that New York Bottling's licenses to distribute Barq's and Crush brand soft drinks were terminated and reverted to their respective franchisors when New York Bottling closed its doors. AR 6898, 6900.

agreement." AR 11 (emphasis added). To accept the FTC's interpretation **[**22]** of "rights related to," in other words, would not only contravene the plain meaning of the Consent Order but also expand that phrase to encompass meanings clearly rejected by the parties during negotiations.

The record also clearly shows that, prior to the Commission's final acceptance of the Consent Order, FTC staff members who had participated in negotiations with Mr. Honickman believed that the final language of Paragraph II did not apply to the vertical assignment of licensing rights directly from DPSU and so advised the Commission. AR 1413, 1418, 1427. Indeed, the Commission was advised by the Assistant Director of the Bureau of Competition that when FTC staff had "suggested to Honickman that we cover the vertical franchise award explicitly, he turned us down." AR 1427. FTC staff appear to have changed their view of the expansive application of the prior approval provision only after Mr. Honickman submitted the Application on October 24, 1991. AR 6892 (memorandum to the Commission from Bureau of Competition staff, dated June 15, 1992, interpreting the "rights related to" language to cover the proposed transaction). While the views of FTC staff do not necessarily reflect the understanding **[**23]** of Commission **[*490]** members themselves, the Court believes that the opinions expressed in staff memoranda prior to final acceptance of the Consent Order are probative of the parties' intent as regards the coverage issue at the time the Order was negotiated.

Finally, as was explained by Judge Revercomb in his Memorandum Opinion in *DPSU I* and as the FTC argued in that case, the parties expressly agreed that the Commission's 1989 administrative complaint against Mr. Honickman could be used to construe the terms of the Consent Order. *See* *DPSU I, 798 F. Supp. at 772*. Examination of that complaint shows that it was premised on the theory that Mr. Honickman's acquisition of the assets of another Bottling Operation (Seven-Up Brooklyn) would likely reduce competition by, among other things, eliminating direct competition from a competitor. AR 6 (P 22). The facts alleged in that complaint describe potential harm to competition from horizontal transactions. AR 0-9 (PP 2-16, 21, 22). As such, it reinforces the impression given by the staff memoranda discussed above that the Consent Order as negotiated and agreed to by the parties gave the FTC a veto over future Honickman **[**24]** acquisitions of the assets or rights of other bottlers, such as those of Seven-Up Brooklyn, but not over vertical acquisitions of rights directly from concentrate manufacturers. The Court is convinced in this case that the more expansive interpretation of the Consent Order urged by the FTC is thus inconsistent with record evidence of the intentions of the parties and "'the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties . . .'" *United States v. Western Elec. Co., 900 F.2d at 293* (quoting *ITT Continental Baking Co., 420 U.S. at 238*).

The Court concludes, therefore, that Mr. Honickman's proposed acquisition from DPSU of a license to bottle, distribute and sell Seven-Up in parts of the territory formerly covered by the now defunct New York Bottling Company is not subject to the Consent Order he entered into with the FTC in 1991. It follows that the Commission's decision to the contrary, and its denial of prior approval of the transaction necessarily based on that decision, are arbitrary and capricious under the APA. Because the coverage question **[**25]** is dispositive, it is unnecessary to address the parties' arguments regarding the substantive merits of the FTC's decision or the procedures it employed in reviewing Mr. Honickman's Application.

Accordingly, the Court will this day enter an Order granting plaintiffs' Motion for Summary Judgment, denying defendant FTC's motion for summary judgment, declaring that Mr. Honickman's proposed acquisition of a new soft drink license from DPSU is not a transaction covered by or subject to the prior approval provision of the 1991 Consent Order, and enjoining the FTC from taking a position to the contrary. This Order, of course, is strictly limited to the question of Consent Order coverage and in no way affects any other actions that the FTC may deem appropriate in the lawful exercise of its discretion vis-a-vis the proposed transaction or the soft drink market in metropolitan New York.

JUNE L. GREEN

UNITED STATES DISTRICT JUDGE

Clorox Co. v. Sterling Winthrop

United States District Court for the Eastern District of New York

November 3, 1993, Decided

CV 92-386

Reporter

836 F. Supp. 983 *; 1993 U.S. Dist. LEXIS 15749 **; 1993-2 Trade Cas. (CCH) P70,413

THE CLOROX COMPANY, Plaintiff, v. STERLING WINTHROP, Defendant.

Core Terms

trademark, disinfectant, products, cleaner, PINE, anticompetitive, advertising, competitor, antitrust, household, cleaning, spray, discovery, marketing, effects, restrictions, submarkets, monopoly, summary judgment, marks, restraint of trade, anti trust law, promotion, labels, likelihood of confusion, settlement agreement, relevant market, conditions, displayed, consumer

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] Supporting Materials, Discovery Materials

Fed. R. Civ. P. 56(c) provides for the granting of summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Fed. R. Civ. P. 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Movants may discharge their burden by showing that there is an absence of evidence to support the nonmoving party's case. The evidence and all factual inferences, however, must be viewed in the light most favorable to the nonmovant.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN2[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act 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 declared to be illegal. *15 U.S.C.S. § 1*. Despite the plain language of *15 U.S.C.S. § 1*, only unreasonable restraints of trade violate the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN3[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Courts find certain restraints of trade illegal per se, while subjecting other restraints to an elaborate inquiry known as the "rule of reason." Per se illegal restraints are 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. Examples of per se violations include horizontal and vertical price-fixing, division of a market into territories, certain tying arrangements, and certain group boycotts involving concerted refusals to deal with a competitor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

When a restraint is not plainly anticompetitive, a factfinder must determine whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Governments > Local Governments > Claims By & Against

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN5[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The "rule of reason" does not require a court to extend the right to trial to anyone who files a valid cause of action notwithstanding the absence of any significant probative evidence tending to support the complaint. To survive summary judgment, a plaintiff must raise a genuine issue of fact concerning the anticompetitive effect of the challenged restraint. Under this rule of reason test plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. This rule reflects the principle that antitrust laws exist for the protection of competition, not competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Convergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Trademark Law > Conveyances > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

HN7[] Misuse of Rights, Copyright & Trademark Misuse Defenses

The protection of trademark rights does not violate antitrust laws. Used as a means of identifying the trademark owner's products, a trademark makes effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage. However, since trademark laws only protect the trademark's source-denoting function, a trademark is misused if it serves to limit competition in the manufacture and sales of a product. Misusing a trademark for anticompetitive purposes can violate the antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Antitrust considerations must be viewed in light of actual market realities.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] **Actual Monopolization, Claims**

To establish the offense of actual monopoly under the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must show the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Counsel: **[**1]** For Plaintiff: Kim J. Landsman, Esq., Morrison & Foerster, New York, New York.

For Defendant: John L. McGoldrick, Esq., McCarter & English, New York, New York.

Judges: DEARIE

Opinion by: RAYMOND J. DEARIE

Opinion

[*985] ***MEMORANDUM AND ORDER***

DEARIE, District Judge.

In this action, the defendant seeks summary judgment dismissing plaintiff's federal and state antitrust claims and related state common law claims of restraint of trade and unfair competition. For the following reasons, the defendant's motion is denied.

BACKGROUND

This lawsuit is the latest skirmish in a 40 year battle between competing trademarks, LYSOL and PINE-SOL. The defendant, Sterling Winthrop ("Sterling"), manufactures and distributes household cleaning and disinfectant products under the trade name LYSOL. The LYSOL trademark has been federally registered for disinfectants since 1906, and for cleaning products since the 1920's. Sterling's primary product using the LYSOL name is an aerosol spray disinfectant. [1]

[2]** The establishment of the PINE-SOL trademark did not come easily. In the 1940's, Clorox Company ("Clorox")'s predecessor filed an application to register the trademark PINE-SOL for a liquid general household cleaner, disinfectant, and deodorant. Sterling opposed this registration in the U.S. Patent Office. On October 2, 1952, the Examiner in Chief sustained the Examiner of Interferences' finding of confusing similarity between the PINE-SOL mark and the LYSOL mark as used on the same or similar goods.

According to Sterling, Clorox's predecessor continued to use the PINE-SOL mark despite the Examiner in Chief's decision. Sterling sued, and the parties eventually settled the dispute by agreement executed on May 3, 1956 ("1956 Agreement"). Then, in 1965, Sterling filed suit again against the then-owner of the PINE-SOL mark, American Cyanamid Company ("Cyanamid"), alleging trademark infringement arising from Cyanamid's marketing of

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[1] This product is currently marketed in various versions including an "original scent," a "country scent," a "fresh scent," and a "light scent." Sterling also markets a disinfectant in a bottle that uses just the LYSOL name and a LYSOL deodorizing cleaner with a lemon scent. Brand extensions include LYSOL PINE ACTION pine cleaner-disinfectant, LYSOL DIRECT multi-purpose spray cleaner, LYSOL basin, tub, and tile cleaner, LYSOL and LYSOL CLING toilet bowl cleaners, LYSOL PINE FRESH CLING toilet bowl cleaner and LYSOL PINE SCENT basin, tub and tile cleaner.

a PINE-SOL disinfectant spray. In 1967, a settlement agreement ("1967 Agreement"), which superseded the 1956 Agreement, ended that suit.

Pursuant to the 1967 Agreement, Cyanamid could continue to manufacture, promote, and sell its existing PINE-SOL liquid cleaner **[**3]** as long as Cyanamid complied with certain **[*986]** conditions. The agreement provided that Cyanamid "shall not use the trademark PINE-SOL in connection with the manufacture, offering for sale, distribution, sale, advertising or promotion of any disinfectant product," (Paragraph 2(a)), except that Cyanamid could continue to "manufacture, offer for sale, distribute, sell, advertise and promote under the trademark PINE-SOL its present liquid cleaner with disinfecting and deodorizing properties," (Paragraph 3(c)), as long as this product continued to be "sold, advertised, and promoted primarily as a cleaner" rather than as a "disinfectant product." (Paragraph 4(a)).

Paragraph 4(a)(i) of the 1967 Agreement specified that, "when the generic name or purpose of the product is set forth in labels or advertising or promotional material, the generic name 'cleaner' or the generic function 'cleans' will continue to be set forth first, i.e., before such terms as 'disinfectant' or 'disinfects' or the like." Paragraph 4(a)(ii) prohibited "a display of such generic terms or functions as 'disinfectant' or 'disinfects' or the like in greater prominence than the generic name or function 'cleaner' or 'cleans,'" **[**4]** and Paragraph 4(a)(iii) further required that "more detailed labeling or advertising claims for the product in regard to its cleaning and disinfecting functions will be displayed in an analogous manner." (Paragraph 4(a)(i), (ii), (iii)).

The 1967 Agreement also provided, at Paragraph 4(c), that:

> In the display of the trademark PINE-SOL on all labels, packages, containers, other labeling, and advertising and promotional materials, separation must be maintained between the words or syllables 'Pine' and 'Sol' by placing between those words or syllables a device representing a pine or evergreen tree as presently used, and each of such words or syllables must begin with a capital letter with the remaining letters being small letters. It is understood, however, that the mark may appear in letters of the same size and a hyphen may be substituted for the small separation device representing a pine or evergreen tree in the text of labels or advertising material where the mark is not used in large type or otherwise displayed with prominence, but even then such words or syllables must always be used in separated form.

(Paragraph 4(c)). Paragraph 5 repeated this requirement with respect **[**5]** to "all labels, packages, containers, other labeling, and advertising and promotional materials used in connection with the products permitted to be marketed by paragraphs 2(b), 3(a) and 3(b)" of the agreement. (Paragraph 5).

Despite the elaborate specificity of the 1967 Agreement, disagreements persisted. In 1983, Cyanamid took the offensive and brought suit against Sterling alleging that Sterling had breached the 1967 Agreement by marketing LYSOL PINE ACTION. Although Sterling contends that Cyanamid alleged that the "use of the LYSOL trademark on a pine oil cleaning product constituted trademark infringement and unfair competition," (Def. 3(g) Statement), Clorox maintains that Cyanamid challenged the product because its "trade dress copied that of the Pine-Sol cleaner." (Pl. 3(g) Statement). [2] The parties eventually resolved this dispute and other pending disputes with yet another settlement agreement negotiated in 1987 ("1987 Agreement" or "Agreement").

[6]** In the 1987 Agreement, Sterling gave considerable ground. Expanding upon the 1967 Agreement, the new agreement permitted new uses of the PINE-SOL mark. The 1987 Agreement provided that Cyanamid could use the PINE-SOL mark for a "multi-purpose pump spray household cleaner with disinfecting properties" (Paragraph 3(d)) as long as Cyanamid complied with certain conditions. These conditions included the requirement that the product "continue to be sold under a generic name indicating that it **[*987]** is a general purpose spray cleaner." (Paragraph 3(d)(ii)). For example, Paragraph 3(d)(ii) specified that, while the product could not be offered as a "special purpose

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[2] Sterling maintains that, in interrogatory answers filed in the 1983 action, Cyanamid "contended that use of the trademark LYSOL for a pine oil cleaner, separate and apart from its trade dress, was likely to cause confusion with Cyanamid's Pine-Sol mark for pine oil cleaners." (Def. 3(g) Statement). Clorox disputes this assertion calling it "materially incomplete and misleading." (Pl. 3(g) Statement). Clorox adds that it has not been "given adequate opportunity to discover information concerning documents filed in the prior litigations." (Pl. 3(g) Statement).

cleaner, *e.g.,* 'bathroom cleaner,'" it could be promoted "for particular uses, surfaces and areas, including new uses, surfaces and areas." (Paragraph 3(d)(ii)). In addition, the Agreement required that the PINE-SOL product not be offered "in more than one delivery form, formula, or scent in a single geographical area" at a given time. (Paragraph 3(d)(iv)).

The 1987 Agreement permitted Cyanamid to use the PINE-SOL mark as part of an endorsement phrase to promote other disinfectant products under trademarks other than PINE-SOL. **[**7]** However, such use depended upon Cyanamid's compliance with an elaborate set of rules. For instance, the Agreement specified that the other trademark could not be used as part of the phrase that included the PINE-SOL mark, could not be likely to cause confusion with the trademark LYSOL or the trademark PINE-SOL, and had to "be, at least, capable of distinguishing the product on which it is to be used, *i.e.,* eligible to be registered on the Supplemental Register, pursuant to Title *15, U.S.C., Section 1091*, as presently worded." (Paragraph 2(e)(i)). In addition, the Agreement provided that "it must reasonably appear from the wording of said phrase that it was intended to convey only the meaning that the said disinfectant product originates with the company that has marketed 'PINE-SOL products." Accordingly, the Agreement noted that the phrases, "FROM PINE-SOL" and "FROM THE MAKERS OF PINE-SOL," would be "permissible," while "ANOTHER PINE-SOL PRODUCT" AND "CLEANS LIKE PINE-SOL" would not be permissible. (Paragraph 2(e)(ii)). The Agreement specified that PINE-SOL could be used "only once in the said phrase and must be preceded somewhere in said phrase **[**8]** by a word no shorter than 'FROM,'" (Paragraph 2(e)(iii)), and that "'PINE-SOL' in the said phrase shall never be displayed with 'PINE' above 'SOL', and 'PINE-SOL' must always appear on a single line." (Paragraph 2(e)(iv)).

Further, at Paragraph 2(e)(xii), the Agreement provided that "no matter may appear on the said disinfectant product or in advertising or promotional material there for which states that the said disinfectant product is generally better than any named or displayed disinfectant product on which Cyanamid uses the trademark PINE-SOL." (Paragraph 2(e)(xii)). However, this provision did permit Cyanamid to "state in such materials that said disinfectant products are better than 'PINE-SOL' for a particular purpose, surface or area." (Paragraph 2(e)(xii)).

The 1987 Agreement explicitly retained the requirement that the PINE-SOL product not be offered in more than one form, scent or formula in a single geographic area at a given time. (Paragraph 4(e)). The Agreement acknowledged Sterling's right to use LYSOL as a mark "in connection with cleaning, disinfecting, deodorizing, laundering and personal care products for home or institutional use, and services related thereto." **[**9]** (Paragraph 7(a)(i)). In addition, the Agreement permitted Sterling to use the name or the mark, "PINE ACTION," as well as to use certain "PINE" designations including "PINE CLEANER," "PINE DISINFECTANT," "PINE SCENT," "PINE FRAGRANCE," "PINE ODOR," "PINE FORMULA," and "PINE FRESH."

Pine-Sol became the number one liquid all-purpose household cleaner in the United States. In August 1990, Clorox purchased the PINE-SOL trademark and products from Cyanamid. Clorox maintains that today, the PINE-SOL trademark possesses the highest recognition factor of all trademarks in the pine cleaner category. (Pl. 3(g) Statement).

On June 4, 1991, Sterling filed suit in New Jersey Superior Court alleging that a Clorox advertising campaign breached the settlement agreement by emphasizing Pine-Sol's disinfectant property. Clorox filed counterclaims based on federal and state antitrust laws. On August 15, 1991, Judge Kevin M. O'Halloran issued a preliminary injunction restraining Clorox from using the disputed advertising and tentatively rejected Clorox's antitrust counterclaims. In his decision, Judge O'Halloran noted: "It is unlikely that **[*988]** the defendant will be able to prove that an agreement which merely **[**10]** provides for emphasis in advertising could be a violation of any antitrust laws. There is no price fixing or division of markets or the like." *(See* O'Halloran, Tr. at 10). On January 28, 1992, Clorox filed this antitrust action and simultaneously moved in the New Jersey court for a stay of the state proceeding. On April 23, 1992, the New Jersey court granted the stay.

No discovery has taken place in this action and very limited discovery took place in the state action before the stay. Nevertheless, Sterling contends that the matter is ripe for summary judgment.

DISCUSSION

Standard For Summary Judgment

Fed. R. Civ. P. 56(c) ***HN1***[] provides for the granting of summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. *Rule 56(c)* mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden **[**11]** of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Movants may discharge their burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Id. at 326*. The evidence and all factual inferences, however, must be viewed in the light most favorable to the nonmovant. *Beacon Enterprises Inc. v. Menzies, 715 F.2d 757, 762 (2d Cir. 1983)*.

Although antitrust cases often present complex issues of fact that make summary disposition difficult to obtain, summary judgment "remains a vital procedural tool to avoid wasteful trials and may be particularly important in antitrust litigation to prevent lengthy and drawn-out litigation that has a chilling effect on competitive market forces." *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 541 (2d Cir. 1993)* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 593-94, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986))*. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp, 475 U.S. 574, 586-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, **[**12]** the Supreme Court advised:

> The non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial' . . . if the factual context renders respondents' claim implausible-- if the claim is one that simply makes no economic sense-- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary . . . . ***Antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Id.

Restraint of Trade

Clorox contends that the Agreement restrains trade in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*, as well as the parallel provisions of New York's Donnelly Act, N.Y. Gen'l. Bus. Laws § 340 *et. seq.* (McKinney 1988). [3] ***HN2***[] *Section 1* of the Sherman Act provides: "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 . . . ." *15 U.S.C. § 1 **[**13]** (Supp.1992)*. Despite the plain language of *Section 1*, only unreasonable restraints of trade violate the Act. *Standard Oil Co. v. United States, 221 U.S. 1, 60, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*.

HN3[] Courts find certain restraints of trade illegal per se, while subjecting other restraints **[*989]** to an elaborate inquiry known as the "rule of reason." Per se illegal restraints are "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." *Northern Pacific Railway v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. **[**14]**

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[3] No separate analysis is required under the Donnelly Act because this Act is "construed in light of federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result." *Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 520 N.E.2d 535, 538, 525 N.Y.S.2d 816 (N.Y. 1988)*.

Examples of per se violations include horizontal and vertical price-fixing, division of a market into territories, certain tying arrangements, and certain group boycotts involving concerted refusals to deal with a competitor.

At least for the purposes of this motion, the 1987 Agreement is not per se illegal. A product of arm's length negotiations over a period of years, the Agreement limits the uses of the PINE-SOL mark in an apparent effort to insure co-existence between the senior and junior marks. ***HN4***[] When a restraint is not "plainly anticompetitive," *National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*, a factfinder must determine "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*. *See also Professional Engineers, 435 U.S. at 691*. This "rule of reason" approach requires consideration of the "facts peculiar to the business to which the restraint is applied; its condition before and **[**15]** after the restraint was imposed; the nature of the restraint and its effect, actual or probable," as well as the "history of the restraint" and "the purpose or end sought to be attained." *Chicago Bd. of Trade,* 231 U.S. at 238. *See also Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*; *United States v. Topco Assoc., Inc, 405 U.S. 596, 607, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*.

However, ***HN5***[] the "rule of reason" does not require a court to "extend the right to trial to 'anyone who files a valid cause of action . . . notwithstanding the absence of any significant probative evidence tending to support the complaint.'" *Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 574 (3d Cir. 1986)* (quoting *First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968))*. Rather, to survive summary judgment, a plaintiff must raise a genuine issue of fact concerning the anticompetitive effect of the challenged restraint. As the Second Circuit recently advised, "Under this [rule of reason] test plaintiff bears the initial burden of showing that the challenged **[**16]** action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." *Capital Imaging Assoc., 996 F.2d at 543*. This rule reflects the principle that antitrust laws exist for "the protection of competition, not competitors." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

Clorox contends that the Agreement unreasonably restrains trade by restricting Clorox's marketing of new products as well as its promotion of the existing PINE-SOL products. Clorox argues that, because many consumers base buying decisions on products' disinfectant properties, Clorox's inability to focus its advertising efforts on Pine-Sol's disinfectant qualities impedes Pine-Sol's ability to compete meaningfully with Lysol.

Although the Agreement only restricts Clorox's use of the PINE-SOL trademark, Clorox urges that, given existing market realities, the Agreement inhibits competition against Lysol in the cleaner-disinfectant market and its relevant submarkets. These submarkets, Clorox urges, include the pure disinfectant market, the spray disinfectant **[**17]** market, the pine cleaner market, and the bathroom cleaner market. According to Clorox, the importance of using a famous brand name to enter the cleaner-disinfectant market and submarkets "has become even more pronounced" since the 1980's (Savage Aff. at 10), and "successful brand extension requires not just a well known trademark, but extension of it to use on products that is **[*990]** consistent and complementary with the existing consumer associations with the well known trademark." (Pl. 3(g); Savage Aff. at 12).

The Group Marketing Manager of Clorox's subsidiary, the Household Products Company, maintains that "successful market entries in household cleaning and disinfecting products without the use of a famous trademark have been rare in the past five years" and that companies recognize that a product that lacks a name already familiar to consumers possesses a low likelihood of success. (Pl.3(g); Savage Aff. at 12). Clorox's manager describes Clorox's own experience with the marketing of certain products and also cites academic and business literature describing the importance of "megabrands" and brand extension. *(See* Pl. Exh. 1-3). According to Clorox, the PINE-SOL mark appears "uniquely **[**18]** suited to enter various new household markets, including the disinfectant spray and bathroom cleaner categories." (Pl. Rep. Mem. at 16; Savage Aff. at 20). Clorox explains that the CLOROX and FORMULA 409 products could not be extended to a disinfectant spray. The company maintains that CLOROX "carries too much association with bleach" and would "also not be appropriate for a product that had a pine scent, because it would only confuse people." (Pl. 3(g) Statement). Furthermore, according to Clorox, FORMULA 409 would not be an effective brand for extension because this product "is a spray cleaner with no disinfectant properties and less consumer association with disinfectancy." (Pl. 3(g) Statement).

Clorox argues that no legitimate trademark purposes justify the Agreement's anticompetitive effects. According to Clorox, no likelihood of confusion exists between the LYSOL and PINE-SOL marks. [4] Further, Clorox emphasizes that Sterling's use of the LYSOL mark on products that directly compete with Clorox's PINE-SOL product-- such as LYSOL PINE ACTION cleaner-disinfectant-- reveals that Sterling "is indifferent to any likelihood of confusion between the LYSOL and PINE-SOL trademarks that **[**19]** might exist, or, more likely, knows that there is no such problem." (Pl. Rep. Mem. at 19). Thus, according to Clorox, the Agreement, rather than effectuating reasonable protection of a trademark, impermissibly protects "certain LYSOL product niches from competition." (Pl. Mem. at 3).

According to Sterling, Clorox's *Section 1* claims fail as a matter of law because Clorox cannot demonstrate that the Agreement results in any anticompetitive effect. Although Clorox has had no discovery, Sterling maintains that discovery is unnecessary because Clorox's claims "make no economic sense." (Def. Rep. Br. at 25). Emphasizing that the Agreement merely limits one competitor's use of one trademark, Sterling proclaims that Clorox's claims **[**20]** require "the Court to accept two fundamentally absurd assumptions regarding the market in this case: that . . . the only company capable of competing with Sterling is Clorox, and the only trademark capable of competing with LYSOL is Pine-Sol." (Def. Rep. at 20).

The argument is overstated. While Clorox must show that the Agreement substantially and adversely affects competition and does not merely injure Clorox's own ability to compete with Lysol, Clorox need not show that the Agreement precludes competition entirely. Indeed, Sterling's position ignores the apparent logic of Clorox's contentions. Clorox asserts that only national brands with superior name recognition and the appropriate connotations for brand extension can compete as viable players in today's household cleaner-disinfectant market and submarkets. (*See* Savage Aff; Pl. Exh. 1-3). Accepting this theory, at least for the purpose of this motion, common sense indicates that the pool of potential competitors and famous names is limited, and that an agreement that restricts even one competitor from using a famous mark could possibly implicate competitive conditions in the market. ***HN6***[] "Convergence of injury to a market competitor **[**21]** and injury to competition is possible when the relevant market is both narrow and **[*991]** discrete and the market participants are few." *Les Shockley Racing v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989)*. *See also* *Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir. 1987)*.

Sterling, however, maintains that "there are numerous competitors in the household products market with numerous valuable trademarks." (Rep. Br. at 25). In a Sterling affidavit, the President of the Household Product Division asserts:

> In addition to Clorox and [Sterling], there are other major companies, including Proctor & Gamble, Colgate and Dow, as well as lesser-known companies, now marketing products in the United States with cleaning or cleaning and disinfecting capabilities. These major companies market products with well known trademarks such as COMET, MR. CLEAN, TOP JOB, SPIC & SPAN, and FANTASTIC. The market is extremely competitive, and is characterized by frequent new product entries accompanied by heavy advertising and promotional campaigns.

(Healy Aff. at 3). Sterling's identification of three "major companies," in addition to Clorox **[**22]** and Sterling, does not refute the possibility that a few leading competitors dominate the market. Further, Sterling's focus on the "household products market" ignores Clorox's contentions regarding the existence of relevant submarkets, including, for example, the disinfectant submarket in which it is generally acknowledged that Sterling enjoys a 90% market share. Although Sterling professes its willingness to accept "as true Clorox's definition of the relevant market" (Def. Rep. at 23, n.9), it focuses instead on competitors in the broader "household products market" and asserts that "*the market* is extremely competitive."

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[4] In support of this assertion, Clorox cites a recent consumer survey commissioned by Clorox which concluded that "essentially no one in the applicable consuming public currently sees Pine-Sol and LYSOL as coming from a common source or origin." *(See* Rappeport Aff. Opp. Summ. J.; Pl. Exh. B).

Indeed, whatever the precise contours of the relevant market, any determination on the issue of anticompetitive effects is premature. Although Clorox's theory may ultimately fail, Clorox's claims cannot be dismissed as "economic nonsense." (Def. Rep. at 25). Rather, Clorox must be afforded an opportunity to seek the discovery that may substantiate its allegations. Sterling complains that "what Clorox really wants is to hinder LYSOL by obtaining extensive, burdensome discovery and prolonging this litigation." (Def. Letter, August 31, 1993). Given the parties' **[**23]** continuing battles for position in the markets in which they compete and the courtrooms in which they have appeared, Sterling's concern is understandable. However, plaintiff presents viable claims that cannot be summarily dismissed and, absent yet another agreement, dispositive action must, at least, await discovery. Accordingly, the supervising magistrate will insure that discovery proceeds efficiently, particularly on those issues that may invite dispositive action.

At this time, the Court must also reject Sterling's assertion that, as a matter of law, the Agreement represents a valid trademark agreement rather than an unreasonable restraint of trade. In general, ***HN7***[] the protection of trademark rights does not violate antitrust laws. "Used as a means of identifying the trademark owner's products, a trademark 'makes effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage.'" *Anti-Monopoly, Inc. v. General Mills Fun Group, 611 F.2d 296, 301 (9th Cir. 1979)* (quoting *Smith v. Chanel, Inc., 402 F.2d 562, 566 (9th Cir. 1968))*. **[**24]** However, since trademark laws only protect the trademark's "source-denoting function," a "trademark is misused if it serves to limit competition in the manufacture and sales of a product." *611 F.2d at 301*. Misusing a trademark for anticompetitive purposes can violate the antitrust laws. *Timken Roller Bearing Co. v. U.S., 341 U.S. 593, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)*. *See also* *United States v. Bayer Co., 135 F. Supp. 65, 70-71 (S.D.N.Y. 1955)* (trademark provisions "went far beyond any protection required for the trademark").

Sterling emphasizes that trademark litigation often results in settlement agreements which prohibit junior users from using trademarks absolutely, or in certain ways or on certain goods. According to Sterling, the Agreement at issue here, like thousands of other trademark settlement agreements, simply delineates the parties' respective trademark **[*992]** rights and limits the future likelihood of consumer confusion concerning the source of the products on which the marks appear. Relying on *California Packing Corp. v. Sun-Maid Raisin Growers of California, 165 F. Supp. 245 (S.D.Cal. 1958)* *aff'd,* *273 F.2d 282 (9th Cir. 1959)*, **[**25]** which upheld an agreement confining the use of the SUN-MAID trademark to raisins and raisin products against an anti-trust challenge, Sterling argues that restrictions on one competitor's use of one trademark "have long been held not to constitute antitrust violations, but rather to be permissible in the trademark context." (Def. Rep. Br. at 15). *California Packing Corp.,* however, is not dispositive here. While the court in that case emphasized that "Sun-Maid . . . has been free, all these years, to can anything,--vegetables or fruits-- and market them under any name so long as that name is not Sun-Maid," the court's discussion provides no information regarding the market conditions at the time of the challenge and whether these conditions limited Sun-Maid's effective ability to enter the market under another name. Because ***HN8***[] antitrust considerations must be viewed in light of "actual market realities," *Eastman Kodak Co. v. Image Technical Serv., Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072 (U.S. 1992)*, *California Packing Corp.* does not preclude the possibility that a trademark agreement that limits one competitor's use of one trademark could, in some **[**26]** instances, violate antitrust laws.

Sterling correctly notes that the Court should show some deference to the agreements that embody the parties' arm's length resolution of their differences over the competing marks. Agreements negotiated by experienced business people should enjoy some level of deference from the Court. However, the Court cannot be expected to ignore the possibility that the Agreement unreasonably restrains competition under the guise of protecting the LYSOL mark. Here, Clorox contends that the Agreement's restrictions on the use of the PINE-SOL mark serve no valid trademark purpose, but rather exist in order to foreclose competition with the LYSOL mark. On their face, several of the Agreement's restrictions do appear to go beyond that which is necessary to protect LYSOL's senior mark. Certainly if the evidence were to show that the current strength of the once inferior PINE-SOL mark removes or significantly reduces the risk of confusion, it is not inconceivable that the parties' considerable efforts in negotiating the very detailed settlement agreements were directed toward other objectives. It may be that Sterling's recognition of the acquired strength of Pine-Sol **[**27]** and the resulting reduction in the likelihood of confusion drove its willingness to give ground to Pine-Sol in the agreements; it is just as plausible that Sterling's objective may have at some point become fired by the objective of protecting certain product or market niches from Clorox's advance. The precise delineation of the parameters within which Clorox is permitted to deploy the PINE-SOL mark may indeed suggest that trademark protection became a secondary consideration at some point. Accordingly, without discovery on the anticompetitive effect of the Agreement or the intent behind the various provisions, the Court cannot find, as a matter of law, that the Agreement simply promotes valid trademark or other legitimate business purposes and does not unreasonably restrain trade.

Monopolization

Clorox also asserts a monopolization claim and an attempted monopolization claim pursuant to Section 2 of the Sherman Act. Sterling has moved for summary judgment on these claims as well. According to Clorox, Sterling possesses a monopoly in the spray disinfectant market and the Agreement enables Sterling to retain this monopoly. (Savage Aff. at 22). The Agreement's restrictions on advertising, **[**28]** Clorox alleges, reinforce Sterling's monopoly by maintaining an artificial separation between the cleaning and disinfectant categories. Without these restrictions, Clorox insists, the PINE-SOL product could and would compete as a "pure disinfectant." (Savage Aff. at 36-38). Clorox also claims that Sterling's recent attempts to enforce expansive interpretations of the Agreement threaten to exacerbate the monopolistic effects of the Agreement.

[*993] ***HN9***[] To establish the offense of actual monopoly under Section 2 of the Sherman Act, Clorox must show "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 63, 16 L. Ed. 2d 369, 86 S. Ct. 1301 (1966)*. As for the first element, Clorox contends that the relevant market is the market for household cleaner and disinfectant products, and, significantly, that within that market, two relevant submarkets-- spray and liquid pure disinfectants-- exist. Clorox maintains that Sterling possesses monopoly power in each of those submarkets, **[**29]** controlling over 90% of the spray disinfectant market and at least 90% of the pure liquid disinfectant market. (Savage Aff. at 22, 36). Although Sterling suggests that pure disinfectants may not be an appropriate market, (Def. Br. at 38, n.10), Sterling does not challenge Clorox's monopoly claims on this ground for the purposes of this motion. Sterling also does not challenge Clorox's estimation of Sterling's market power or claim that this market share could not, as a matter of law, constitute a monopoly.

The second element requires Clorox to prove that Sterling used or attempted to use monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *United States v. Griffith, 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*. This element requires proof of exclusionary or anticompetitive intent as well as effect. *U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1358-60 (2d Cir. 1992)*. Clorox maintains that the purpose of the Agreement is "to maintain [LYSOL's] monopoly in the spray and pure disinfectants submarkets by prohibiting entry of a major competitor." (Pl. Br. at 67). Clearly, Clorox **[**30]** requires discovery to attempt to seek to prove this contention. However, once again, Sterling counters that these monopolization claims fail in any event because Clorox cannot establish an anticompetitive injury. As previously discussed, resolution of the Agreement's anticompetitive effects will await discovery. Moreover, although Sterling boasts that Lysol's success is due to superior product or business acumen and not because of the Agreement's restrictions on the PINE-SOL mark, this argument, in addition to raising an issue of material fact, begs the question of the anticompetitive intent and effect of the Agreement.

Sterling's assertion that the *Noerr-Pennington* doctrine bars Clorox from relying on the state litigation to establish exclusionary conduct need not concern the Court at this point because Clorox's claims of exclusionary conduct do not rely solely on the initiation of litigation. Rather, Clorox also asserts that the Agreement excludes competition by "preventing PINE-SOL products from entering the spray disinfectant submarket, creating and maintaining an artificial separation between household cleaners and disinfectants, and, more generally, placing complex restrictions **[**31]** on the use, marketing, and promotion of the PINE-SOL mark." (Pl. Br. at 69).

However, in the interest of clarifying issues for trial, one aspect of Clorox's claims with respect to the state court litigation warrants attention. Clorox alleges that the *Noerr-Pennington* doctrine does not apply because the state court litigation initiated by Sterling to enforce the Agreement constitutes a "mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*. Clorox expounds, "If Sterling knew that there was no likelihood of confusion between the LYSOL and PINE-SOL marks . . . then a reasonable jury could conclude that Sterling knew that there was no legitimate ancillary purpose to an anticompetitive agreement and therefore that the New Jersey action was sham litigation." (Pl. Br. at 71). Clorox's emphasis on the existing likelihood of confusion between the PINE-SOL and LYSOL marks is misguided. Even if true, the mere fact that confusion does not now exist between the LYSOL and PINE-SOL trademarks means little. **[**32]** If no confusion exists between the two marks because the Agreement has been effective in preventing such confusion, the lack of confusion neither **[*994]** means that the Agreement serves no valid trademark purposes nor renders the state court litigation a sham. The current likelihood of confusion between the two marks may be relevant, but is by no means dispositive, of the question of whether a "legitimate ancillary purpose" exists to justify the Agreement's purported anticompetitive effects.

Claim Preclusion

Sterling argues that *res judicata* bars Clorox's claims. According to Sterling, Clorox's predecessor, Cyanamid, sought termination of the 1967 Agreement in two litigations in 1983 and 1986 and did not argue that the 1967 Agreement violated antitrust principles. Sterling maintains that since that litigation ended by stipulations of dismissal with prejudice, Clorox is now barred from raising antitrust claims that could have been raised in those litigations. The Court rejects Sterling's argument. The settlement of the prior litigations did not perpetually immunize Sterling from antitrust scrutiny. Clorox maintains that its claims are based on changed circumstances. Clorox cites the **[**33]** anticompetitive effects of the present Agreement in the current market, Sterling's efforts to enforce expansive interpretations of the Agreement, and the disappearance of any likelihood of potential for confusion between the two marks. (Pl. Br. at 74). Further Clorox broadly opines that the 1987 amendments to the Agreement "altered virtually every operative paragraph of the prior agreement, creating new anticompetitive effects and giving rise to new antitrust violations." (Pl. Br. at 84). Whether these antitrust claims are of recent vintage and whether the claims could have, or should have, been raised on an earlier occasion, critical factual questions must be resolved before any preclusion may be seriously considered. *See Lawlor v. Nat'l Serv. Corp., 349 U.S. 322, 99 L. Ed. 1122, 75 S. Ct. 865 (1955)*.

CONCLUSION

For the foregoing reasons, the Court denies Sterling's motion for summary judgment. The Court refers the parties to the assigned magistrate for a discovery conference pursuant to *Rule 16 of the Federal Rules of Civil Procedure*.

SO ORDERED.

Dated: Brooklyn, New York

November 3, 1993

RAYMOND J. DEARIE

[34]** United States District Court

Denny's Marina v. Renfro Prods.

United States Court of Appeals for the Seventh Circuit

September 9, 1993, Argued ; November 4, 1993, Decided

Nos. 93-1168 and 93-1302

Reporter

8 F.3d 1217 *; 1993 U.S. App. LEXIS 28799 **; 1993-2 Trade Cas. (CCH) P70,402

DENNY'S MARINA, INCORPORATED, Plaintiff-Appellant, v. RENFRO PRODUCTIONS, INCORPORATED; INDIANAPOLIS BOAT, SPORT AND TRAVEL SHOW, INCORPORATED; MAXINE J. RENFRO, et al., Defendants-Appellees.

Subsequent History: DENIED.

Prior History: **[**1]** Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 91 C 1333. Larry J. McKinney, Judge.

Disposition: Reversed and Remanded

Core Terms

boat, Dealer, conspiracy, horizontal, summary judgment, per se rule, price-fixing, competitors, marine, unreasonable restraint, district court, Fairgrounds, prices

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment will be denied if a reasonable jury could return a verdict for the non-movant.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Sherman Act, Claims**

A successful claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

There are two standards for evaluating whether an alleged restraint of trade is unreasonable: the rule of reason and the per se rule. The nature of the restraint determines which rule will be applied.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

International Trade Law > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **International Aspects, Commerce With Foreign Nations**

Price-fixing agreements need not include explicit agreement on prices to be charged or that one party has the right to be consulted about the other's prices. Under the Sherman Act, *15 U.S.C.S. § 1*, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. Concerted action by dealers to protect themselves from price competition by discounters constitutes horizontal price-fixing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Horizontal price-fixing is illegal per se without requiring a showing of actual or likely impact on a market. This is because joint action by competitors to suppress price-cutting has the requisite substantial potential for impact on competition to warrant per se treatment. The pernicious effects are conclusively presumed.

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Judges: Before CUMMINGS, COFFEY and ROVNER, Circuit Judges.

Opinion by: CUMMINGS

Opinion

[*1219] CUMMINGS, *Circuit Judge.*

This is an appeal from summary judgment granted in favor of the defendants below: The "Renfro Defendants" (Renfro Productions, Inc.; Indianapolis Boat, Sport, and Travel Show, Inc.; Maxine J. Renfro; and Kevin Renfro), "CIMDA" (the Central Indiana Marine Dealers Association), and the "Dealer Defendants" (certain members of CIMDA), in an action brought under the Sherman Antitrust Act, *15 U.S.C. § 1* and the Clayton Act, *15 U.S.C. §§ 15(a)*, *26*. The Court has jurisdiction over the appeal pursuant to *28 U.S.C. § 1291*.

In December 1991 Denny's Marina, Inc. ("Denny's"), a marine dealer in Peru, Indiana, filed this suit, alleging that the defendants had excluded Denny's from two Indianapolis boat shows. (See note 3 *infra.)* On defendants' motions for summary judgment the district court held that plaintiff could not invoke the **[**4]** *per se* rule of illegality under *Section 1* of the Sherman Act even if it could demonstrate a horizontal conspiracy to exclude it from the boat shows because it regularly undersold its competitors. Before Denny's could invoke the *per se* presumption of an unreasonable restraint of trade, the court held, it must "make a sufficient showing of a potential market-wide impact" resulting from the defendants' actions. Because Denny's did not make such a showing, the court granted summary judgment in favor of the defendants. [1] We hold that this was error and therefore reverse and remand for trial.

[5] FACTS**

Because summary judgment was granted to the defendants, the facts alleged by Denny's and any inferences therefrom must be construed in its favor. ***HN1***[] Summary judgment will be denied if a reasonable jury could return a verdict for the plaintiff. *Valenti v. Qualex, Inc., 970 F.2d 363, 365 (7th Cir. 1992)*.

Denny's is a full-service marine dealer located near Peru, Indiana. It sells fishing boats, motors, trailers and marine accessories in the central Indiana market. [2] The Dealer Defendants are marine dealers in the same market area who compete with Denny's to sell boats to Indiana consumers. CIMDA is a trade association of marine dealers in that area. The Renfro Defendants are producers of two boat shows held annually at the Indiana State Fairgrounds (the "Fairgrounds Shows"). [3] The February fairgrounds show (the "Spring Show") originated over 30 years ago. It is one of the top three boat shows in the United States, attracting between 160,000 and 191,000 consumers annually. The **[*1220]** October show (the "Fall Show") is smaller and began in 1987. Denny's alleges that the defendants conspired to exclude it from participating in these shows because its policy **[**6]** was to "meet or beat" its competitors' prices at the shows.

Denny's participated in the Fall Show in 1988, 1989, and 1990; it participated in the Spring Show in 1989 and 1990. At all of these shows Denny's **[**7]** was very successful, apparently because it encouraged its customers to shop the other dealers and then come to Denny's for a lower price. During and after the 1989 Spring Show some of the Dealer Defendants began to complain to the Renfro Defendants about Denny's sales methods. After the 1990 Spring Show these Dealer Defendants apparently spent a good part of one CIMDA meeting "venting their . . . frustration" (App. at 15) about Denny's. The complaints to the Renfro Defendants also escalated. As a result, the Renfro Defendants informed Denny's that after the 1990 Fall Show (in which Denny's was contractually entitled to participate) it could no longer participate in the Fairgrounds Shows. This litigation ensued. Denny's seeks compensatory damages to be assessed by a jury, as well as injunctive relief.

Discussion

HN2[] A successful claim under *Section 1* of the Sherman Act requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1158 (5th Cir. 1992)*, certiorari **[**8]** denied *sub nom. Dillard v. Security Pacific Corp., 122 L. Ed. 2d 355, 113 S. Ct. 1046*; *Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 n.1 (4th Cir. 1980)*; *Ernest W. Hahn, Inc. v.*

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[1] The Renfro Defendants had filed a state law counterclaim against Denny's over which the district court had supplemental jurisdiction. *28 U.S.C. § 1367*. Having dismissed all of the federal claims with prejudice, the district court declined to retain jurisdiction over the state law claims, dismissing them without prejudice. Plaintiff agrees that the counterclaim should be reinstated if the antitrust claim is remanded. Reply Brief at 37.

[2] The central Indiana market is defined by the parties as extending from Peru and Wabash on the north to Greenwood and Columbus on the south, and from Muncie and Newcastle on the east to Lafayette and Crawfordsville on the west. This geographic market is said to comprise the area served by Indianapolis news and advertising media. The product market concerns the retail sale of boats and marine accessories to consumers, and the promotion of such sales at boat and recreation shows. In 1989 the total sales of the relevant products in central Indiana was $ 89 million. R. 114 at 6.

[3] The original defendants included International Shows, Inc. and its president Charles Worpell. They also produce an annual boat show in Indianapolis, but Denny's settled its claims against them prior to filing its Amended Complaint below.

Codding, 615 F.2d 830, 844 (9th Cir. 1980); cf. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348*. The district court noted that defendants do not dispute the first and third elements of proof. [4] Hence the parties' only argument is whether Denny's has made a sufficient showing of the second element, unreasonable restraint of trade, to withstand defendants' motions for summary judgment.

[9]** ***HN3***[] There are two standards for evaluating whether an alleged restraint of trade is unreasonable: the rule of reason and the per se rule. See, *e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 109 L. Ed. 2d 333, 110 S. Ct. 1884*; *Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 458, 90 L. Ed. 2d 445, 106 S. Ct. 2009*. The nature of the restraint determines which rule will be applied. *Atlantic Richfield Co., 495 U.S. at 342*. Because the restraint alleged by Denny's constitutes a horizontal price-fixing conspiracy, it is *per se* an unreasonable restraint of trade. See, *e.g., Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348, 73 L. Ed. 2d 48, 102 S. Ct. 2466*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811*; cf. *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423-424, 107 L. Ed. 2d 851, 110 S. Ct. 768*.

The conspiracy in this case was horizontal because it was "the product of a horizontal agreement." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730 n.4, 99 L. Ed. 2d 808, 108 S. Ct. 1515*; accord *United States v. General Motors Corp., 384 U.S. 127, 140, 16 L. Ed. 2d 415, 86 S. Ct. 1321* **[**10]** *passim.* It consisted of Denny's competitors and their association. That the conspiracy was joined by the operators of the Fairgrounds boat shows does not transform it into a vertical agreement. See, *e.g., Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 767-768, 104* ***[*1221]*** *S. Ct. 1464, 1472-1473, 79 L. Ed. 2d 775*; *General Motors, 384 U.S. at 140*; *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, 814 F.2d 358, 369 (7th Cir. 1987)*; *Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 743-744 (7th Cir. 1982)*.

Likewise, the conspiracy was to fix prices. ***HN4***[] Price-fixing agreements need not include "explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices." *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 48, 112 L. Ed. 2d 349, 111 S. Ct. 401*; accord *United States v. Capitol Service, Inc., 756 F.2d 502, 506 (7th Cir. 1985)*, certiorari denied *sub nom. United Artists Communications, Inc. v. United States, 474 U.S. 945, 88 L. Ed. 2d 288, 106 S. Ct. 311*; *Premier Electrical, 814 F.2d at 368*. **[**11]** "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se." Socony-Vacuum Oil, 310 U.S. at 223*. Concerted action by dealers to protect themselves from price competition by discounters constitutes horizontal price-fixing. *General Motors, 384 U.S. at 147*; *Valley Liquors, 678 F.2d at 743-744*. Hence the actions of the Dealer Defendants and CIMDA, joined by the Renfro Defendants, to prevent Denny's from participating in the Boat Shows constitutes a horizontal price-fixing conspiracy notwithstanding the apparent lack of an explicit agreement to set prices. [5]

[12]** So far, the position of this Court is similar to that of the court below. Nevertheless, having essentially found that plaintiff had adduced sufficient evidence of a horizontal price-fixing conspiracy to withstand a motion for summary judgment, the court below refused to apply the *per se* rule that would allow it to conclude that there had been an unreasonable restraint of trade in the relevant market. Instead, before it would apply the per se rule the court required plaintiff to demonstrate a substantial potential for impact on competition in the central Indiana market as a whole. [6] **[**13]** Such an exception to the *per se* rule against price-fixing is unwarranted by cited precedent

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[4] The district court assumed, for the purposes of ruling on the defendants' motions for summary judgment, that "(1) the Dealer Defendants and CIMDA conspired to get Denny's out of the Boat Shows because it was a pricecutter; (2) the Renfro Defendants and/or International [International Shows, Inc., another producer of boat shows] joined the conspiracy, giving it the power to achieve its goals, and Denny's was kicked out; (3) with Denny's gone, the defendants were able to (and did) charge higher prices at the Boat Shows than they could have otherwise. . . ." App. at 24.

[5] The Renfro Defendants argue that their conduct was not part of a horizontal price-fixing conspiracy but rather was unilateral action taken to ensure that their shows would not be damaged by the plaintiff free-riding on other exhibitors' elaborate displays. The argument is misplaced because there is presently enough evidence of a conspiracy to withstand defendants' motions for summary judgment. At trial, of course, all the defendants are free to argue that they did not conspire against the plaintiff.

apart from a district court case discussed below. As plaintiff explains, it "simply cannot afford the elaborate market analysis and expert witnesses required to make such a showing." [7]

As far **[**14]** back as 1940, it has been clear that ***HN5***[] horizontal price-fixing is illegal per se without requiring a showing of actual or likely impact on a market. *Socony-Vacuum Oil, 310 U.S. at 223-224*, and its progeny; Areeda & Haverkamp, ***Antitrust* [*1222] *Law*** (1986) § 1510 at 415, 418-419. This is because joint action by competitors to suppress price-cutting has the requisite "substantial potential for impact on competition," *Superior Court Trial Lawyers Ass'n, 493 U.S. at 433* (quoting *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16, 80 L. Ed. 2d 2, 104 S. Ct. 1551*) to warrant *per se* treatment. The district court would require plaintiff in this case to demonstrate a particular potential for impact on the market, when one of the purposes of the per se rule is that in cases like this such a potential is so well-established as not to require individualized showings. *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646-647, 64 L. Ed. 2d 580, 100 S. Ct. 1925*; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 7-8, 60 L. Ed. 2d 1, 99 S. Ct. 1551*. The pernicious effects are conclusively presumed. *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1108 (7th Cir. 1984)*, **[**15]** certiorari denied, *470 U.S. 1054, 84 L. Ed. 2d 821, 105 S. Ct. 1758*.

In support of its holding that Denny's needed to show that the restraint here had a substantial potential for impact on competition in the market as a whole, the district court relied on *Family Boating Center, Inc. v. Washington Area Marine Dealers Association, 1982-1 Trade Cas. (CCH) P64,592 (D.D.C. 1982)*. In that case, the court refused to apply the *per se* rule to a case in which the plaintiff's competitors had engaged in concerted action to exclude it from exhibiting at a boat show. The facts in the opinion are sketchy, but the concerted action is characterized as a group boycott, apparently because the defendants--themselves also competitors of plaintiff Family Boating Centers--were the ones who refused to sell it exhibition space. The *Family Boating Centers* court required the plaintiff to demonstrate likely anti-competitive effects before it would apply the *per se* rule to the boycott. The reasoning of that opinion is contrary to all other authority brought to our attention and therefore will not be followed here.

Since Denny's presented enough evidence for a court and jury **[**16]** to conclude that the defendants engaged in a horizontal conspiracy to suppress price competition at boat shows, their conduct is a *per se* violation of *Section 1* of the Sherman Act. *Maricopa Medical Society, 457 U.S. at 338*. The district court's grant of summary judgment to defendants is reversed and the case is remanded for trial. The dismissal of the Renfro Defendants' counterclaim is likewise reversed and remanded for further consideration.

End of Document

[6] The requirement imposed by the district court is not the same as the "quick look" described in *General Leaseways v. National Trucking Ass'n, 744 F.2d 588, 595 (7th Cir. 1984)*. When an otherwise-illegal practice is alleged to be in furtherance of a lawful, pro-competitive end, a "quick look" at the economies of the restraint might be necessary in order to decide whether to apply the *per se* rule. In this case, however, the Dealer Defendants have not alleged a lawful end to which the restraint in question could be said to be ancillary.

[7] Plaintiff actually offers this as an explanation of why it elected to pursue only a legal theory that would trigger the *per se* rule and not one that would trigger the so-called rule of reason. The rule of reason requires an inquiry into whether the challenged practices were "unreasonably restrictive of competitive conditions." *Standard Oil Co., 221 U.S. 1, 65, 55 L. Ed. 619, 31 S. Ct. 502*; accord *National Society of Professional Engineers v. United States, 435 U.S. 679, 690, 55 L. Ed. 2d 637, 98 S. Ct. 1355*. Proof of actual impact on competitive conditions can result in both parties presenting extensive economic analysis of the relevant market. It is in part to avoid such excessive costs of litigation that the *per se* rule is applied in cases where the anti-competitive effect of certain practices may be presumed.

The court below incorrectly required plaintiff to establish a "potential" for impact on competitive conditions before it would apply the *per se* rule. This would effectively require plaintiffs to make a rule of reason demonstration in order to invoke the *per se* rule!

McCormick v. Bradley

Court of Appeals of Colorado, Division B

November 4, 1993, Decided

No. 92CA1613

Reporter

870 P.2d 599 *; 1993 Colo. App. LEXIS 298 **; 1994-1 Trade Cas. (CCH) P70,532; 17 BTR 1720

Lewrence R. McCormick d/b/a McCormick Custom Homes, Plaintiff-Appellant and Cross-Appellee, v. Leo N. Bradley, Bear Creek Development Corporation, a Colorado corporation, and Bear Creek Properties Corporation, a Colorado corporation, Defendants-Appellees and Cross-Appellants.

Subsequent History: [1]** Rehearing Denied December 2, 1993. Certiorari Denied April 11, 1994 (93SC773). Released For Publication April 12, 1994.

Prior History: Appeal from the District Court of Jefferson County. Honorable Christopher J. Munch, Judge. No. 91CV1437

Disposition: JUDGMENT AFFIRMED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

Core Terms

seller, relevant market, trial court, economic power, defendants', antitrust, attorney's fees, costs, tied product, tying arrangement, products, tying product, directed verdict, comparable, custom home, residential, possesses, award of attorney's fees, antitrust violation, present evidence, buyers, fact finder, foreclosed, prevailing, purchaser

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Trials, Judgment as Matter of Law**

When considering a motion for directed verdict, the evidence and all legitimate inferences therefrom must be viewed in the light most favorable to the non-moving party.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2[] **Trials, Judgment as Matter of Law**

A directed verdict is proper if the facts are not in conflict and are susceptible of only one reasonable interpretation and if no reasonable jury could decide the issue against the moving party.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Public Enforcement, State Civil Actions**

See *Colo. Rev. Stat. § 6-4-104* (1992).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Public Enforcement, State Civil Actions**

While the broad language of *Colo. Rev. Stat. § 6-4-104* (1992) could potentially bar almost any business arrangement if literally construed, *Colo. Rev. Stat. § 6-4-104* was meant to prohibit only those combinations which unreasonably restrain, or are designed to eradicate competition in, a specific market.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Private Actions, Standing**

Any person injured by a violation of the Colorado antitrust statutes may bring a civil action and recover actual damages pursuant to *Colo. Rev. Stat. § 6-4-114* (1992).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Conditioning the sale of one product on the purchase of another tends to suspend the purchaser's independent judgment as to the merits of the tied product and insulates that product from the competitive stresses of the open market.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Antitrust & Trade Law, Sherman Act**

Because the federal antitrust statutes serve similar purposes and seek to achieve a similar goal of protecting competition, federal antitrust opinions are entitled to careful consideration when interpreting Colorado antitrust statutes.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Selling two products in combination is not illegal; it first must be established that this tying arrangement possesses a significant potential for restraint of competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN9[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement may be a per se antitrust violation, and if so, the detrimental effect on the tied market is presumed without a detailed inquiry into actual market conditions.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN10[] **Public Enforcement, State Civil Actions**

Under Colorado law, a tying arrangement is unreasonable per se only if (1) the supplier of the tying product possesses sufficient economic power with respect to that product appreciably to restrain free competition in the market for the tied product and (2) a not insubstantial amount of commerce in the tied market is affected thereby. If no per se violation is established, the practice may nonetheless be illegal under the rule of reason test if the anti-competitive impact in the market for the tied product outweighs any pro-competitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN11[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The existence of two separate products is usually determined by evidence of separate consumer demand for each product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN12[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the first part of the per se violation analysis, a plaintiff must prove that the seller possesses economic power in the relevant market. Economic power, in antitrust terms, means that a single seller possesses the ability to raise prices and restrict output for the product in the relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Economic power can be established by showing that the tying product is unavailable elsewhere or is particularly unique and desirable or, alternatively, that the defendant occupies a dominant position in the tying market. Thus, if the seller offers a unique product, the proper focus of concern is whether the uniqueness of the product gives the seller the power to raise prices or impose other burdensome terms, such as accepting a tied product, with respect to any appreciable number of buyers within the market. Factual uniqueness alone is not adequate. If the seller's unique product does not confer some significant economic marketing advantage or is not significantly differentiated from what other sellers could offer if they so chose, and therefore competitors are able to offer a comparable product at a comparable price even if they have not done so, then there is no economic power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN14[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The fact that a product is unique, in the sense of without like or equal, does not in and of itself, confer economic power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Evidence > Burdens of Proof > General Overview

Patent Law > ... > Utility Patents > Product Patents > Machines

HN15[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The burden is on the antitrust plaintiff to show that no competitor could have offered a comparable product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Business & Corporate Compliance > ... > Overview & Legal Concepts > Related Legal Issues > Copyright

HN16[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The fact that a particular customer prefers a particular tying product is not necessarily probative of significant economic power.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN17[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The impact on competition of a single forced sale of a tied product to a single customer is never sufficient to warrant a finding of market power over the tying product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN18[] **Price Fixing & Restraints of Trade, Tying Arrangements**

To have established the requisite economic power, a plaintiff needs to show that because of this power in the tying market, defendants had the ability to impose a burden upon an appreciable number of buyers in the relevant geographic area that defendants could not have affected in a competitive market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN19[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Economic power may also be established by showing that the seller occupies a dominant position in the relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN20[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The critical figure for whether a substantial amount of commerce within the tied market has been foreclosed is the percentage of sales of the tied product that was foreclosed by the tying arrangement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN21[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

To prevail in the absence of a per se violation, a plaintiff bears the burden of demonstrating that the tying arrangement unreasonably restrains competition and must necessarily explain to the fact finder what the actual effect on competition in the relevant market has been. Only if the actual anti-competitive impact of the tying arrangement on the market for the tied product outweighs any pro-competitive effects may the practice be found to be an antitrust violation.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN22[] Private Actions, Costs & Attorney Fees

Because plaintiff did not recover a judgment in excess of that offer of settlement pursuant to *Colo. Rev. Stat. § 13-17-202* (Cum. Supp. 1993), defendants were entitled to an award of actual costs.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN23[] Private Actions, Costs & Attorney Fees

The trial court has no discretion to deny an award of actual costs under *Colo. Rev. Stat. § 13-17-202* (Cum. Supp. 1993), so long as it determines that those costs are reasonable.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Costs > Costs Recoverable > Reproduction Costs

HN24[] Private Actions, Costs & Attorney Fees

Colo. Rev. Stat. § 13-16-122(1)(f) (1987) authorizes the award of fees for copies of papers necessarily obtained for use in the case.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN25[] Private Actions, Costs & Attorney Fees

A losing position does not necessarily justify an award of attorney fees under *Colo. Rev. Stat. § 13-17-102* (1987).

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN26[] Private Actions, Costs & Attorney Fees

Attorney fees may not be awarded if a plaintiff makes a good faith presentation of an arguably meritorious legal theory upon which no determinative authority in Colorado exists.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN27[] Private Actions, Costs & Attorney Fees

An award of attorney fees to the prevailing party under *Colo. Rev. Stat. § 6-4-114(2)* (1992) is discretionary with the trial court.

Counsel: Gary S. Cohen, Denver, Colorado, for Plaintiff-Appellant and Cross-Appellee.

Bradley, Campbell, Carney & Madsen, Jim M. Hansen, Matthew S. McElhiney, Golden, Colorado, for Defendants-Appellees and Cross-Appellants.

Judges: Opinion by JUDGE DAVIDSON, Hume and Briggs, JJ., concur

Opinion by: DAVIDSON

Opinion

[*601] Plaintiff, Lewrence McCormick, d/b/a McCormick Custom Homes, appeals from the judgment entered against him on a partial directed verdict and a jury verdict in favor of defendants, Leo N. Bradley, Bear Creek Development Corporation, and Bear Creek Properties Corporation. Defendants cross-appeal. We affirm and remand for consideration of defendants' claim for attorney fees pursuant to *§ 6-4-114(2), C.R.S.* (1992 Repl. Vol. 2).

Plaintiff is a builder of custom houses. In early 1991, he entered into a contract with Lonnie and Christi Herbert to build a house for them on one of the 35 lots located in the South Pointe section of the Bear Creek sub-division near Golden, **[**2]** Colorado. The Herberts had been informed by the South Pointe sales agent that the developer had an approved **[*602]** builder policy and that plaintiff was not one of the approved builders.

It was undisputed that, during the period relevant here, the real estate market was in decline, and South Pointe was having difficulties getting started as a viable residential development. Originally, the developer had expected to have all 35 South Pointe lots sold with either speculation or custom homes by 1991, but at the time of trial in 1992, although the real estate market had begun to improve, 12 lots remained unsold.

According to the testimony of the South Pointe sales agent, at the time the Herberts purchased their lot, six speculation homes had been built by South Pointe approved builders. No lots had yet been sold for custom homes; a total of 29 vacant lots were available for sale. The sales agent agreed to ask the developer if it was possible to have plaintiff approved as a builder. After the sales agent informed the Herberts that plaintiff would not be approved, the Herberts chose an approved builder to construct their home and cancelled the contract with plaintiff.

Plaintiff filed suit against **[**3]** the developer alleging antitrust violations under Colorado law and tortious interference with contractual or prospective economic relationship. After the close of defendants' evidence, the trial court granted a directed verdict in favor of defendants on the antitrust claim. The trial court then submitted the tort claim to the jury, and it returned a verdict in favor of defendants.

Defendants then moved to alter or amend the judgment seeking attorney fees and costs. Treating this motion as a motion for an award of attorney fees and a bill of costs, the trial court denied the motion for attorney fees, and approved the bill of costs, without comment.

I.

Plaintiff first argues that the trial court erred in determining that he had not presented sufficient evidence to submit the antitrust claim to the jury. We disagree.

HN1[] When considering a motion for directed verdict, the evidence and all legitimate inferences therefrom must be viewed in the light most favorable to the non-moving party. *Ferguson v. Gardner, 191 Colo. 527, 554 P.2d 293 (Colo. 1976)*; *Klein v. Sowa, 759 P.2d 857 (Colo. App. 1988)*.

HN2[] A directed verdict **[**4]** is proper if the facts are not in conflict and are susceptible of only one reasonable interpretation and if no reasonable jury could decide the issue against the moving party. *Paine, Webber Jackson & Curtis, Inc. v. Adams, 718 P.2d 508 (Colo. 1986)*; *Evans v. Webster, 832 P.2d 951 (Colo. App. 1991)*.

According to *§ 6-4-104, C.R.S.* (1992 Repl. Vol. 2): HN3[] "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is illegal." HN4[] While this broad language could potentially bar almost any business arrangement if literally construed, our supreme court has determined that the statute was meant to prohibit only those combinations which unreasonably restrain, or are designed to eradicate competition in, a specific market. *See People v. Colorado Springs Board of Realtors, Inc., 692 P.2d 1055 (Colo. 1984)*.

HN5[] Any person injured by a violation of the Colorado antitrust statutes may bring a civil action and recover actual damages pursuant to *§ 6-4-114, C.R.S.* (1992 Repl. Vol. 2).

Plaintiff alleges that the approved builder policy adopted by defendant violates **[**5]** *§ 6-4-104*. Specifically, he contends that because a potential buyer may not purchase the residential lot (the tying product) without also purchasing the goods and services provided by one of the approved builders (the tied product), the approved builder policy constitutes an illegal tying arrangement.

HN6[] Conditioning the sale of one product on the purchase of another tends to suspend the purchaser's independent judgment as to the merits of the tied product and insulates that product from the competitive stresses of the open market. *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L.Ed. 1277, 73 S. Ct. 872 (1953)*. For this reason, tying arrangements are subject to rigorous examination under most state and federal antitrust laws. *See Northern Pacific Ry. Co.* **[*603]** *v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*.

HN7[] And, because the federal antitrust statutes serve similar purposes and seek to achieve a similar goal of protecting competition, federal antitrust opinions are entitled to careful consideration when interpreting Colorado antitrust statutes. **[**6]** *People v. North Avenue Furniture & Appliance Inc., 645 P.2d 1291 (Colo. 1982)*.

As the trial court noted, HN8[] selling two products in combination is not illegal; it first must be established that this tying arrangement possesses a significant potential for restraint of competition. *See Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*; *Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407 (11th Cir. 1987)*.

HN9[] A tying arrangement may be a *per se* antitrust violation, and if so, the detrimental effect on the tied market is presumed without a detailed inquiry into actual market conditions. *International Salt Co. v. United States, 332 U.S. 392, 92 L.Ed. 20, 68 S. Ct. 12 (1947)*.

HN10[] Under Colorado law, a tying arrangement is unreasonable *per se* only if (1) the supplier of the tying product possesses sufficient economic power with respect to that product appreciably to restrain free competition in the market for the tied product and (2) a not insubstantial amount **[**7]** of commerce in the tied market is affected thereby. *People v. Colorado Springs Board of Realtors, Inc., supra.* If no *per se* violation is established, the practice may nonetheless be illegal under the "rule of reason" test if the anti-competitive impact in the market for the tied product outweighs any pro-competitive effects. *People v. Colorado Springs Board of Realtors, Inc., supra; see also Jefferson Parish Hospital District No. 2 v. Hyde, supra.*

Prior to granting defendants' motion for directed verdict on the antitrust claims, the trial court found that two separate products, South Pointe lots and the goods and services provided by one of the approved builders, were tied together. HN11[] The existence of two separate products is usually determined by evidence of separate consumer demand for each product. *See Virtual Maintenance, Inc. v. Prime Computer, Inc., 957 F.2d 1318 (6th Cir. 1992) modified on other grounds, 995 F.2d 1324 (6th Cir. 1993)*. The parties seem to be in agreement that separate consumer demand **[**8]** exists for the two products here, and we conduct our analysis accordingly.

The parties also seem to agree that the fact that the two products here are sold by two separate sellers does not preclude plaintiff's *per se* antitrust claim. We note that there is authority to suggest that when two products are sold together by two separate sellers, a *per se* analysis will pertain only if the two sellers share in the profits derived from the sale of the packaged items. *See generally* *Gonzalez v. St. Margaret's House Housing Development Fund Corp., 880 F.2d 1514 (2d Cir. 1989)* (economic interest factor discussion). However, from the evidence presented at trial it is unclear whether profits were shared by the two sellers, and this issue was neither raised nor addressed by the parties or the trial court. Thus, we will assume, as do the parties, that a *per se* analysis is not precluded here.

A.

Plaintiff first contends that he presented sufficient evidence to create a jury question as to whether defendants' approved builder policy was a *per se* antitrust violation. We disagree.

1.

HN12[] Under the first part of the *per se* violation analysis, a plaintiff **[**9]** must prove that the seller possesses economic power in the relevant market. Economic power, in antitrust terms, means that a single seller possesses the ability to raise prices and restrict output for the product in the relevant market. *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*.

HN13[] This requisite economic power can be established by showing that the tying product is unavailable elsewhere or is particularly **[*604]** unique and desirable or, alternatively, that the defendant occupies a dominant position in the tying market. *See* *Fortner Enterprises, Inc. v. United States Steel Corp., supra*; *United States v. Loew's Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*.

Thus, if the seller offers a unique product, the proper focus of concern is whether the uniqueness of the product gives the seller the power to raise prices or impose other burdensome terms, such as accepting a tied product, with respect to any appreciable number of buyers within the market. *Fortner Enterprises, Inc. v. United States Steel Corp., supra.* **[**10]**

Factual uniqueness alone is not adequate. If the seller's unique product does not confer some significant economic marketing advantage or is not significantly differentiated from what other sellers could offer if they so chose, and therefore competitors are able to offer a comparable product at a comparable price even if they have not done so, then there is no economic power. *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)*; *Virtual Maintenance, Inc. v. Prime Computer, Inc., supra*; *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705 (11th Cir. 1984)*.

Here, the Herberts agreed to use the goods and services provided by one of the approved builders only because the South Pointe lot was, in their view, uniquely suited for their needs and they could not purchase that lot unless they agreed to use an approved builder. Plaintiff's primary contention, both at trial and on appeal, is that this particular piece of land was such a unique and otherwise unavailable product that defendants, by virtue of mere possession **[**11]** of the lot, also possessed the requisite economic power.

We do agree that rarely, if ever, would a potential purchaser find that any two pieces of real property were identical. *See* *Denver Urban Renewal Authority v. Berglund-Cherne Co., 193 Colo. 562, 568 P.2d 478 (1977)*. Any particular piece of real estate is therefore, in that sense, unique and impossible of precise duplication. *Benson v. Nelson, 725 P.2d 71 (Colo. App. 1986)*; *see also* *Prosser v. Schmidt, 118 Colo. 502, 197 P.2d 318 (1948)*.

HN14[] Contrary to plaintiff's contentions, however, the fact that a product is "unique," in the sense of "without like or equal," does not in and of itself, confer economic power. *See* *Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419 (5th Cir. 1978)*. ***HN15***[] The burden is on the antitrust plaintiff to show that no competitor could have offered a comparable product. *3* *P.M., Inc. v. Basic Four Corp., 591 F. Supp. 1350 (E.D. Mich. 1984)*. *Compare* *International Salt Co. v. United States, supra* **[**12]** (the tying product, a salt dispensing machine, was unique because the seller's patent prevented others from selling comparable machines) *and* *United States v. Loew's, Inc., supra* (the copyright attached to seller's product, feature films for television, prevented others from selling comparable films) *with 3 P.M., Inc. v. Basic Four Corp., supra* (trademark and partial copyright attached to seller's product, business computer systems, did not conclusively demonstrate that others could not have produced a comparable product). ***HN16***[] Further, the fact that a particular customer prefers a particular tying product is not necessarily probative of significant economic power. *See Jefferson Parish Hospital District No. 2 v. Hyde, supra.*

Land has been recognized as a "unique" product in antitrust cases, *see Northern Pacific Ry. Co. v. United States, supra; State v. Hossan-Maxwell, Inc., 181 Conn. 655, 436 A.2d 284 (1980)*. In the majority of cases cited **[**13]** by plaintiff, however, the "uniqueness' of the land did not, *ipso facto,* establish economic power but instead was considered in conjunction with other considerations, including objective criteria of desirability, in defining what was the relevant market. *See Suburban Mobile Homes, Inc v. Amfac Communities, Inc., 101 Cal. App. 3d 532, 161 Cal. Rptr. 811 (1980)* (the highly desirable locations within commuting distance of San Francisco and the unique amenities of certain mobile home lots constituted economic power in the market for such lots); *MacManus v. A.E. Realty Partners, 146 Cal. App. 3d 275*. *194 Cal. Rptr. 567 (1983)* (the desirable **[*605]** characteristics of the defendant's homes coupled with a general scarcity of available homes supported an allegation of economic power within the residential real estate market); *Northern Pacific Ry. Co. v. United States, supra* (Northern Pacific's vast holdings of land situated in desirable locations adjacent to the railroad tracks conferred sufficient economic power in the relevant market).

[14]** Plaintiff relies upon *State v. Hossan-Maxwell, Inc., supra,* in which the Connecticut Supreme Court concluded, without discussion, that the uniqueness of residential property was sufficient evidence of market power. In that case, the court first announced that the pertinent inquiry was whether the seller had the power to force a tying arrangement upon any appreciable number of buyers within the market for the tying product, but then neglected to explain how the uniqueness of residential lots, without more, bestowed this ability upon the seller. We decline to reach the same conclusion concerning defendants' lots here without, at the minimum, evidence that defendants' lots possessed unique and desirable attributes, attractive to other buyers in addition to the Herberts, which prevented other sellers from offering a comparable product. *See 3 P.M., Inc. v. Basic Four Corp., supra,* and *compare State v. Hossan-Maxwell, Inc., supra, with Northern Pacific Ry. Co. v. United States, supra.*

Moreover, what is absent **[**15]** from the *Hossan-Maxwell* analysis is the recognition of the fundamental concept that any inquiry into the validity of a tying arrangement, even when a unique product is involved, must focus on the markets in which the products are sold. *See Jefferson Parish Hospital District No. 2 v. Hyde, supra;* cf. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L.Ed 1264, 76 S. Ct. 994 (1956)* (products need not be fungible to be considered in the relevant market; that market is composed of products which are reasonably interchangeable for the purposes for which they are offered).

This market power analysis has both a product and a geographic dimension that, once defined, provide the framework against which economic power may be measured. *Virtual Maintenance, Inc. v. Prime Computer, Inc., supra.* Accordingly, the analysis of defendant's power within the tying market necessarily required plaintiff to define precisely the market for vacant residential lots. *See People v. Colorado Springs Board of Realtors, Inc., supra.* **[**16]**

Plaintiff, however, presented no evidence establishing the relevant market. Therefore, no reasonable fact finder could conclude that the uniqueness of the custom home lot creates sufficient economic power in the relevant market for the tying product.

We reject the notion urged by plaintiff that the relevant market consists of a single lot which a single purchaser has selected. ***HN17***[] The impact on competition of a single forced sale of a tied product to a single customer is never sufficient to warrant a finding of market power over the tying product. *Jefferson Parish Hospital District No. 2 v. Hyde, supra; Ryko Manufacturing Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987)*; *W.H. Brady Co. v. Lem Products, Inc., 659 F. Supp. 1355 (N.D.Ill. 1987)*.

The facts of this case aptly illustrate the soundness of this principle; by proving merely that one purchaser found the South Pointe lot subjectively more desirable than others they had seen, plaintiff did not show that defendants had economic power within the relevant market of residential lots available to all potential buyers. **[**17]** *See United States Steel Corp. v. Fortner Enterprises, Inc., supra; Kingsport Motors, Inc. v. Chrysler Motors Corp., 644 F.2d 566 (6th Cir. 1981)*.

HN18[] To have established the requisite economic power, plaintiff needed to show that because of this power in the tying market, defendants had the ability to impose a burden, here the purchase of the tied product, upon an appreciable number of buyers in the relevant geographic area that defendants could not have affected in a competitive market. *See* II E. Kintner, *Federal* ***Antitrust Law*** 238 (1980). Taken by itself the evidence of the forced sale to the Herberts did not demonstrate that the unique characteristics of the South Pointe lots made the package offered by defendants sufficiently more advantageous than that offered by other sellers to confer **[*606]** any economic power within the relevant market. *See Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985)*.

2.

As noted above, ***HN19***[] economic power may also be established by showing that the seller occupies a dominant position in the relevant market. Plaintiff failed **[**18]** to demonstrate that defendants controlled even a significant portion of the relevant market here.

Assuming that plaintiff meant to define the relevant market as including the Denver metropolitan area, defendants presented evidence that, at the time the Herberts were looking for a custom home lot on which to build, at least 1419 comparable lots, in terms of desirability of location, price range, and other considerations, were available. Thus, it was undisputed that the South Pointe lots represent less than 3% of the total number available in the area.

This was the only evidence presented tending to define the relevant market. By failing to present evidence of his own to define the relevant market, plaintiff lost any opportunity to show that defendants' conception of the relevant market was incorrect.

As so defined, 3% of the available vacant custom home lots in the area does not constitute significant economic power in the market for such lots. *See United States Steel Corp. v. Fortner Enterprises, Inc., supra; United States v. E.I. du Pont de Nemours & Co., supra* (although **[**19]** each seller possesses a monopoly with respect to the seller's own individual product, the measure of market dominance must take into account similar substitute products); *Jefferson Parish Hospital District No. 2 v. Hyde, supra* (30% market share insufficient); *Virtual Maintenance, Inc. v. Prime Computer, Inc., supra* (11% market share insufficient); *Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792 (1st Cir. 1988)* (5.6% market share insufficient); *A. I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673 (6th Cir. 1986)* (2-4% market share insufficient).

We therefore agree that no reasonable fact finder could have concluded that defendant had the requisite economic power in the relevant market for the tying product.

B.

Plaintiff's proof also suffered a similar deficiency as to whether a substantial amount of commerce within the tied market had been foreclosed. ***HN20***[] The critical figure for purposes of this analysis is the percentage of sales of the tied product that was foreclosed by the tying arrangement. *Fortner Enterprises, Inc. v. United States Steel Corp., supra.* **[**20]**

However, plaintiff made no effort to define the market for the tied product -- the goods and services provided by custom home builders in the relevant geographic area. It was plaintiff's burden to establish that a not insubstantial amount of these sales were foreclosed by defendants' policy, but plaintiff presented evidence of only one out of an unknown number of total sales which was foreclosed from competition.

While we agree with plaintiff that the dollar amount of the Herbert contract is not insignificant or paltry, *see Fortner Enterprises, Inc. v. United States Steel Corp., supra,* we do not agree that this is the relevant figure for the purpose of proving a not insubstantial amount of commerce has been foreclosed. *See Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477 (D.Or. 1987)*; *Metromedia Broadcasting Corp. v. MGM/UA Entertainment Co., 611 F. Supp. 415 (C.D.Cal. 1985)*; cf. *Tic-X-Press, Inc. v. Omni Promotions Co., supra* (although the evidence presented dealt with a single purchaser, the fact that this purchaser **[**21]** was involved in a total of seven forced transactions was sufficient to show a substantial impact on the market). Therefore, we agree with the trial court that no reasonable fact finder could conclude that plaintiff had established a *per se* antitrust violation. *See People v. Colorado Springs Board of Realtors, Inc., supra.*

II.

Plaintiff next argues that, even if no *per se* antitrust violation could be established, the trial court was required to submit **[*607]** the claim to the jury for consideration of the "rule of reason" test. We disagree.

HN21[] To prevail in the absence of a *per* se violation, a plaintiff bears the burden of demonstrating that the tying arrangement unreasonably restrains competition and must necessarily explain to the fact finder what the actual effect on competition in the relevant market has been. *Jefferson Parish Hospital District No. 2 v. Hyde, supra.* Only if the actual anti-competitive impact of the tying arrangement on the market for the tied product outweighs any pro-competitive effects may the practice be found to be an antitrust violation. *People v. Colorado Springs Board of Realtors, Inc., supra.* **[**22]**

Plaintiff did not define the market for the tied product by product or by geography, *see Virtual Maintenance, Inc. v. Prime Computer, Inc., supra,* and he presented no evidence of any impact on that market. Because of this lack of definition of the relevant market, it cannot be presumed that defendants' policy had anti-competitive effects, other than plaintiff's loss of the Herbert contract which he contends would not have occurred if the market were unrestrained by defendants' policy. *See People v. Colorado Springs Board of Realtors, Inc., supra.*

Therefore, we agree with the trial court's conclusion that no reasonable fact finder could determine that the pro-competitive effects of the approved builder policy were outweighed by anti-competitive impact. Hence, the directed verdict in favor of defendants was not erroneous. *See Candell v. Western Federal Savings & Loan Ass'n, 156 Colo. 552, 400 P.2d 909 (1965)*.

III.

Plaintiff also argues that the trial court erroneously awarded defendants photocopying costs in the amount of $ 950.95. We disagree.

Plaintiff rejected defendants' **[**23]** offer of settlement pursuant to *§ 13-17-202, C.R.S.* (1993 Cum. Supp.). ***HN22***[] Because plaintiff did not recover a judgment in excess of that offer of settlement, defendants were entitled to an award of actual costs. *See Callaham v. First American Title Insurance Co., 837 P.2d 769 (Colo. App. 1992)*; *§ 13-17-202(1)(a)(II), C.R.S.* (1993 Cum. Supp.).

HN23[] The trial court has no discretion to deny an award of actual costs under this statute, so long as it determines that those costs are reasonable. *Scholz v. Metropolitan Pathologists, P.C., 851 P.2d 901 (Colo. 1993)*; *Jorgensen v. Heinz, 847 P.2d 181 (Colo. App. 1992)*.

HN24[] Moreover, contrary to plaintiff's assertion that photocopying costs may not be awarded as reasonable costs, *§ 13-16-122(1)(f) C.R.S.* (1987 Repl. Vol. 6A) authorizes the award of fees for "copies of papers necessarily obtained for use in the case." *See Cherry Creek School District #5 v. Voelker, 859 P.2d 805, 812 (Colo. 1993)* (the list of items which may be awarded as costs in *§ 13-16-122(1)* is meant to be illustrative and not exclusive); *Perkins v. Flatiron Structures Co., 849 P.2d 832*, **[**24]** (Colo. App. 1992).

Here, plaintiff does not contend that the photocopies were not necessary for use in this case or that the costs were unreasonable. Thus, we conclude that the trial court was well within its discretion to award photocopying costs.

IV.

Because of our resolution of the antitrust issues, we need not address plaintiff's remaining contention that the improper directed verdict prejudiced the jury as to his claim for tortious interference with contract.

V.

On cross-appeal, defendants argue that because plaintiff's claims were groundless, frivolous, and vexatious, they were entitled to an award of attorney fees under *§ 13-17-102, C.R.S.* (1987 Repl. Vol. 6A). Defendants also argue that they are entitled to an award of attorney fees as the prevailing party pursuant to *§ 6-4-114(2), C.R.S.* (1992 Repl. Vol. 2). We agree that a remand is necessary on the issue of attorney fees.

A.

HN25[] A losing position does not necessarily justify an award of attorney fees under *§ 13-17-102*. *See Romberg v. Slemon, 778 P.2d 315 **[*608]** (Colo. App. 1989)*; *Federal Land Bank v. Jost, 761 P.2d 270 (Colo. App. 1988)*. ***HN26***[] Attorney fees may not be awarded **[**25]** if, as here, a plaintiff makes a good faith presentation of an arguably meritorious legal theory upon which no determinative authority in Colorado exists. *See SaBell's, Inc. v. City of Golden, 832 P.2d 974 (Colo. App. 1991)*; *Pedlow v. Stamp, 819 P.2d 1110 (Colo. App. 1991)*.

We conclude that the trial court did not err by refusing to award attorney fees on this basis. We also decline to award attorney fees incurred in defending this appeal. *See Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. 1984)*.

B.

As to defendants' request for an award of attorney fees under *§ 6-4-114(2)* of the Colorado antitrust statute, an amended version came into effect on July 1, 1992, several weeks before the trial of this matter. Plaintiff requested permission to supplement his complaint before trial to include remedy provisions included in the new version of the statute. Plaintiff contended, and the trial court agreed, that the new version of the statute should be applicable to this action prospectively under *Billington v. Yust, 789 P.2d 196 (Colo. App. 1989)*. Accordingly, defendants **[**26]** then requested that the trial court award them their attorney fees incurred after the effective date of the amendments to *§ 6-4-114(2)*.

HN27[] By its terms, an award of attorney fees to the prevailing party under *§ 6-4-114(2)* is discretionary with the trial court. We recognize that unlike, for example, *§ 14-10-119, C.R.S.* (1987 Repl. Vol. 6B), there are no specific guidelines to assist the court in the exercise of its discretion. Certainly, there are many reasons why a court may choose to grant or not to grant attorney fees, such as disparity of income. Here, however, although defendants prevailed on the merits on all claims, the trial court denied defendants' request for attorney fees without comment. And, we cannot ascertain from a review of the record what factors, if any, it relied upon in exercising its discretion. Thus, we must remand the cause to the trial court to delineate the basis for its ruling concerning defendants' request for attorney fees under *§ 6-4-114(2)* as the prevailing party both in the trial court and on appeal. *Cf. Cherry Creek School District #5 v. Voelker, supra.*

VI.

Defendants also argue that the trial court erred by denying their motion for directed verdict **[**27]** on plaintiff's tortious interference with contract claim. In view of the jury verdict rendered in their favor, and the disposition of this appeal, it is not necessary to address this issue.

The cause is remanded on the issue of defendants' request for attorney fees under *§ 6-4-114(2)*, and the judgment is affirmed in all other respects.

JUDGE HUME and JUDGE BRIGGS concur.

Gabriel & Assocs. v. Invisible Fence Co.

United States District Court for the District of Maryland

November 9, 1993, Decided ; November 9, 1993, Filed

CIVIL NO. H-93-1016

Reporter

1993 U.S. Dist. LEXIS 19907 *; 93-2 Trade Cas. (CCH) P70,440

GABRIEL & ASSOCIATES, INC. and LAUR & BEV CORPORATION, Plaintiffs v. INVISIBLE FENCE COMPANY, INC., et al., Defendants

Core Terms

distributors, pet, monopolization, electronic, personal jurisdiction, conspiracy, manufacturer, motion to dismiss, plaintiffs', defense motion, contracts, network, lack of personal jurisdiction, allegations, marketing, commerce, restraint of trade, fail to state, Robinson-Patman Act, Sherman Act, competitor, contacts, amended complaint, anti trust law, Clayton Act, defendants', antitrust violation, interstate commerce, relevant market, leave to amend

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

HN1[] **In Rem & Personal Jurisdiction, Constitutional Limits**

The limits of a federal district court's personal jurisdiction are coextensive with that of the state courts of the state in which the federal district court sits. Under *Fed. R. Civ. P. 4(e)* a court must apply a two step analysis in determining whether or not it may exercise personal jurisdiction over a particular defendant. First, the court must determine whether such personal jurisdiction is statutorily authorized. Second, the court must determine whether such personal jurisdiction is permissible under the *Due Process Clause of the Fourteenth Amendment*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Torts > Procedural Matters > Commencement & Prosecution > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN2[] Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products

Md. Cts. and Jud. Proc. Code Ann., § 6-103, states in relevant part: A court may exercise personal jurisdiction over a person who directly or by an agent: Transacts any business or performs any character of work or service in the state; Contracts to supply goods, food, services, or manufactured products in the state; Causes tortious injury in the state by an act or omission in the state; Causes tortious injury in the state or outside of the state by an act or omission outside the state if he regularly does or solicits business, engages in any other persistent course of conduct in the state or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the state. This statute has been interpreted by Maryland courts as extending personal jurisdiction to the limits permissible under the Due Process Clause.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN3[] In Personam Actions, Challenges

In order for a court to assert personal jurisdiction over a defendant who is neither a domiciliary of Maryland nor served while present in Maryland, such defendant must have "minimum contacts" with Maryland such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Generally, the defendant must have taken some action "purposefully directed" towards Maryland. If a court determines that a defendant has purposeful contacts with the forum state, it must then determine whether the assertion of personal jurisdiction would conform to fair play and substantial justice. Importantly, when a court's exercise of personal jurisdiction is challenged by a defendant, the burden of alleging and proving the factual basis for the court's exercise of such jurisdiction is upon the plaintiff.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN4[] In Rem & Personal Jurisdiction, In Personam Actions

The burden is on the plaintiff to make out a prima facie case of personal jurisdiction over a defendant.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN5[] In Rem & Personal Jurisdiction, In Personam Actions

It is well established that jurisdiction over a corporation does not constitute jurisdiction over corporate officers, directors or employees who are sued as individuals.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN6[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* should be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In determining whether to dismiss a complaint, the court must view the well-pleaded material allegations in a light most favorable to the plaintiff, with the alleged facts accepted as true.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN7[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(a) calls for a short and plain statement of the claim showing that the pleader is entitled to relief, and *Fed. R. Civ. P. 10(b)* states, each claim founded on a separate transaction or occurrence shall be stated in a separate count whenever a separation facilitates the clear presentation of the matters set forth.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1* provides, in part, every contract, combination or conspiracy in restraint of trade or commerce among the several states is declared to be illegal. Mere conclusory allegations do not satisfy the requirements for pleading a violation of the antitrust laws.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN9[] **Pleadings, Rule Application & Interpretation**

The facts alleged must, if proved, show that the plaintiff is entitled to relief under the statutory provision in question.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Mere meetings between a manufacturer and its distributors do not, without more, prove the existence of an unlawful vertical conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Exclusive & Reciprocal Dealing, Exclusive Dealing

An arrangement does not violate the antitrust laws unless it creates an unreasonable restraint on interbrand competition.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN12[] Scope, Monopolization Offenses

The Sherman Act, *15 U.S.C.S. § 2* makes it unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce among the several states. The statute bars three types of conduct: monopolization, attempted monopolization, and a conspiracy to monopolize trade. To prove an antitrust violation of monopolization, a plaintiff must prove (1) the defendant's possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To prove an antitrust violation of attempted monopolization, a plaintiff must show that the would-be monopolist had a dangerous probability of success.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

To prove an antitrust violation of conspiracy to monopolize, a plaintiff must prove: (1) that a conspiracy to obtain (or maintain) a monopoly in the relevant market existed; (2) that this conspiracy to monopolize concerned goods in interstate commerce; (3) that the defendant entered into the conspiracy with the specific intention or purpose of monopolizing the relevant market; (4) that at least one of the conspirators committed an overt act to further the conspiracy; and (5) that the plaintiff was injured in its business or property as a result of the defendant's actions.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN14[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)* provides: It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where the effect of such discrimination may be substantially to lessen competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN15[] **Robinson-Patman Act, Claims**

To have standing the Robinson-Patman Act, *15 U.S.C.S. § 13*, a plaintiff must also prove that it was injured by the defendant's actions.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN16[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act, *15 U.S.C.S. § 14* provides: It shall be unlawful for any person engaged in interstate commerce, in the course of such commerce, to make a sale or contract for sale of goods for use, consumption or resale within the United States on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in the goods of a competitor or competitors of the seller, where the effect of such sale may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Antitrust & Trade Law > Clayton Act > General Overview

HN17[] Antitrust & Trade Law, Clayton Act

In order to plead a cause of action under section 3 of the Clayton Act, *15 U.S.C.S. § 14* plaintiff must allege that a contract for sale of goods between defendant and plaintiff, not defendant and others, was conditioned on a promise of not dealing in the goods of a competitor.

Civil Procedure > Attorneys > General Overview

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN18[] Civil Procedure, Attorneys

Fed. R. Civ. P. 11 provides that if a particular claim is not well grounded in fact and warranted by existing law, sanctions should be imposed.

Judges: [*1] Harvey, II

Opinion by: ALEXANDER HARVEY, II

Opinion

MEMORANDUM AND ORDER

In this civil action, plaintiffs have charged numerous defendants with violations of federal ***antitrust law*** resulting from defendants' sale and distribution of the "Sta-Put System" brand of electronic pet restraints. [1] The two plaintiffs, Gabriel & Associates, Inc. and Laur & Bev Corporation, are distributors of electronic pet restraints. The complaint named 19 defendants, including 15 corporations and 4 individuals. By its Memorandum and Order of October 13, 1993, the complaint was dismissed without prejudice as to four of the corporate defendants. [2] The 11 remaining corporate defendants include one manufacturer of electronic pet restraints and 10 distributors of that product.

[*2] Pending before the Court are motions to dismiss filed on behalf of all of the remaining defendants. The following motions have been filed:

(1) Motion of defendant Invisible Fence Company, Inc. to dismiss the complaint for failure to state a claim on which relief may be granted;

(2) Motion of individual defendants Helen Weary, Thomas Weary, William Annesley and Jeffrey Hanhausen to dismiss the complaint for lack of personal jurisdiction;

(3) Motion of defendant Clark Enterprises, Inc. to dismiss the complaint for lack of personal jurisdiction;

(4) Motion of defendants Canine Containment Distributing Company; I.F.D., Inc.; Clark Distributors, Inc.; Invisible Fence Distributor of the Midwest; Invisible Fence of the Northland; Invisible Fence of the North Pacific; Invisible Fence South and J.G.B. Distributing, Inc. to dismiss the complaint for failure to state a claim on which relief may be granted;

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[1] Electronic pet restraints emit low frequency signals which are inaudible to the human ear and which harm a pet that strays from the area "fenced in" by these signals.

[2] Two defendants were dismissed pursuant to *Rule 4(j), F.R.Civ.P.*, and two others were dismissed for lack of prosecution.

(5) Motion of defendants Invisible Fence of the North Pacific; Canine Containment Distributing Company; I.F.D., Inc.; Invisible Fence Distributor of the Midwest; Invisible Fence of the Northland; Invisible Fence South and J.T.B. Distributing Inc. to dismiss the complaint for lack **[*3]** of personal jurisdiction; and
(6) Motion of defendant Canine Fence Company, Inc. to dismiss the complaint for lack of personal jurisdiction.

Following its review of the complaint, defendants' motions and the extensive memoranda and exhibits filed in support of and in opposition to the pending motions, the Court has determined that no hearing is necessary. *See* Local Rule 105.6. For the reasons stated herein, the Court has concluded that all of the pending motions to dismiss of all defendants must be granted.

I

Background Facts

Reading the complaint in a light most favorable to the plaintiffs, the following are the pertinent facts. Invisible Fence Company ("IF"), is the manufacturer of the "Sta-Put" brand of electronic pet restraints. Plaintiffs have here sued four of IF's corporate officers individually, and numerous distributors of the product located in various parts of the United States.

Defendant IF is incorporated in Delaware and has its principal place of business in Pennsylvania. It currently markets its product through a network of independent, exclusive distributors. The distributors are guaranteed by IF to be the only "Sta-Put" distributor in their region. In **[*4]** return, each distributor agrees not to sell or market the brands made by other pet restraint manufacturers. [3] Vigorous competition exists in the field of electronic pet restraints.

Plaintiffs Gabriel & Associates, Inc. and Laur & Bev Corporation distribute pet restraints to retailers in two markets, namely in Maryland and North Carolina. Plaintiffs were once part of IF's distribution network and purchased their stocks of "Sta-Put" pet restraints directly from IF as the manufacturer. However, when IF reorganized its distribution network in 1991, plaintiffs were no longer permitted to be a part of IF's exclusive network. As a result, plaintiffs could no longer purchase products directly from IF as the manufacturer but instead had to purchase the "Sta-Put" product from distributors, which were one step further down the distribution chain.

Plaintiffs complain of their exclusion from IF's **[*5]** direct distribution network. They allege that IF has harmed their business by selling products directly to plaintiffs' customers on a consignment basis. According to plaintiffs, they cannot, because of these circumstances, profitably offer competitive prices to their customers. Plaintiffs further allege that IF and its distributors frequently failed to fill plaintiffs' orders of "Sta-Put" systems. Plaintiffs also assert that IF sought to harm their business by "junking" the plaintiffs' stock [4] and by interfering with plaintiffs' attempts to sell their business. Between 1989 and 1992, plaintiffs attempted to sell their North Carolina business, and, at least on one occasion, they had lined up a buyer. However, IF allegedly interfered with and scuttled that transaction by offering the potential buyer the exclusive territory formerly assigned to the plaintiffs.

Based on these allegations, plaintiffs contend that defendants have violated various provisions **[*6]** of federal ***antitrust law***, including provisions of the Sherman Act, of the Clayton Act, and of the Robinson-Patman Act. [5]

II

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[3] It appears that it was the violation by plaintiffs of this exclusivity agreement that led to their termination as an IF distributor.

[4] It is not clear from the complaint what is meant by "junking."

[5] The complaint also claims, in its introductory paragraph, violations by defendants of the "Fair Trade Law." However, the complaint does not address such a law beyond this initial mention of it, and the Court will not therefore consider that assertion.

Discussion

(a)

The Motions to Dismiss

For Lack of Personal Jurisdiction

HN1[] The limits of a federal district court's personal jurisdiction are coextensive with that of the state courts of the state in which the federal district court sits. *Rule 4(e), F.R.Civ.P.* A court must apply a two step analysis in determining whether or not it may exercise personal jurisdiction over a particular defendant. First, the court must determine whether such personal jurisdiction is statutorily authorized. Second, the court must determine whether such personal jurisdiction is permissible under the *Due Process Clause of the Fourteenth Amendment*. E.g., *Prince v. Illien Adoptions International, Ltd., 806 F. Supp. 1225, 1228 (D.Md. 1992)*. **[*7]**

Maryland's long-arm statute, ***HN2***[] *Md. Cts. & Jud. Proc. Code Ann. § 6-103*, states in relevant part:

> (b) In general -- A court may exercise personal jurisdiction over a person who directly or by an agent:
> (1) Transacts any business or performs any character of work or service in the State;
> (2) Contracts to supply goods, food, services, or manufactured products in the State;
> (3) Causes tortious injury in the State by an act or omission in the State;
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State.

This statute has been interpreted by Maryland courts as extending personal jurisdiction to the limits permissible under the Due Process Clause. E.g., *Geelhoed v. Jensen, 277 Md. 220, 224, 352 A.2d 818 (1976)*. ***HN3***[] In order for a court to assert personal jurisdiction over a defendant who is neither a domiciliary of Maryland nor served while present in Maryland, such defendant must **[*8]** have "minimum contacts" with Maryland such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington, 326 U.S. 310, 316, 319, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*. Generally, the defendant must have taken some action "purposefully directed" towards Maryland. *Hanson v. Denckla, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)*; *Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 109, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987)*. If a court determines that a defendant has purposeful contacts with the forum state, it must then determine whether the assertion of personal jurisdiction would conform to "fair play and substantial justice." *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*, quoting *International Shoe Co., 326 U.S. at 320*. Importantly, **[*9]** when a court's exercise of personal jurisdiction is challenged by a defendant, the burden of alleging and proving the factual basis for the court's exercise of such jurisdiction is upon the plaintiff. *Mylan Laboratories, Inc. v. AKZO, N.V., 2 F.3d 56, 59-60 (4th Cir. 1993)*.

In this case, 13 of the 15 remaining defendants have challenged this Court's jurisdiction over them. When the principles of the decisions cited hereinabove are applied to the facts of this case, it is apparent that all of the pending motions to dismiss for lack of personal jurisdiction must be granted. Plaintiffs have failed to establish, either by the allegations of the complaint or in the oppositions which they have filed to defendants' motions to dismiss, that the 13 defendants in question have contacts with the State of Maryland which would permit this Court to exercise personal jurisdiction over them.

(i)

The Nine Remaining Distributors

The distributors of IF which have been sued here are located in various parts of the United States. Defendant IF operates its business mostly in Pennsylvania. The plaintiffs have not alleged any facts indicating that IF's distributors, other **[*10]** than Clark Distributors, Inc., (hereinafter "Clark Distributors"), have engaged in any kind of business activity in Maryland.

All the distributors (except for Clark Distributors, which operates in Maryland) have submitted affidavits establishing that they are incorporated outside Maryland, that they have their principal places of business outside Maryland, that they transact no business in Maryland, that they have not contracted to conduct any business in Maryland, and indeed that they have engaged in no activity at all in Maryland. [6] **[*11]** These affidavits place the burden on plaintiffs to come forward with contrary evidence. [7] No such evidence has been supplied by the plaintiffs. Indeed, in their complaint, plaintiffs have not even alleged facts which would indicate that these defendants had the necessary "minimum contacts" with Maryland. [8]

For these reasons, the motions of these **[*12]** nine defendants to dismiss for lack of personal jurisdiction will be granted.

(ii)

The Four Individual Defendants

Defendants Helen Weary, Thomas Weary, William Annesley, and Jeffrey Hanhausen, all of whom are officers or directors of defendant IF, have challenged this Court's jurisdiction on grounds that they, as individuals, have no contacts with Maryland.

Plaintiffs' complaint contains no allegations which would, if proved, establish that these individual defendants had any of the necessary "minimum contacts" with Maryland. Indeed, the facts alleged by plaintiffs concerning these defendants' activities, such as visiting plaintiffs' Maryland warehouse, making phone calls to Maryland discussing shipments, and the like, are clearly acts done in their position as corporate officers conducting the business of their employer.

HN5[] It is well established that jurisdiction over a corporation does not constitute jurisdiction over corporate officers, directors or employees who are sued as individuals. *Birrane v. Master Collectors, Inc., 738 F. Supp. 167, 168-70 (D.Md. 1990)*; *Umans v. PWP Services, Inc., 50 Md. App. 414, 420-21, 439 A.2d 21 (1982)*. **[*13]** Thus, the fact that personal jurisdiction exists in this case as to defendant IF does not give this court personal jurisdiction over these individual officers and directors.

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[6] Defendant Canine Fence, Inc., acknowledges in its motion to dismiss that it has twice sold goods to a Maryland resident. It sold replacement parts for a machine that it had sold in Connecticut, whose buyer later moved to Maryland. Two isolated sales to one customer in Maryland does not constitute the necessary minimum contacts under the *International Shoe* due process analysis. Moreover, plaintiffs did not even file an opposition to Canine Fence's motion to dismiss.

[7] In a case such as this one, ***HN4***[] the burden is on the plaintiff to make out a *prima facie* case of personal jurisdiction over a defendant. *Mylan Laboratories, Inc. v. AKZO, N.V., 2 F.3d 56, 60 (4th Cir. 1993)*.

[8] In their opposition to defendants' motions to dismiss for lack of personal jurisdiction, plaintiffs completely ignore the issue of personal jurisdiction. Instead, they argue that this Court has subject matter jurisdiction in antitrust cases and that venue was proper in this district. It is axiomatic, however, that "venue provisions come into play only after jurisdiction has been established." *Lindahl v. Office of Personnel Management, 470 U.S. 768, 793 n.30, 84 L. Ed. 2d 674, 105 S. Ct. 1620 (1985)*. *See also*, *Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68, 84 L. Ed. 167, 60 S. Ct. 153 (1939)*, 15 C. Wright & A. Miller, *Federal Practice and Procedure* § 3801, at 4-5 (1986).

Plaintiffs have therefore failed to satisfy their burden of alleging or producing facts establishing the necessary minimum contacts. Accordingly, the motions to dismiss for lack of personal jurisdiction of the four individual defendants will also be granted.

(b)

The Motions to Dismiss

For Failure to State a Claim

Only two defendants, IF, a manufacturer, and Clark Distributors, a distributor, have conceded that this Court has personal jurisdiction over them. These two defendants have, however, filed motions to dismiss for failure to state a claim upon which relief may be granted pursuant to *Rule 12(b)(6), F.R.Civ.P.* [9]

[*14] ***HN6***[]

A motion to dismiss under *Rule 12(b)(6), F.R.Civ.P.*, should be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. In determining whether to dismiss a complaint, this Court must view the well-pleaded material allegations in a light most favorable to the plaintiff, with the alleged facts accepted as true. 2A *Moore's Federal Practice,* P 12.07 [2.-5] (2d ed. 1987); 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 304-21 (1990).

Defendants first contend that the complaint fails to meet the minimal pleading requirements of *Rule 8* and *Rule 10, F.R.Civ.P.* ***HN7***[] *Rule 8(a)* calls for "a short and plain statement of the claim showing that the pleader is entitled to relief," and *Rule 10(b)* states, "Each claim founded on a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth."

The complaint filed in this case by plaintiffs is a veritable jumble **[*15]** of facts, conclusory statements of law, and antitrust jargon. It is disorganized and confusing. Nevertheless, the Court will not dismiss the complaint for failure of the plaintiffs to comply with *Rules 8* and *10*. A court should liberally construe an antitrust complaint. *Knuth v. Erie-Crawford Dairy Coop., 395 F.2d 420, 423 (3rd Cir. 1968)*, *cert. denied, 410 U.S. 913, 35 L. Ed. 2d 278, 93 S. Ct. 966 (1973)*. Even if the complaint is given a liberal reading, this Court nevertheless concludes that it fails to state claims against defendants IF and Clark Distributors upon which relief may be granted. The motions to dismiss of these two defendants will therefore be granted pursuant to *Rule 12(b)(6)*, with leave to plaintiffs to file an amended complaint against defendants IF and Clark. [10]

The complaint contains **[*16]** two counts. Count I is entitled "Violation of Title *15 USC § 1* and *§ 2*." In this Count, plaintiffs also allege a violation of the Robinson-Patman Act, *15 U.S.C. § 13*. Count II is entitled "Conspiracy in Restraint of Trade (USC *§ 1* Monopoly of Trade) (*15 U.S.C. § 14* Civil Damages, Sale, etc. On Agreement Not To Use Goods Of a Competitor)." Although it cannot be readily determined from a reading of the complaint, the Court will assume that plaintiffs are asserting claims under all of the antitrust statutes listed. The Court will therefore address herein *§§ 1* and *2* of the Sherman Act, *§ 2* of the Robinson-Patman Act, and § 3 of the Clayton Act.

(i)

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[9] while this Court discusses herein only the motions to dismiss for failure to state a claim of these two defendants, its analysis would apply to the other defendants as well. Plaintiffs' failure to state a claim upon which relief may be granted thus represents an alternative ground for dismissal of the other thirteen defendants as well.

[10] If an amended complaint is filed, it should be drafted in strict compliance with *Rule 8(a)* and *Rule 10(b), F.R.Civ.P.*

15 U.S.C. § 1

Both counts of the complaint assert claims under HN8[] § 1 of the Sherman Act, which provides, in part, "Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal." Plaintiffs' complaint does not properly allege a conspiracy in restraint of trade.

Mere conclusory allegations do not satisfy the requirements for pleading **[*17]** a violation of the antitrust laws. As Judge Friendly wrote:

> A mere allegation that defendants violated the antitrust laws as to a particular plaintiff and commodity no more complies with Rule 8 than an allegation which says only that a defendant made an undescribed contract with the plaintiff and breached it, or that a defendant owns a car and injured plaintiff by driving it negligently.

Klebanow v. New York Produce Exchange, 344 F.2d 294, 299 (2d Cir. 1965). Moreover, HN9[] the facts alleged must, if proved, show that the plaintiff is entitled to relief under the statutory provision in question.

Applying these principles here, this Court concludes that plaintiffs have not alleged sufficient facts to avoid dismissal of the claims asserted by plaintiffs under § 1 of the Sherman Act. Paragraph 20 of the complaint alleges:

> That at various times between 1991 and 1993 your defendants met, conspired, entered into contracts, engaged in combination and conspiracy to restrain the trade and commerce of the electronic pet restraint business with the sole purpose of fixing or conspiring to fix the price, market share and availability of the electronic pet **[*18]** restraint commerce.

Plaintiffs here rely on the fact that the defendants "met" and "entered into contracts." [11] HN10[] Mere meetings between a manufacturer and its distributors do not, without more, prove the existence of an unlawful vertical conspiracy. As the Supreme Court said in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984), "In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently."

[*19] Plaintiffs do not in the complaint explain how the contracts relied upon resulted in a restraint of trade. On the contrary, the "contracts" which the defendants allegedly entered into are not proof of antitrust violations. These contracts are described in Paragraphs 27-29 of the complaint, as follows:

> 27. That on or about April of 1991, the Defendants . . . attempted to set up and establish the national marketing scheme [sic] to conduct the business of distribution and marketing electronic pet restraints and conferred on the Defendants . . . as the exclusive agency for the marketing the same [sic] in the continental United States in which the Plaintiff and other dealers conduct the business of selling electronic pet restraints to wholesale and retail dealers for resale. That in order to participate in said marketing scheme, each of the above defendants agreed not to use or deal in merchandise, goods or wares of a competitor in violate [sic] of 15 USC § 14.
>
> 28. That on or about April 1, 1991 pursuant to an Agreement executed by each one of the Defendants [sic], the Defendants commenced thereinafter and still continue the marketing and distribution **[*20]** of "Sta-Put Systems" as the exclusive agent in the continental United States.

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[11] In addition, plaintiffs allege various types of unilateral conduct on the part of defendant IF, such as buying plaintiffs' stock and "junking" it, and placing some retailers on a "consignment basis." Complaint P 19. Unilateral conduct, however, does not violate § 1 of the Sherman Act, which bars a "conspiracy" in restraint of trade. More than one party is obviously required. Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984).

> 29. The distributorship system of the Defendants as alleged in paragraph 3 above and the contract of the Defendants as alleged in paragraph 4 about [sic] [12] were undertaken by the Defendants as part of a conspiracy to fix, control, raise and stabilize arbitrarily, unlawfully, unreasonably and knowingly the price of electronic pet restraints in interstate commerce; to restrain trade in interstate commerce for electronic pet restraints and to preclude the Plaintiff and other dealers marketing and distributing electronic pet restraints from dealing in interstate commerce except on the terms controlled by the Defendants in violation of Title 15 USC § 1, et seq.

The contracts alleged by plaintiffs as restraining trade in the sale of electronic pet restraints are those whereby defendant **[*21]** IF appointed a network of exclusive distributors for its product. However, the appointment by a manufacturer of a network of exclusive dealers results in a vertical relationship, which must be reviewed under the rule of reason. Such **HN11**[] an arrangement does not violate the antitrust laws unless it creates an unreasonable restraint on interbrand competition. *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Nowhere in the complaint is it alleged that the defendants' network had any impact on competition between brands of pet restraints. On the contrary, the complaint alleges that interbrand competition is vigorous. Paragraph 17 alleges:

> The business of the Plaintiffs is in the purchasing of electronic pet restraint systems *from various manufacturers* and reselling the same to various customers and purchasers for retail trade in the state of Maryland and North Carolina *constitutes a substantial competitive product to the [defendant Invisible Fence] "Sta-Put System*" and sold by the Defendant, Invisible Fence Company, Inc. in the same states. (emphasis added)

Under conditions **[*22]** like those alleged in the complaint, there is no violation of the antitrust laws. Furthermore, IF's unilateral exclusion of the plaintiffs from its network likewise does not violate *§ 1* of the Sherman Act. *Garment Dist., Inc. v. Belk Stores Services., Inc., 799 F.2d 905, 910 (4th Cir. 1986)*, *cert. denied, 486 U.S. 1005, 100 L. Ed. 2d 193, 108 S. Ct. 1728 (1988)*; *Purity Prods., Inc. v. Tropicana Prods., Inc. 702 F. Supp. 564, 570-74 (D.Md. 1988)*, *aff'd mem., 887 F.2d 1081 (4th Cir. 1989)*.

For these reasons, this Court concludes that the complaint fails to state a claim against defendants IF and Clark Distributors under *§ 1* of the Sherman Act.

(ii)

15 U.S.C. § 2

HN12[] *Section 2* of the Sherman Act makes it unlawful to "monopolize, attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several states . . . ." The statute bars three types of conduct: monopolization, attempted monopolization, and a conspiracy to monopolize trade.

To prove an antitrust **[*23]** violation of monopolization, a plaintiff must prove (1) the defendant's possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991)* (en banc), *cert. denied, U.S. , 112 S. Ct. 973 (1992)*, citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*.

The complaint contains no allegations addressing the element of market power. [13] Not only is there no discussion of market shares or barriers to entry, but the complaint even describes a vigorously competitive market. Complaint P 17. The complaint thus fails to state a proper claim of monopolization.

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[12] Paragraphs 3 and 4 do not relate in any way to defendants' distributorship system or to contracts between them.

[13] Nor does the complaint address the second element. In this Circuit, a plaintiff must show, in order to satisfy this element, that there could be no valid business reason or concern for efficiency for the defendant's conduct. *Oksanen, 945 F.2d at 710*.

To prove an antitrust violation of attempted monopolization, a plaintiff must show that the would-be monopolist had a "dangerous probability of success." United States v. Empire Gas, 537 F.2d 296 (8th Cir. 1976), **[*24]** *cert. denied, 429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)*. The complaint does not address this element in any way. Therefore, it fails to state a proper claim of attempted monopolization.

HN13[]

To prove an antitrust violation of conspiracy to monopolize, a plaintiff must prove (1) that a conspiracy to obtain (or maintain) a monopoly in the relevant market existed, (2) that this conspiracy to monopolize concerned goods in interstate commerce, (3) that the defendant entered into the conspiracy with the specific intention or purpose of monopolizing the relevant market, (4) that at least one of the conspirators committed an overt act to further the conspiracy, and (5) that **[*25]** the plaintiff was injured in its business or property as a result of the defendant's actions. Leonard B. Sand et al., *Modern Federal Jury Instructions - Civil* P 80.03, p. 80-72 (1993). *See also,* Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Association of S.C., 436 F. Supp. 418, 425 (D.S.C. 1976), *aff'd,* 569 F.2d 821 (4th Cir.), *cert. denied, 439 U.S. 910, 58 L. Ed. 2d 255, 99 S. Ct. 277 (1978)*.

These necessary elements have not been pled in the complaint. Although plaintiffs have alleged that a conspiracy existed, the complaint does not define the relevant market in any way, nor does it allege an overt act on the part of a conspirator which would tend to indicate furtherance of the conspiracy to monopolize. Therefore, the complaint fails to state a proper claim of attempted monopolization.

(iii)

15 U.S.C. § 13

While the complaint does not rely on this section of the Robinson-Patman Act in a separate count, plaintiffs have alleged a violation of § 13 in the concluding line of Paragraph 19. [14] **HN14**[] Section 2(a) **[*26]** of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where . . . the effect of such discrimination may be substantially to lessen competition . . . .

[*27] To prove a violation of this Section of the Robinson-Patman Act, a plaintiff must prove the following elements: (1) discrimination in price; (2) between different purchasers; (3) of commodities of like grade and quality; and (4) that the effects of such discrimination may substantially lessen or injure competition. Universal Lite Distributors, Inc. v. Northwest Indus., Inc., 452 F. Supp. 1206, 1214 (D.Md. 1978), *aff'd,* 602 F.2d 1173 (4th Cir. 1979). Obviously, **HN15**[] to have standing, a plaintiff must also prove that it was injured by the defendant's actions.

The plaintiffs have not pled any of the required elements. Remarkably, they have not even asserted that defendant IF sold its pet restraint systems at different prices to different customers. Such an allegation is the cornerstone of a claim asserted under § 13(a). Moreover, plaintiffs have failed to allege that IF's "indirect price discrimination" has had or would have any impact on competition. FTC v. Sun Oil Co., 371 U.S. 505, 527, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963). Accordingly, the complaint fails to state **[*28]** a proper claim under the Robinson-Patman Act.

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[14] Paragraph 19, entitled "Violations of Title 15 USC § 1 and § 2," states:

> 19. At various times between January 1992 and January 1993 Defendant, Invisible Fence Company, Inc. took over the stock of Gabriel and Associates, Inc. and the Laura [sic] and Bev Corporation sold by the Plaintiffs to retail sellers in the state of Maryland and the state of North Carolina and arranged to junk and destroy such stocks. At the same time Defendant, Invisible Fence Company, Inc. arranged to place such retail sellers who were the Plaintiff's customers under a consignment basis to induce them to transfer their business from the Plaintiffs to the Defendant, Invisible Fence Company, Inc., thereby committing indirect price discrimination in violation of Title 15 USC § 13, Subsection (a).

(iv)

15 U.S.C. § 14

HN16[] Section 3 of the Clayton Act provides:

> It shall be unlawful for any person engaged in [interstate] commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods . . . for use, consumption or resale within the United States . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the seller, where the effect of such . . . sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

To prevail on a claim of a violation of this statute, a plaintiff must allege and prove (1) that the defendant made a sale on the condition that the buyer not deal in the goods of the sellers' competitors; (2) that the contract has the effect of substantially lessening competition in the relevant market; and (3) that the plaintiff was injured in its business or property as a result of the defendant's actions.

Plaintiffs' Clayton Act claims must fail for two reasons. First, plaintiffs have no standing to assert a Clayton **[*29]** Act claim. Indeed, a plaintiff will usually be injured only when the challenged contract prevents it from entering into other contracts which it would deem beneficial. As Judge Watkins of this Court said in *Central Chem. Corp. v. Agrico Chem. Co., 531 F. Supp. 533, 540 (D.Md. 1982)*, *aff'd,* 1985-2 CCH Trade Cases P 66, 753 (4th Cir. 1985), ***HN17***[] "In order to plead a cause of action under § 3, plaintiff must allege that a contract for sale of goods between [defendant] and [plaintiff], not [defendant] and others, was conditioned on a promise of not dealing in the goods of a competitor . . . ."

In this case, the plaintiffs acknowledge in their complaint that they are able to and do purchase the products of IF's competitors. Complaint P 17. Such an admission is fatal to a Clayton § 3 claim. *David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc., 504 F.2d 52, 58 (4th Cir. 1974)*, *cert. denied, 420 U.S. 992, 43 L. Ed. 2d 674, 95 S. Ct. 1430 (1975)*; *McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 338 (4th Cir. 1959)*. **[*30]**

Second, plaintiffs have failed to allege any adverse impact of the challenged contracts on competition in the sale of electronic pet restraint systems. As discussed above, they actually do the opposite by alleging that substantial competition exists among various manufacturers of the product. Complaint P 17.

Thus, the complaint fails to state a proper claim under the Clayton Act.

IV

Leave to Amend

The motions to dismiss of thirteen defendants have been granted because this Court lacks personal jurisdiction over those defendants. These dismissals are without leave to amend.

The motions to dismiss of defendants IF and Clark Distributors have been granted because the complaint fails to state claims against those defendants which would entitle them to relief. If they choose to do so, plaintiffs may file an amended complaint against those two defendants. The dismissals as to defendants IF and Clark Distributors are therefore with leave to amend.

As the Court has pointed out herein, the facts alleged in the complaint do not come close to stating proper antitrust claims against defendants IF and Clark Distributors. Although the precise nature of plaintiffs' claims cannot be determined **[*31]** from a reading of the complaint, it appears here that the essential dispute between plaintiffs and defendant IF arises as a result of the latter's network of exclusive distributors from which plaintiffs have now been excluded. It appears that plaintiffs are now unable to purchase the "Sta-Put" system of pet restraints directly from defendant IF and that plaintiffs are therefore required to pay a mark-up imposed by IF's distributors. It is doubtful that these facts amount to antitrust violations under any theory which may be espoused. Nevertheless, the Court will not at this stage of these proceedings foreclose plaintiffs from attempting to allege proper antitrust claims against defendants IF and Clark.

In this regard, the Court would remind counsel for plaintiffs to pay strict attention to counsel's obligations under ***HN18***[] *Rule 11, F.R.Civ.P.* *Rule 11* provides that if a particular claim is not well grounded in fact and warranted by existing law, sanctions should be imposed. Counsel should carefully consider the facts and should include in any amended complaint only those claims which are well grounded in fact and existing law. If the claims alleged in an amended complaint which is later **[*32]** filed are not well grounded in fact and existing law, defendants IF and Clark Distributors may move for sanctions under *Rule 11*.

Although there are many deficiencies in the existing complaint, the Court will not under all the circumstances here impose sanctions at this time on counsel for plaintiffs. *Rule 11* sanctions addressed to an original complaint are not ordinarily imposed until later in the proceedings. Now that plaintiffs' attorney has had the benefit of reviewing defendants' memoranda and the Court's rulings set forth in this Memorandum and Order, plaintiffs' attorney should have a much more comprehensive understanding of the applicable facts and existing law. Counsel for plaintiffs should understand that the Court will not hesitate to impose sanctions if *Rule 11* is later violated.

V

Conclusion

For the reasons stated, the motions to dismiss of thirteen of the remaining defendants will be granted without leave to amend. The motions to dismiss of defendants IF and Clark Distributors will be granted with leave to amend.

Accordingly, it is this 9th day of November, 1993 by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion of defendant **[*33]** Invisible Fence Company, Inc. to dismiss the complaint be and the same is hereby granted, with leave to plaintiffs to file an amended complaint against said defendant within 20 days;
2. That the motion of defendants Helen Weary, Thomas Weary, William Annesley and Jeffrey Hanhausen to dismiss the complaint be and the same is hereby granted;
3. That the motion of defendant Clark Enterprises, Inc. to dismiss the complaint be and the same is hereby granted;
4. That the motion of defendant Clark Distributors, Inc. to dismiss the complaint be and the same is hereby granted, with leave to plaintiffs to file an amended complaint against said defendant within 20 days;
5. That the motion to dismiss the complaint of defendants Invisible Fence of the North Pacific; Canine Containment Distributing Company; I.F.D., Inc.; Invisible Fence Distributor of the Midwest; Invisible Fence of the Northland; Invisible Fence South and J.T.B. Distributing, Inc. be and the same is hereby granted; and
6. That the motion of defendant Canine Fence Company, Inc. to dismiss the complaint be and the same is hereby granted.

Alexander Harvey, II, Senior United States District Judge

Lone Star Indus. v. Compania Naviera Perez Companc (In re New York Trap Rock Corp.)

United States District Court for the Southern District of New York

November 16, 1993, Decided

93 Civ 5480 (VLB)

Reporter

160 B.R. 876 *; 1993 U.S. Dist. LEXIS 16326 **

In re: NEW YORK TRAP ROCK CORPORATION, LONE STAR INDUSTRIES, INC., et al., Debtors. LONE STAR INDUSTRIES, INC., A Delaware corporation, Debtor and Debtor-in-Possession, Plaintiff - Appellant, v. COMPANIA NAVIERA PEREZ COMPANC, SACFIMFA, SUDACIA, SA, INVESORA PATAGONICA, SA and LOMO NEGRA COMPANIA INDUSTRIAL ARGENTINA SA, all Argentine corporations, Defendants - Appellees.

Prior History: [1]** (Chapter 11) Case Nos 90 B 27276 to 21286, 90 B 21334 and 21335, (Jointly Administered) Adversary Proceeding No 92-5403A.

Core Terms

entities, premium, corporate control, shareholders, nonfederal, reasons, trading, shares, potential bidder

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contract Formation > Contracts Law > Contract Formation

HN1[] **Contracts, Contract Formation**

As is often the case in bargaining, a party that must complete a transaction is in a weaker position than one that can walk away from it. Where a party is irrevocably committed to sell an asset and bail out of a relationship, the opportunities for win-win bargaining in a nonzero sum game that are available in ongoing relationships are thinned to a point approaching nonexistence.

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > Collusive Bidding

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > General Overview

HN2[] **Estate Property Lease, Sale & Use, Collusive Bidding**

11 U.S.C.S. § 363(n) provides for adverse consequences when the sale price of an asset sold in bankruptcy was controlled by an agreement among potential bidders at such sale.

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > Collusive Bidding

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > General Overview

HN3[] **Estate Property Lease, Sale & Use, Collusive Bidding**

It is impossible for a sale of property other than that belonging to the debtor to violate *11 U.S.C.S. § 363(n)*; the seller of non-debtor property is acting independently and any consequences to the debtor are not regulated by the statute.

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > Duties & Liabilities of Shareholders

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN4[] **Shareholders, Shareholder Duties & Liabilities**

Failure to obtain a corporate control premium does not represent a judicially cognizable loss of a property right absent special circumstances such as violation of the Williams Act, designed to protect public shareholders against potential pressure in connection with tender offers for traded securities.

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > Collusive Bidding

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > General Overview

HN5[] **Estate Property Lease, Sale & Use, Collusive Bidding**

11 U.S.C.S. 363(n), in addition to not covering sales of non-debtor property, bars only collusion among actual or potential bidders for a debtor's property and not secret or other use of one's own bargaining power.

Business & Corporate Law > ... > Shareholders > Shareholder Duties & Liabilities > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN6[] **Shareholders, Shareholder Duties & Liabilities**

No statutory restriction such as that provided by the Williams Act on purchases and sales of securities involving corporate control has been enacted with regard to privately held companies not traded on United States exchanges. Apart from such special cases, a control premium - as opposed to any market or agreed value of the shares themselves - is not ordinarily recognized as an independent legally protected property interest. Absent specific statutory protection such as that provided by the Williams Act, a corporate control premium is not a benefit to which the holder is entitled to rely absent violation of contractual commitments, fraud, breach of trust or other legally prohibited behavior.

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > Collusive Bidding

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Creditors & Debtors

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > General Overview

HN7[] **Estate Property Lease, Sale & Use, Collusive Bidding**

11 U.S.C.S. 363(n) imposes sanctions against action such that in connection with a sale of debtors' property under the Bankruptcy Code, the sale price was controlled by an agreement among potential bidders at such sale.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > General Overview

Bankruptcy Law > Administrative Powers > Estate Property Lease, Sale & Use > Collusive Bidding

HN8[] **Robinson-Patman Act, Coverage**

In prohibiting collusion affecting bids for property sold under the Bankruptcy Code, *11 U.S.C.S. § 363(n)* is in effect a supplementary ***antitrust law*** akin to *§ 1* of the Sherman Act (*15 U.S.C.S. § 1*) with its own separate jurisdictional groundwork and separate sanctions for violation. *11 U.S.C.S. § 363(n)* does not prohibit independent trading affecting such a price, nor secrecy in regard to such trading. In this regard, *§ 363(n)* parallels the interpretation given to the Sherman Act--and by virtue of its importance to the related Robinson-Patman Price Discrimination Act (*15 U.S.C.S. § 13*), which encourages rather than prohibits nonfraudulent secrecy in formulation of trading positions.

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN9[] **Venue, Forum Non Conveniens**

Declination of exercise of supplemental jurisdiction over nonfederal claims where there is no independent basis of federal subject matter jurisdiction is a lesser step than dismissal on grounds of forum non conveniens where such a independent ground is present.

Judges: BRODERICK

Opinion by: VINCENT L. BRODERICK

Opinion

[*878] MEMORANDUM ORDER

VINCENT L. BRODERICK, U.S.D.J.

I

This bankruptcy appeal involves sale of the debtor Lone Star's 50% interest in a series of Argentine corporations. The holder of the other 50% interest, the defendant Perez Companc, sold its share to a potential buyer at a higher price than obtained by Lone Star, to the only other interested bidder for shares in the Argentine entities. [1] Prior to this sale, Perez Companc held an advantage in bidding for Lone Star's share because as the existing 50% owner, only it could deliver 100% of the shares involved to a third party. Only Perez Companc could offer complete control of the Argentine companies to a new owner.

[2]** Lone Star, on the other hand, chose to take advantage of its ability to file for a **[*879]** noninsolvency bankruptcy for purposes of effecting a corporate reorganization under Chapter 11 of the United States Bankruptcy Code, and pursuant to that Chapter sought to liquidate its 50% interests in the Argentine entities. Because a 50% share of what amounts to a corporate partnership with parties with whom one has no prior dealings is difficult to sell, Lone Star found Perez the only available buyer - for the very reason that only it could obtain for itself or a third party complete ownership of the Argentine entities. Lone Star, of course, knowingly entered into the corporate betrothals involved which would doubtless be profitable if and only if both 50% owners cooperated, and which would foreseeably be difficult to sell successfully to others at a desirable price.

HN1[] As is often the case in bargaining, a party which must complete a transaction is in a weaker position than one which can walk away from it. See Roth, "Toward a Theory of Bargaining: An Experimental Study in Economics," 220 Science 687 (May 13, 1983); Hofstadter, "Mathematical Themas," 245 Sci Am 18 (July 1981). Where a party is irrevocably **[**3]** committed to sell an asset and bail out of a relationship, the opportunities for win-win bargaining in a nonzero sum game which are available in ongoing relationships are thinned to a point approaching nonexistence. Compare T. Schelling, *The Strategy of Conflict* (1960) with E. Goffman, *Strategic Interaction* (1969).

Lone Star, having chosen to enter a 50%-50% corporate shareholder relationship and further to commit itself to sell its holdings within a finite time, was quite predictably able to obtain only a fire sale price for its share in the Argentine entities. Dissatisfied, it brought this litigation asserting that Perez Companc should have acted in such a way as to equalize the inherently unequal structure of the situation.

II

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[1] Perez Companc, sold its 50% of the Argentine entities, to a third party for $ 55 million without informing Lone Star. Lone Star later sold its 50% interest to the same party for $ 37 million; Perez Companc did not bid and there were no other bidders. For a more detailed discussion of the facts, see *In re New York Trap Rock Corp. (Lone Star Industries v Compania Naviera Perez Companc et al.),* *155 Bankr. 871 (1993)* (Schwartzberg, J.).

In its adversary complaint before the Bankruptcy Court, Lone Star contends that Perez Companc's conduct and related acts of other defendants violated *11 USC 363(n)* which ***HN2***[] provides for adverse consequences when "the sale price [of an asset sold in bankruptcy] was controlled by an agreement among potential bidders at such sale." Lone Star also asserted a large number of related state law claims.

United States Bankruptcy **[**4]** Judge Howard Schwartzberg in a carefully reasoned 41-page opinion reported at *155 Bankr. 871 (1993)* held that ***HN3***[] it was impossible for a sale of property *other than that belonging to the debtor* to violate *§ 363(n)*; the seller of non-debtor property was acting independently and any consequences to the debtor were not regulated by the statute. He also rejected Lone Star's nonfederal claims. I affirm the decision of the Bankruptcy Court for the reasons set forth by Judge Schwartzberg in his opinion, and for additional reasons set forth in greater detail below. I do not repeat here the reasoning articulated by the Bankruptcy Judge, with which I agree, [2] and discuss only my additional reasons for reaching the same conclusions as did the Bankruptcy Judge:

(1) ***HN4***[] Failure to obtain a corporate control premium does not represent a judicially cognizable loss of a property right absent special circumstances such as violation of the Williams Act, designed to protect public shareholders against potential pressure in connection with tender offers for traded securities.

(2) *Section 363(n) of the Bankruptcy Code*, ***HN5***[] in addition to not covering sales of non-debtor property as **[**5]** pointed out by Judge Schwartzberg, bars only collusion among actual or potential bidders for a debtor's property and not secret or other use of one's own bargaining power.

(3) Exercise of supplemental jurisdiction over the remaining, nonfederal, claims in this **[*880]** case was properly declined, in addition to the reasons given by Judge Schwartzberg, because of inappropriateness of such exercise under the criteria set forth in *28 USC 1367(c)*.

[6]** III

The essence of Lone Star's complaint is that the "control premium" inherent in ability to determine the policies of a corporation is an asset belonging in part to Lone Star, so that any machinations to deprive Lone Star of its share of that premium are illegal under one or more sources of law.

The existence of a control premium is based on the ability of the controlling party to utilize the assets of the controlled corporation for the benefit of the controlling party rather than exclusively for the benefit of all stockholders equally. In some instances, a side benefit to the controlling party and benefit to the shareholders collectively are sufficiently aligned that both gain from the coincidence of interests. Thus, corporate law does not forbid all self-interested transactions involving officers or directors of an entity, but requires full disclosure of them to independent directors and frequently bars voting on such transactions by the interested parties.

Where coincidence of interests is attenuated and a transaction benefiting those in control of an entity does *not* redound to the benefit of all, there is a breach of the fiduciary duty of the directors of the entity chosen **[**7]** by the controlling party. The combination of legitimate coincident interests and temptations of breaches of fiduciary duty by directors or management at the behest of holders of control, yields a control premium as a result of buyers' and sellers' evaluation of how much a position in a corporation is worth. See *City National Bank v. American Commonwealth Financial Corp, 801 F.2d 714, 715 n 1 (4th Cir 1986)*, *cert. denied 479 U.S. 1091 (1987)*; Bayne, "A Legitimate Transfer of Control," 18 Stan L Rev 438 (Jan 1966); Berle, "The Price of Power: Sale of Corporate Control," 50 Cornell LQ 628 (1965); Bayne, "The Sale of Corporate Control," 33 Fordham L Rev 583 (1965); Comment, 31 Emory LJ No 1 at 139 (Winter 1982); see also Note, 27 Geo LJ 217 (1938).

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[2] Appellant points out that a transaction not involving a debtor may violate ***11 USC 363(n)*** if it is a ruse or subterfuge to prevent someone from bidding, but this concept is inapplicable to the present case. Appellant also stresses that it never waived the right to discovery. But no specific discoverable information which would alter Judge Schwartzberg's ruling or those in this memorandum order has, however, been pinpointed. I find these and numerous other objections made to Judge Schwartzberg's decision lacking in merit.

Trading in corporate control has at times functioned to the detriment of noncontrolling shareholders (generally holding far less than 50% interests in the entity involved), leading Congress to adopt restrictions on the practice in connection with tender offers for publicly **[**8]** held corporations in the United States. These restrictions involved waiting periods for mature consideration of such offers and mandatory proration of tender offers among public shareholders whether or not they rushed to buy first before the offeror had the necessary number of shares to seize control. See § 14(d)(6) of the Williams Act, *15 USC 78n(d)(6)* ; Securities & Exchange Commission Rules 14-d-8, *17 CFR 240.14d-8* and 14-d-6(e)(vi), 17 CFR 240.14(e)(vi); *Piper v. Chris-Craft Industries, 430 U.S. 1, 23, 51 L. Ed. 2d 124, 97 S. Ct. 926 (1977)*; *Pryor v. United States Steel Corp,* 794 F.2d at 55-56.

HN6[] No such statutory restriction on purchases and sales of securities involving corporate control has been enacted with regard to privately held companies not traded on United States exchanges. Apart from such special cases, a control premium - as opposed to any market or agreed value of the shares themselves - is not ordinarily recognized as an independent legally protected property interest.

Absent specific statutory protection such as that provided by the Williams Act, a corporate control premium is not a benefit to which the **[**9]** holder is entitled to rely absent violation of contractual commitments, fraud, breach of trust or other legally prohibited behavior. As discussed below, such claims in this case, if sustainable, are based on state or foreign, not federal law, and it is questionable whether this country is the proper location for their exploration.

Acknowledgment of the monetary value of a share of control, in contrast to a share of the profits of an enterprise, as a separate, independent property right to be protected by the courts would require the judiciary to determine just how far directors could practicably **[*881]** go in violation of their fiduciary duty to proceed exclusively for the benefit of all shareholders. This is not a tenable position for the courts.

Awarding half of the difference between the proceeds obtained by the debtor and that obtained by Perez Companc is not a satisfactory substitute because this would deprive Perez Companc of the value of its contribution toward successful sale of the asset through its willingness to dispose of its own share, thus giving the ultimate buyer ability to manage the Argentine entities without the need for constant consultation and perhaps combat with a co-equal **[**10]** 50% owner. The risk of a disadvantage of this type was inherent in Lone Star's decision to enter into a 50-50 share division in the first instance, and the cost of that choice cannot be shifted to others because it turned out to be significant.

IV

Section 363(n) of the Bankruptcy Code ***HN7***[] imposes sanctions against action such that in connection with a sale of debtors' property under the Code, "the sale price was controlled by an agreement among potential bidders at such sale". There is no claim here that bidders or potential bidders agreed in advance concerning what sums they would or would not offer at the sale of Lone Star's 50% interest in the Argentine entities involved in this case.

HN8[] In prohibiting collusion affecting bids for property sold under the *Bankruptcy Code, § 363(n)* is in effect a supplementary ***antitrust law*** akin to *§ 1* of the Sherman Act (*15 USC 1*) with its own separate jurisdictional groundwork and separate sanctions for violation. *Section 363(n)* does not prohibit independent trading affecting such a price, nor secrecy in regard to such trading. In this regard, *§ 363(n)* parallels the interpretation given to the Sherman Act - and by virtue **[**11]** of its importance to the related Robinson-Patman Price Discrimination Act (*15 USC 13*) which encourages rather than prohibits nonfraudulent secrecy in formulation of trading positions. See *United States v. United States Gypsum Co., 438 U.S. 422, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*; *Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979)*.

Lone Star's complaint appears to be not that Perez Companc colluded with another bidder, but that it *failed* to combine forces with Lone Star to permit Lone Star to get a share of the control premium which it had inherently lost the ability to obtain because of its conduct of the equivalent of a fire sale of a 50% interest in the Argentine entities. Collusion between Lone Star and Perez Companc as to what they would demand from third parties for their respective 50% interests in the Argentine entities involved, however (as opposed to a sale of the interest of one to the other) would appear to restrain the market in such shares to the same extent as collusion between Perez and other potential bidders in fixing the price such bidders would offer (which is not claimed to have occurred).

[12]** V

In addition to Judge Schwartzberg's reasons for rejecting Lone Star's nonfederal claims, his decision should also be affirmed on the ground that exercise of supplemental (previously known as pendent) jurisdiction over them should be declined under criteria set forth in *28 USC 1367(c)* once the claim under *11 USC 363(n)* has been dismissed.

The only significant connection between the Argentine entities and the United States appears to be that a U.S. entity, Lone Star, purchased a 50% interest in them and then sought to reorganize in this country under Chapter 11 of the Bankruptcy Code; all further events in this country were brought about by Lone Star's actions or responses to them. See generally Karmel, "The Second Circuit's Role in Expanding the SEC's Jurisdiction Abroad," 65 St. John's L Rev No 3 at 743 (Summer 1991); Tepass, "Resolving Extraterritoriality Conflicts in Antitrust," 5 Conn J Int'l L No 2 at 565 (Spring 1990); see also *Alesayi Beverage Corp v. Canada Dry Corp, 797 F. Supp. 320 (SDNY 1992)*.

Here, the only federal claim in this case (under *11 USC 363* **[**13]** *(n)*) has been dismissed. *28 USC 1367(c)(3)*. The intricacies of nonfederal (state or Argentine) corporate **[*882]** law involved in the remaining claims are novel and complex, and substantially predominate. *28 USC 1367(c)(1)*, *(2)*.

There are also "exceptional circumstances" involving "other compelling reasons for declining jurisdiction." *28 USC 1367(c)(4)*. Argentina is the primary location of the underlying assets relevant to the sale. The relevance of this factor is emphasized by its treatment as significant in each situation described in each major subdivision of the general federal venue statute. *28 USC 1391(a)(2)*, *(b)(2)*, *(e)(2)*. This factor is as important in adversary proceedings under the Bankruptcy Code as in other contexts. See *In re New York Trap Rock Corp (Lone Star Industries v. Rankin County, 158 Bankr. 574, 1993 U.S. Dist. LEXIS 12740, 1993 WL 3607 (SDNY 1993)*.

Argentine corporate law may also be the most appropriate one to govern the rights of the parties with regard to their shares in the **[**14]** Argentine entities at stake in this case. It would be far more appropriate for such matters, in contrast to claims under U.S. Bankruptcy Code provisions such as *11 USC 363(n)*, to be adjudicated in Argentina.

HN9[] Declination of exercise of supplemental jurisdiction over nonfederal claims where there is no independent basis of federal subject matter jurisdiction is, of course, a lesser step than dismissal on grounds of *forum non conveniens* where such a independent ground is present.

Even if some other source of jurisdiction over nonfederal claims such as diversity of citizenship under *28 USC 1332(a)(2)* were to be sustainable the factors discussed above, and by Judge Schwartzberg in regard to personal jurisdiction over the defendants, would support a *forum non conveniens* dismissal with respect to Lone Star's claims. The center of gravity of this case, apart from the bankruptcy sale governed by *11 USC 363(n)*, is clearly in Argentina. See generally *Borden, Inc. v. Meiji Milk Products Co, 919 F.2d 822 (2d Cir 1990)*, *cert. denied 111 S. Ct. 2259, 114 L. Ed. 2d 712 (1991)*; **[**15]** *Pedro Pablo Blanco F. v. Banco Industrial de Venezuela, SA, 997 F.2d 974 (2d Cir 1993)*.

Dated: White Plains, N.Y.

November 16, 1993

/s/ Gerard L. Goettel, U.S.D.J.

in the absence of

VINCENT L. BRODERICK, U.S.D.J.

Datagate, Inc. v. Hewlett-Packard Co.

United States District Court for the Northern District of California

November 17, 1993, Decided ; November 18, 1993, Filed

NO. C 86-20018 RPA

Reporter
1993 U.S. Dist. LEXIS 17707 *; 1994-2 Trade Cas. (CCH) P70,827

DATAGATE, INC., Plaintiff, v. HEWLETT-PACKARD COMPANY, Defendant.

Core Terms

hardware, software, summary judgment, tying arrangement, injunctive relief, customers, offers, tie-in, user

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[ ] **Entitlement as Matter of Law, Appropriateness**

Under *Fed. R. Civ. P. 56*, summary judgment is proper if no factual issues exist for trial. To survive a motion for summary judgment, the non-moving party must demonstrate that the fact in contention is material, that is, a fact that might affect the outcome of the suit under the governing law. In addition, the nonmoving party must demonstrate that the factual dispute is genuine, that is, the evidence is such that a reasonable jury could return a verdict for the non-moving party. Although summary judgment is generally disfavored in anti-trust litigation, it is appropriate when the non-moving party does not show any issues of material fact and does not present an adequate record to support a finding in his favor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Tying Arrangements, Clayton Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different, or tied, product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement violates *§ 1* of the Sherman Act, codified at *15 U.S.C. § 1*, if the seller has appreciable economic power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

If only a single purchaser is "forced" with respect to the purchase of a tied item, the resultant impact on competition is not sufficient to warrant the concern of ***antitrust law***.

Judges: [*1] AGUILAR

Opinion by: ROBERT P. AGUILAR

Opinion

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Hewlett-Packard Company ("HP") moves this Court pursuant to *Fed. R. Civ. P. 56* for an order granting summary judgment in its favor with respect to Plaintiff Datagate Inc.'s ("Datagate") tie- in claim on the ground that Plaintiff lacks sufficient evidence to support such a claim. Defendant further moves for summary judgment on Plaintiff's claim for permanent injunctive relief. For the reasons set forth below, Defendant's motion for summary judgment is GRANTED.

BACKGROUND

HP manufactures, sells, and services computer systems. HP offers both hardware and software maintenance support for its systems. Datagate is an independent service organization ("ISO") which specializes in providing hardware maintenance service for HP systems. As an ISO, Datagate competes directly with HP for the hardware maintenance business of HP system users. ISO's have thrived over the last decade by offering maintenance services at significantly lower prices than the computer manufacturers.

Datagate has alleged that it and other ISOs which service HP products cannot provide software support because such support requires **[*2]** the use of HP proprietary materials. Datagate claims that beginning in 1983, HP, as part of a scheme to drive out of business those ISOs which service HP hardware, started tying its software support to its hardware support. Pursuant to this alleged strategy, if an HP system user hired an ISO instead of HP to provide hardware maintenance, HP would refuse to provide the customer with software service. This tying arrangement, according to Datagate, forced many of its customers to switch to using HP's hardware service, thereby damaging Datagate's business. Datagate's complaint also contains a claim for permanent injunctive relief under Section 16 of the Clayton Act, *15 U.S.C. § 26*.

While HP stipulates for purposes of this motion that it had market power in the tying product (software service) and that there was a substantial volume of commerce in the tied product (hardware service) - requisite elements of a tie-in claim - it argues that there is no evidence that it imposed tying arrangements on its customers.

DISCUSSION

HN1[] Under *Rule 56 of the Federal Rules of Civil Procedure*, summary judgment is proper if no factual issues exist for trial. To survive **[*3]** a motion for summary judgment, the non-moving party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 248-249, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. In addition, the nonmoving party must demonstrate that the factual dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* "Although summary judgment is generally disfavored in anti-trust litigation, it is appropriate when the non-moving party does not show any issues of material fact and does not present an adequate record to support a finding in his favor." *Christofferson Dairy, Inc. v. MMM Sales, Inc., 849 F.2d 1168, 1171 (9th Cir. 1988)*.

1. *Tie-in Claim*

HN2[] A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. *Eastman Kodak Co. v. Image Technical Services, Inc., 119 L. Ed. 2d 265, 112 S. Ct. 2072, 2079 (1992)*. **[*4]** Such an arrangement violates *§ 1* of the Sherman Act, *15 U.S.C. § 1*, if the seller has appreciable economic power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product. *Id. at 2079*.

The parties have stipulated for purposes of the instant motion that HP had sufficient market power in the tying product market (software service) to restrain competition appreciably in the tied product market (hardware service) and that a tying arrangement imposed by HP would affect a substantial volume of commerce in the tied market. Accordingly, the sole issue before the Court is whether there is sufficient evidence that HP illegally tied the sale of software service to the sale of hardware service by representing to more than one or a few isolated HP system users that HP would not service the user's software unless the user also purchased hardware service from HP.

As evidence of an HP tying arrangement, Datagate proffers the declaration of Judy Lefkowitz, a former Datagate employee. In words reminiscent of facts presented in a law school evidence exam, Ms. Lefkowitz avers that the person **[*5]** responsible for awarding Beverly Hospital's HP service contracts told her that an HP representative told him that HP would provide software support only on the condition that the hospital purchase hardware service from HP. This assertion cannot be considered in determining the existence of issues for trial, as it would not be admissible in evidence as required by *Rule 56 (e)*. The declaration, replete with hearsay, was not made on personal knowledge.

Similarly inadequate to withstand summary judgment is Datagate's reliance on the deposition of David Carver, An HP officer. Datagate's statement in its opposition brief that Carver admitted that he discussed tying service to software maintenance with other HP officers misrepresents Carver's testimony. Carver testified only that he took part in discussions relating to competition between HP and Datagate for service contracts. Carver never said he discussed Datagate in the context of tying arrangements. Moreover, as HP points out, discussions of tying arrangements do not amount to evidence sufficient to create a triable issue as to the existence of a tying arrangement. There must be facts showing that tying arrangements were actually imposed.

[*6] Datagate also offers the declaration of Paul Lawrence, the president of Ideal Computer Services, an ISO which services HP hardware, and the interrogatory answers of Amtek, another ISO involved in litigation with HP. Both the declaration and interrogatory answers involve allegations that HP engaged in illegal acts to expand its hardware service business. Lawrence avers that some of his customers have told him that HP would not sell software service separate from hardware service. He further claims that other customers have said that HP coerced them into buying its hardware service by offering hardware and software services together at a lower price than the software service alone. These statements are inadmissible hearsay which the Court cannot consider when determining the existence of genuine issues for trial. Further, the evidence concerning the pricing practices of HP is not relevant to the claim at issue here. As previously stated, a tie-in claim must involve a threat to withhold a product unless the customer also purchases another product. While evidence of HP's pricing for combined hardware and software may be relevant to a Section 2 monopolization claim under the Sherman Act, **[*7]** it does not raise a triable issue as to Datagate's *Section 1* tie-in claim. The Amtek interrogatory responses relied on by Datagate also concern allegations that HP engaged in anticompetitive pricing practices. As such, this evidence is also inapposite to the instant motion.

The only probative evidence Datagate offers is the deposition of Robert Buckner, a Rockwell International employee who testified that HP employees told him that HP would not provide software service to Rockwell unless it also purchased Hardware support from HP. According to Buckner, these representations forced Rockwell to purchase hardware support from HP instead of Datagate in 1986. Although this testimony constitutes evidence that HP engaged in tying conduct, a single incident of tying is insufficient to support a tie-in claim. As the Supreme Court has stated, ***HN3***[] "If only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of ***antitrust law***." *Hyde,* 466 U.S. at 16. Evidence that HP coerced purchasers in addition to Rockwell is necessary to withstand summary judgment.

2. *Injunctive* **[*8]** *Relief Claim*

Plaintiff has effectively stipulated that it has no cognizable claim for permanent injunctive relief under Section 16 of the Clayton Act, *15 U.S.C. § 26*. Statement of Plaintiff Regarding Injunctive Relief for Acts Occurring in 1986 at 1-2. Accordingly, Defendant is entitled to summary judgment on this claim.

CONCLUSION

For the above-stated reasons Defendant Hewlett Packard's motion for summary judgment is GRANTED as to all of Plaintiff's claims.

IT IS SO ORDERED.

DATED: November 17, 1993

ROBERT P. AGUILAR

United States District Judge

JUDGMENT

Pursuant to this Court's order of this date, "Order Granting Defendant's Motion For Summary Judgment," judgment is entered in favor of Defendant Hewlett-Packard Company and against Plaintiff Datagate, Inc.

IT IS SO ORDERED.

DATED: November 17, 1993

ROBERT P. AGUILAR

United States District Judge

[AHP Subsidiary Holding Corp. v. Stuart Hale Co.](#)

United States District Court for the Northern District of Illinois, Eastern Division

November 19, 1993, Decided ; December 1, 1993, Docketed

No. 89 C 8566

Reporter

1993 U.S. Dist. LEXIS 16878 *; 1993 WL 498331

AHP SUBSIDIARY HOLDING CORPORATION, INC., a Delaware corporation, Plaintiff, v. STUART HALE COMPANY, an Illinois corporation, Defendant.

Core Terms

counterclaim, trademark, motion to strike, affirmative defense, sham, infringement, redundant, declaratory judgment, move to strike, contends

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN1[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Affirmative defenses may be stricken under *Fed. R. Civ. P. 12(f)* only if they are legally insufficient on their face. Motions to strike affirmative defenses will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN2[] **Sherman Act, Defenses**

Actions that are taken through legally protected channels do not violate the antitrust laws, even if they are intended to eliminate competition.

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN3[] **Pleadings, Crossclaims**

When a counterclaim for declaratory relief brings into question issues that already have been presented in plaintiff's complaint and defendant's answer to the original claim, it is redundant and a decision on the merits of plaintiff's claim will render the request for declaratory judgment moot.

Judges: [*1] Conlon

Opinion by: SUZANNE B. CONLON

Opinion

MEMORANDUM OPINION AND ORDER

AHP Subsidiary Holding Corp., Inc. ("AHP") [1] sues Stuart Hale Co. ("Stuart Hale") for federal trademark infringement and unfair competition. AHP contends that its registered trademark for the aerosol cooking spray, Pam, is infringed by Stuart Hale's aerosol cooking spray, Pan-Lite. AHP moved for a preliminary injunction, and Stuart Hale moved for summary judgment. Stuart Hale's motion was granted, and AHP's motion was found to be moot. *See* Order, No. 89 C 8566 (N.D. Ill. Jan. 22, 1992) (adopting magistrate's report in full).

The Seventh Circuit reversed and remanded. *AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611 (7th Cir. 1993)*. The Seventh Circuit found that there were material issues of fact precluding summary judgment on AHP's infringement **[*2]** claims. *Id. at 616-19*. [2] The Seventh Circuit, invoking Circuit Rule 36, [3] reassigned this action to this court for further proceedings. Presently still pending are motions that were not ruled upon before this case was appealed. AHP moves to strike Stuart Hale's affirmative defense, as well as its counterclaim, pursuant to *Fed. R. Civ. P. 12(f)*. In addition, AHP moves to strike Stuart Hale's demand for a jury trial.

DISCUSSION

[*3] 1. Motion To Strike Affirmative Defense

As an affirmative defense, Stuart Male contends that by filing this trademark action, AHP is intentionally attempting to force Stuart Hale out of the cooking spray market, in violation of *section 2* of the Sherman Antitrust Act. *15 U.S.C. § 2*. AHP moves to strike Stuart Male's defense, pursuant to *Fed. R. Civ. P. 12(f)*.

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[1] The original plaintiff in this action, Boyle-Midway Household Products, Inc., transferred all of its rights, title, and interest to the trademark at issue in this case to AHP.

[2] The complaint also stated a claim for dilution of trademark under Illinois law. The Seventh Circuit upheld summary judgment on the dilution claim. *See* *AHP, 1 F.3d at 619*.

[3] Circuit Rule 36 provides that on remand after a trial, a case generally must be reassigned to a different judge. The Seventh Circuit found that the district court had "evaluate[d] the evidence as if the proceeding were a trial on the merits," and concluded that the case therefore must be reassigned. *AHP, 1 F.3d at 620*.

HN1[] Affirmative defenses may be stricken under *Fed. R. Civ. P. 12(f)* only if they are legally insufficient on their face. *See Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1294 (7th Cir. 1989)*. Motions to strike affirmative defenses will not be granted "unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *Williams v. Jader Fuel Co., Inc., 944 F.2d 1388, 1400 (7th Cir. 1991)*, *cert. denied, 119 L. Ed. 2d 228, 112 S. Ct. 2306 (1992)* (citations omitted). However, if the insufficiency of a defense is apparent, a motion to strike can help to "clear away irrelevant or redundant clutter." *Van Schouwen v. Connaught Corp., 782 F. Supp. 1240, 1245 (N.D. Ill. 1991)*. **[*4]** Thus, in reviewing AHP's motion to strike, the court must determine if Stuart Male's defense is insufficient as a matter of law.

AHP argues that Stuart Male's defense is not well-pleaded under the Sherman Act because it does not define the relevant market and does not allege a dangerous probability of success. AHP's arguments are inapposite on a motion to strike. AHP does not address the question whether it "would succeed despite any state of the facts which could be proved in support of the defense." *Williams v. Jader Fuel Co., Inc., 944 F.2d 1388, 1400 (7th Cir. 1991)*, *cert. denied, 119 L. Ed. 2d 228, 112 S. Ct. 2306 (1992)* (citations omitted). AHP's arguments based on the form of the affirmative defense lack merit.

AHP contends that Stuart Male's affirmative defense is defective because AHP's allegedly anticompetitive actions consist solely of a legitimate pursuit of legal redress. AHP notes that under the Supreme Court's *Noerr-Pennington* doctrine, ***HN2***[] actions that are taken through legally protected channels do not violate the antitrust laws, even if they are intended to eliminate competition. *See Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1960)* **[*5]** (attempt to influence public officials does not violate Sherman Act); *United Mine Workers of America v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* (same); *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)* (good faith attempt to protect economic interests through use of the courts does not violate antitrust laws). AHP asserts that Stuart Male's defense is legally insufficient because AHP's suit cannot be a violation of the Sherman Act.

Stuart Hale responds that AHP's suit falls within the "sham" exception to the *Noerr-Pennington* doctrine. *See Winterland Concessions Co. v. Trela, 735 F.2d 257, 263-64 (7th Cir. 1984)*. Stuart Hale suggests that AHP does not bring this action to protect its trademark, but to protect its future ability to market new products, which it does not now produce. Stuart Male concludes that its defense may not be stricken because there is at least a factual dispute concerning the motives for AHP's suit.

Stuart Male's position is unfounded; AHP's suit is not a sham. Under the Seventh Circuit's decisions, a suit is a sham, and therefore is not **[*6]** protected under the *Noerr-Pennington* doctrine, only when the purpose of the suit is "'to harm one's competitors not by the *result* of the litigation but by the simple fact of the *institution* of the litigation.'" *Winterland Concessions Co. v. Trela, 735 F.2d 257, 263-64 (7th Cir. 1984)* (citing *Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1265-66 (S.D. Fla. 1980)* (emphasis in original). Litigation is unprotected "when the purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself." *Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982)*, *cert. denied, 461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 (1983)*. Thus, a suit is a sham only if it is brought not for the purpose of prevailing on the merits, but for the purpose of damaging competition by the mere fact of litigation.

It has not been established that this case is a sham; it appears that AHP is pursuing this case to protect its own interests. Instead, Stuart Male alleges that AHP has a particular long-range motive for hoping to prevail **[*7]** in this suit. Stuart Hale argues that AHP is not entitled to trademark protection because it attempts to protect a trademark on a product it has not yet marketed. However, this allegation does not suggest that the suit is a sham, but merely that it is meritless. Stuart Male's allegations that the suit is a sham are really arguments on the merits against AHP's charges of trademark infringement. Because AHP brings this suit for the legitimate purpose of protecting its interests, it is shielded from Sherman Act liability under the *Noerr-Pennington* doctrine. As such, Stuart Male's affirmative defense fails as a matter of law -- and must be stricken.

2. Motion To Strike Counterclaim

As a counterclaim in this action, Stuart Hale seeks a declaratory judgment that the name Pan-Lite does not infringe or unfairly compete with the registered trademark, PAM. Stuart Hale also requests that AHP be directed to withdraw its opposition to Stuart Hale's pending trademark application. AHP moves to strike Stuart Hale's counterclaim, pursuant to *Fed R. Civ. P. 12(f)*. AHP contends that Stuart Hale's counterclaim is redundant, duplicative, and is improper under the Declaratory Judgment Act, *28 U.S.C. §§ 2201 **[*8]** -02*.

HN3[] When a counterclaim for declaratory relief "brings into question issues that already have been presented in plaintiff's complaint and defendant's answer to the original claim . . . it is redundant and a decision on the merits of plaintiff's claim will render the request for declaratory judgment moot." Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, 6 *Federal Practice and Procedure,* § 1406 (1990 ed.). When the court finds a counterclaim redundant, and therefore moot, it loses jurisdiction to rule on that counterclaim.

In this case, Stuart Male contends that its counterclaim is not redundant because it raises issues not addressed in the prior pleadings. The counterclaim seeks an order that AHP withdraw its opposition to Stuart Hale's pending trademark application. Stuart Male's contention has merit; this issue is not addressed in the complaint or the answer. First, although the United States Patent and Trademark Office will consider the disposition of AHP's suit in reaching its decision on Stuart Hale's pending trademark application, the decision in this case will not necessarily have collateral estoppel effect. *Cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979)*. **[*9]** In addition, AHP would not be required to withdraw its opposition to Stuart Hale's application if this court were to rule that Stuart Hale does not infringe AHP's trademark. Thus, Stuart Hale's counterclaim is not redundant because it would not be rendered moot by the disposition of AHP's suit. [4] The counterclaim need not be stricken.

3. Motion To Strike Jury Demand

In its answer to the complaint, Stuart Male demands a jury trial. AHP moves to strike the jury demand. AHP's complaint seeks injunctive relief. Stuart Hale's counterclaim seeks a declaratory judgment. Neither party seeks money damages. Because neither party states a cause of action for money damages, Stuart Hale is not entitled to a jury trial under the *Seventh Amendment*. Accordingly AHP's motion to strike Stuart Male's jury **[*10]** demand must be granted.

CONCLUSION

For the foregoing reasons, plaintiff AHP Subsidiary Holding Corp.'s motions to strike the antitrust affirmative defense and to strike the jury demand are granted. AHP's motion to strike the counterclaim for declaratory judgment is denied.

ENTER:

Suzanne B. Conlon

United States District Judge

November 19, 1993

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[4] For the same reasons, AHP's contention that Stuart Male's counterclaim "does not serve the purposes of the Declaratory Judgment Act" because it "adds nothing to the issues raised in the existing pleadings" also lacks merit.

Coleman v. Cannon Oil Co.

United States District Court for the Middle District of Alabama, Southern Division

November 19, 1993, Decided ; November 19, 1993, Filed

CIVIL ACTION NO. 90-T-414-S

Reporter
849 F. Supp. 1458 *; 1993 U.S. Dist. LEXIS 19740 **; 1994-2 Trade Cas. (CCH) P70,754

T. R. COLEMAN, et al., Plaintiffs, v. CANNON OIL COMPANY, et al., Defendants.

Subsequent History: [1]** As Corrected August 5, 1994.

Core Terms

prices, conspiracy, injunction, anti trust law, Sherman Act, gasoline, damages, nominal damages, price fixing, defendants', price-fixing, competitors, rivals, Clayton Act, plaintiffs', conspire, motion for judgment as a matter of law, retail price, interdependence, gasoline price, fix prices, parallelism, changes, dealers, circumstantial evidence, self interest, antitrust, employees, parties, treble

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

The Sherman Antitrust Act *§ 1*, *15 U.S.C.S. § 1*, provides that every contract, combination, or conspiracy in restraint of trade or commerce is illegal. The Clayton Act *§ 4*, *15 U.S.C.S. § 15*, provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN2[] **Antitrust & Trade Law, Sherman Act**

With the phrase "contract, combination, or conspiracy," Congress sought to embrace a single concept -- that is, an agreement, express or implied, between two or more persons-- and thus the terms in the phrase are used interchangeably. Sherman Act *§ 1*, *15 U.S.C.S. § 1*, does not prohibit independent business decisions and actions.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

With the phrase "in restraint of trade or commerce," Congress did not seek to prohibit all agreements that restrain trade or commerce but only those that impose an unreasonable restraint. However, certain agreements, including conspiracies to fix prices, have been held to be per se unreasonable and always illegal, meaning that no demonstration of an unreasonable restraint on competition is required. This conclusion rests on the empirical observation that such agreements would always or almost always tend to restrict competition and decrease output.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN4[] **Clayton Act, Claims**

Clayton Act *§ 4*, *15 U.S.C.S. § 15*, requires that a plaintiff who has demonstrated a Sherman Act violation also prove an injury to his or her business or property from the violation and provide some indication of the amount of damage done. The plaintiff must introduce substantial probative facts demonstrating that some damage flowed from the unlawful conspiracy.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN5[] **Trials, Judgment as Matter of Law**

See *Fed. R. Civ. P. 50*.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN6[] **Trials, Judgment as Matter of Law**

In determining whether to grant or deny a *Fed. R. Civ. P. 50* motion, all the evidence must be considered in the light, and with all reasonable inferences, most favorable to the party opposed to the motion. The motion may be granted only if the evidence points so overwhelmingly in favor of the moving party that no reasonable person could draw a contrary conclusion. Where reasonable people could differ on the basis of substantial, conflicting evidence, the motion must be denied.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN7[] **Trials, Judgment as Matter of Law**

In determining whether evidence is sufficient to withstand a *Fed. R. Civ. P. 50* motion for judgment as a matter of law, because the *Fed. R. Civ. P. 50* standard is, for the most part, identical to that for summary judgment pursuant to *Fed. R. Civ. P. 56*, the court is constrained by the United States Supreme Court's application of *Fed. R. Civ. P. 56*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Inferences & Presumptions > Inferences

HN8[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. In such circumstances, the plaintiff must come forward with sufficiently unambiguous evidence that tends to exclude the possibility that the alleged conspirators acted independently. Plaintiff must present direct or circumstantial evidence that reasonably tends to prove that the defendants were engaged in a conspiracy rather than acting independently.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN9[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, it is the conspiracy alone that is prohibited; the underlying independent conduct is not necessarily unlawful and, indeed, may be procompetitive and of a nature that the antitrust laws would want to foster. The antitrust laws are thus peculiar in that a conspiracy creates the initial illegality. Setting one's own profit-maximizing price is, for example, entirely lawful under the antitrust laws; the antitrust laws are concerned with such price fixing only when it is the subject or result of a conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Claims**

Mere parallel pricing does not, standing alone, establish the existence of a conspiracy. If persons acted similarly, but independently of one another, without any agreement or mutual understanding among themselves, then there would be no conspiracy. The Sherman Act is directed not against uniformity of prices or price levels charged, but against the determination of prices or price levels by agreement among competitors. Rather, parallel conduct is a factor to be weighed, and generally to be weighed heavily. There must therefore be parallelism accompanied by substantial additional evidence to support a finding of an agreement necessary to establish a violation of Sherman Act *§ 1*, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN11[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The fact that a firm's action is against its self interest could support a finding of a conspiracy. To satisfy the requirements of a conspiracy, the action that is against self interest must go beyond mere interdependence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN12[] **Monopolies & Monopolization, Conspiracy to Monopolize**

All that plaintiff must prove is that defendants in some way came to an agreement or mutual understanding to accomplish a common purpose; a "gentlemen's agreement" will do.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > ... > Exemptions > Statements by Coconspirators > Statements During Conspiracy

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > Members of Conspiracy

Evidence > ... > Exemptions > Statements by Coconspirators > Statements Furthering Conspiracy

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

HN13[] **Conspiracy, Elements**

Fed. R. Evid. 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and was made by a coconspirator of a party during the course and furtherance of the conspiracy. These statements are admissible, however, only if a preponderance of the evidence shows (1) the existence of a conspiracy, (2) the participation of the defendant and the declarant in the conspiracy, and, (3) that the declarant made the statement during the course and in furtherance of the conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN14[] Monopolies & Monopolization, Conspiracy to Monopolize

Evidence that one dealer complained to another about prices would be insufficient proof of a conspiracy; the proof must show that the dealer sought and obtained an agreement to maintain a certain price.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN15[] Remedies, Damages

Trebling of damages under Clayton Act § 4, 15 U.S.C.S. § 15, is mandatory.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN16[] Private Actions, Remedies

"Nominal damages" constitute more a recognition of an important right than an actual monetary recovery under the right. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Injunctions

HN17[] **Remedies, Damages**

The Clayton Act § 16, 15 U.S.C.S. § 26 provides in part that any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including 15 U.S.C.S. §§ 13, 14, 18, and 19, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. In any action in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN18[] **Remedies, Injunctions**

Even in the absence of actual past and current injury, threatened injury and the necessities of the public interest may independently still warrant a prospective injunction. The Clayton Act § 16, 15 U.S.C.S. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of threatened injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN19[] **Remedies, Injunctions**

The purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. The Clayton Act § 16, 15 U.S.C.S. § 26, should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. Its availability should be conditioned by the necessities of the public interest that Congress has sought to protect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN20[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

It is because it is so difficult to determine whether a fixed price is unreasonable at one point in time that price fixing is a per se violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.*

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN21[] Private Actions, Remedies

Injury to the public exists merely in an individual acquiring the power to fix prices. It does not matter whether that power is reasonably exercised or not.

Counsel: For T. R. COLEMAN, et al., PLAINTIFFS: Edward M. Price, Jr., Dothan, AL, Rufus R. Smith, Jr., Dothan, AL, L. Andrew Hollis, Jr., Jeffrey C. Kirby, Birmingham, AL, Kenneth Millwood, Aaron Watson, Scott Tippett, John Latham, Sylvia Kochler, Valerie Verduce, Atlanta, GA, Edward C. Brewer, Atlanta, GA.

For Southeastern Oil, McGee Oil, Defendants: W. Terry Travis, Dennis Pierson, George L. Beck, Jr., Montgomery, AL. For Home Oil, Thomas Shirley, Defendants: Joseph Mays, Jr., David Hymer, Cada Carter, Birmingham, AL. For Graceville Oil Co., Defendant: Charles L. Robinson, David Proctor, Birmingham, AL. For Sheffield Oil Co., Defendant: C. H. Espy, Jr., Dothan, AL. For Cannon Oil, Vernon Cannon, Defendants: T. E. Buntin, Jr., Dothan, AL, Thomas S. Lawson, James N. Walter, Montgomery, AL. For Sunshine Jr. Food Stores, Defendant: J. Riley Davis, Tallahassee, FL. For Sunshine Jr. Food Stores, Defendant: J. Riley Davis, Tallahassee, FL. For Davis & Harp Oil Co., Herndon Oil Co., Defendants: Ezra B. Jones, III, Atlanta, GA.

Judges: Thompson

Opinion by: MYRON H. THOMPSON

Opinion

[*1461] MEMORANDUM OPINION

In this class-action lawsuit, plaintiffs, who are individual gasoline consumers, charged that defendants, who are retail sellers **[**2]** of gasoline, violated federal antitrust laws by **[*1462]** conspiring to fix gasoline prices in Dothan, Alabama. Plaintiffs are: T. R. Coleman; Bernard J. Petit; and R. L. and Lucy Middleton. Defendants are: Sunshine-Jr. Stores, Inc.; Rodney Parrish; Vernon Cannon and his company, Cannon Oil Company; Thomas Shirley and his company, Home Oil Company; and James Sheffield and his company, Sheffield Oil Company. [1] Plaintiffs seek

[1] Vernon Cannon died after this litigation began. His wife Metha Jean Cannon replaced him as a defendant in her capacity as executrix of his estate. For ease of discussion, the court will continue to refer to Mr. Cannon as the defendant.

damages and injunctive relief under *§ 1* of the Sherman Act, *15 U.S.C.A. § 1 (West Supp. 1993)*, and *§ 4* and *§ 16* of the Clayton Act, *15 U.S.C.A. §§ 15*, *26 (West Supp. 1993)*. Plaintiffs properly invoked the court's jurisdiction pursuant to *28 U.S.C.A. §§ 1331 (West 1993)*, *1337 (West Supp. 1993)*.

[3]** After a month-long trial, a jury found that defendants had engaged in illegal price fixing but awarded only nominal damages of one dollar. Defendants have filed motions requesting that the court enter judgment in their favor as a matter of law. Plaintiffs have filed motions requesting that the court treble the nominal damages award and enter a final injunction prohibiting defendants from engaging in future illegal price fixing. For the reasons given below, the court will grant plaintiffs' motion to enter a final injunction and defendant Sunshine-Jr. Stores' motion for judgment as a matter of law and will deny the other motions.

I. BACKGROUND

Plaintiffs filed this lawsuit on April 19, 1990, charging several persons and their businesses with conspiring to fix the retail price of gasoline in Dothan, Alabama. The original defendants consisted of the following: Sunshine-Jr. Stores; Rodney Parrish; Vernon Cannon and his company, Cannon Oil Company; Thomas Shirley and his company, Home Oil Company; and James Sheffield and his company, Sheffield Oil Company; Southeastern Oil Company, Inc.; Davis & Harp Oil Company, Inc.; Herndon Oil Company, Inc.; Beard Oil Company; A. W. Herndon and his **[**4]** company, A. W. Herndon Oil Company, Inc.; McGee Oil; and Graceville Oil Company, Inc. The court certified a plaintiff class for "damages" consisting of "all individuals and entities who made retail purchases of gasoline from the defendants in the Houston County, Alabama area since April 15, 1986." [2] **[**5]** The court dismissed Beard Oil Company [3] and entered summary judgment in favor of Southeastern Oil Company, Davis & Harp Oil Company, Herndon Oil Company, and McGee Oil Company. [4] The plaintiffs settled their claims against Graceville Oil Company [5] and against A. W. Herndon and his company, A. W. Herndon Oil Company. [6] This case went to trial as to the remaining defendants--Sunshine-Jr. Stores, Rodney Parrish, Vernon Cannon and Cannon Oil Company, Thomas Shirley and Home Oil Company, and James Sheffield and Sheffield Oil Company--who are collectively referred to in the remainder of this order as just the defendants. A jury found that these defendants had engaged in illegal price fixing and that they should pay nominal damages of one dollar. The parties responded to the verdict with the motions now before the court. [7]

[*1463] II. DEFENDANTS' MOTIONS FOR JUDGMENT AS A MATTER OF LAW

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[2] ***Coleman v. Cannon Oil Co., 141 F.R.D. 516, 519 (M.D. Ala. 1992)***. The court, however, denied plaintiffs' request to certify a plaintiff class with regard to "injunctive relief." *Id.*

Also, the City of Dothan is within Houston County, Alabama.

[3] Order of March 4, 1993.

[4] Order of January 30, 1992.

[5] Order of June 17, 1992.

[6] Order of April 20, 1993.

[7] After the trial, plaintiffs asked the court to reconsider its order granting summary judgment in favor of Southeastern Oil Company, Herndon Oil Company, McGee Oil Company, and Davis & Harp Oil Company. Plaintiffs also asked the court to add new individual defendants. Plaintiffs contended that the trial evidence reflected that these persons and companies were part of the trial defendants' conspiracy to fix prices. By order dated February 24, 1993, the court denied the plaintiffs' request as untimely. *See* *DeBruyne v. Equitable Life Assurance Society of the United States, 920 F.2d 457, 471 (7th Cir. 1990)* (on a motion to reconsider, a court ordinarily will not hear evidence that was within the moving party's knowledge at the time of the initial decision); *Barton v. American Red Cross, 826 F. Supp. 407, 409 (M.D. Ala. 1993)* (Thompson, J.) (same).

[6]** As stated, plaintiffs sought relief under the antitrust laws of the United States: *§ 1* of the Sherman Act, *15 U.S.C.A. § 1 (West Supp. 1993)*, and *§ 4* of the Clayton Act, *15 U.S.C.A. § 15 (West Supp. 1993)*. [8] *Section 1* of the Sherman Antitrust Act ***HN1***[] provides that, "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal." *Section 4* of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained." With these laws, "Congress was dealing with competition, which it sought to protect." *Standard Oil Co. v. F.T.C., 340 U.S. 231, 249, 71 S. Ct. 240, 249, 95 L. Ed. 239 (1951)* (citation omitted). As this court explained in its instructions to the jury, "The purpose of the antitrust laws is to preserve our system of free and open competition, the most important part of our private enterprise system." "These laws," the court continued, "promote the concept **[**7]** that free competition results in the best allocation of economic resources, to the end that the consuming public may receive better goods and services at a lower cost."

Plaintiffs charged that defendants violated *§ 1* of the Sherman Act by entering into a "contract, combination, or conspiracy" among themselves and with others "in restraint of trade or commerce" to fix the retail price of gasoline in the Dotham, Alabama market. ***HN2***[] With the phrase "contract, combination, or conspiracy," Congress sought "to embrace a single concept"--that is, an agreement, express or implied, between two or more persons--and thus the terms in the phrase are used interchangeably. Phillip E. Areeda, ***Antitrust Law*** P 1400a at 3 (1986) (hereinafter referred to as "Areeda"). *Section 1* of the Sherman Act does not prohibit independent **[**8]** business decisions and actions. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984)*.

HN3[] With the phrase "in restraint of trade or commerce," Congress did not seek to prohibit all agreements that restrain trade or commerce but only those that impose an "unreasonable restraint." *N.C.A.A. v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 98, 104 S. Ct. 2948, 2959, 82 L. Ed. 2d 70 (1984)*. However, certain agreements, including conspiracies to fix prices, have been held to be per se unreasonable and always illegal, meaning that no demonstration of an unreasonable restraint on competition is required. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984)*. This conclusion rests on the empirical observation that such agreements "'would always or almost always tend to restrict competition and decrease output.'" *N.C.A.A.. 468 U.S. at 100, 104 S. Ct. at 2959*, **[**9]** (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S. Ct. 1551, 1562, 60 L. Ed. 2d 1 (1979))*.

Finally, *§ 4* of the Clayton Act ***HN4***[] requires that a plaintiff who has demonstrated a Sherman Act violation also prove an injury to his or her business or property from the violation and provide some indication of the amount of damage done. *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 782 (11th Cir. 1983)*. "The plaintiff must introduce substantial probative facts demonstrating that some damage flowed from the unlawful conspiracy." *Id.*

To prevail under *§ 1* of the Sherman Act against a defendant, therefore, a plaintiff has to establish the following: first, that there was a conspiracy involving the defendant; and, second, that the purpose of the conspiracy was to fix the retail price of gasoline in the targeted market. A common plan or understanding between two or more persons to adopt or follow any pricing formula which will result in raising, lowering, or maintaining prices or price ranges charged for goods or services would **[**10]** constitute a price-fixing conspiracy in violation of *§ 1* of the Sherman Act. And, third, to obtain relief under *§ 4* of the Clayton Act, the plaintiff must also show injury in his or her **[*1464]** business or property as a result of the conspiracy. *See, e.g., Storer Cable Communications v. Montgomery, Ala., 826 F. Supp. 1338, 1349 (M.D. Ala. 1993)* (Thompson, J.).

Defendants request that the court set aside the jury's finding that they violated the federal antitrust laws, and they ask that the court enter judgment as a matter of law in their favor pursuant to *Rule 50 of the Federal Rules of Civil Procedure* (1993). *Rule 50* provides that, ***HN5***[] "If . . . a party has been fully heard with respect to an issue and

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[8] Plaintiffs also seek prospective injunctive relief under *§ 16* of the Clayton Act, *15 U.S.C.A. § 26 (West Supp. 1993)*; this requested relief is discussed later in this memorandum opinion.

there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross claim, or third-party claim that cannot under the controlling law be maintained without a favorable finding on that issue." ***HN6***[] In determining whether to grant or deny a *Rule 50* motion, all the evidence must be considered in the **[**11]** light, and with all reasonable inferences, most favorable to the party opposed to the motion. The motion may be granted only if the evidence points so overwhelmingly in favor of the moving party that no reasonable person could draw a contrary conclusion. Where reasonable people could differ on the basis of substantial, conflicting evidence, the motion must be denied. *Martinez v. City of Opa-locka, 971 F.2d 708, 711 (11th Cir. 1992)* (per curiam).

HN7[] In determining whether evidence is sufficient to withstand a *Rule 50* motion for judgment as a matter of law, defendants correctly point out that, because the *Rule 50* standard is, for the most part, identical to that for summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure* (1993), this court is constrained by the Supreme Court's application of *Rule 56* in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. There, in finding that summary judgment was appropriate against two American firms on their claim that several Japanese companies had engaged in a predatory pricing conspiracy **[**12]** aimed at driving American firms from the American consumer electronic products market, the Court wrote: first, that the fact that defendants simply "had no rational economic motive to conspire," *id. at 596, 106 S. Ct. at 1361*, combined with evidence that the defendants' conduct was "consistent with other, equally plausible [innocent] explanations" implied that the defendants' conduct could "not give rise to an inference of conspiracy," *id. at 596-97, 106 S. Ct. at 1361*; and, second and more importantly, that, even if the defendants had a rational economic motive to conspire, summary judgment would still have been appropriate in light of the fact that "***HN8***[] conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Id. at 597 n. 21, 106 S. Ct. at 1361 n. 21* (citing *Monsanto, 465 U.S. at 763-64, 104 S. Ct. at 1470-71*). The Court indicated that, in such circumstances, **[**13]** the plaintiff must come forward with "sufficiently unambiguous" evidence "'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id. 475 U.S. at 588, 597, 106 S. Ct. at 1356, 1362* (quoting *Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471*).

However, as Professor Areeda has cautioned, "It is important not to be misled by *Matsushita[]."* Areeda, P 1405' at 1021 (Supp. 1993). "The Court surely did not mean that the plaintiff must disprove all non-conspiratorial explanations for the defendants' conduct." *Id.* The Court said that plaintiff's evidence need only "tend" to exclude the possibility that the defendants acted independently. *Id.* Moreover, the Court surely did not mean that a trial court must find for defendants as matter of law "whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 438 (9th Cir. 1990), cert. denied, U.S. , 111 S. Ct. 2274 (1991).* **[**14]** First, because "circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences," *id. at 439*, such "an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment [or judgment as a matter of law] in an antitrust conspiracy case," and indeed "would seem to be tantamount to requiring direct evidence of conspiracy." *Id. Compare United States v. Henderson, 693 F.2d 1028, 1031 (11th Cir. 1982)* **[*1465]** ("[circumstantial] evidence is not testimony to the specific fact being asserted, but testimony to other facts and circumstances from which the jury may infer that the fact being asserted does or does not exist") *with Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1222 (11th Cir. 1993)* ("Evidence is direct when it is sufficient to prove discrimination without inference or presumption"). *Matsushita* did not dispense with circumstantial evidence as a basis for finding a conspiracy. *See Monsanto, 465 U.S. at 764, 104 S. Ct. at 1471* (plaintiff must "present **[**15]** direct or circumstantial evidence" that reasonably tends to prove that the defendants were engaged in a conspiracy rather than acting independently).

Second, "to read Matsushita as requiring judges to ask whether the circumstantial evidence is more 'consistent' with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy only if the judge has first decided that he would himself draw that inference." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d at 438*. Under this approach, the judge would essentially be "a thirteenth juror, who must be persuaded before an antitrust violation may be found." *Id. Matsushita* should not understood as having brought about such "a dramatic judicial encroachment on the province of the jury." *Id.*

Instead, as Professor Areeda has explained, *Matsushita's* "context made clear that the Court was simply requiring sufficient evidence to allow a reasonable factfinder to infer that the conspiratorial explanation is more likely than not." Areeda, P 1405' at 1021 (Supp. 1993). The question then is **[**16]** what is "sufficient evidence"? The critical import of *Matsushita* is in its statement that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *475 U.S. at 588, 106 S. Ct. at 1356*. *Matsushita,* therefore, does not prohibit reliance on circumstantial (that is, ambiguous) evidence; it merely limits the range of permissible inferences that may be drawn from such evidence.

This inferential limitation is grounded in the unique nature of the law of antitrust conspiracy. In general, a conspiracy is an agreement or mutual understanding between two or more persons that they will act together for some purpose. However, a Sherman Act conspiracy differs sharply from the more typical concept of conspiracy found in other contexts. Under the criminal drug laws, for example, both the underlying act and the conspiracy are illegal--that is, the laws make it an offense for anyone to violate, as well as conspire to violate, the federal drug statutes. *See e.g., 21 U.S.C.A. § 846*. In contrast, ***HN9***[] under the Sherman Act, it is the conspiracy alone that is prohibited; **[**17]** the underlying independent conduct is not necessarily unlawful and, indeed, may be procompetitive and of a nature that the antitrust laws would want to foster. "The antitrust laws are thus peculiar in that a conspiracy creates the initial illegality." Areeda, P 1402a at 9 (1986). As Professor Areeda has explained, "setting one's own profit-maximizing price is," for example, "entirely lawful under the antitrust laws"; the antitrust laws are "concerned with such price fixing only when it is the subject or result of a conspiracy." *Id.* Because of this peculiar but important distinction, courts have the added responsibility in antitrust conspiracy cases of assuring that underlying lawful conduct is not brought within the prohibitive reach of the law, even inadvertently; they must be careful to condemn only that conduct--that is, the agreement--that Congress intended to fall within the reach of the antitrust laws. *Matsushita* teaches that the determination of whether underlying circumstantial conduct is sufficient to support an inference of a Sherman Act violation, and thus to fall within the prohibitive reach of the Act, is a legal issue for the court. Of course, if the underlying **[**18]** conduct is sufficient to support such an inference, it is still up to the jury to make the inference.

The evidence presented by the plaintiffs in this case was in large measure circumstantial and consisted of, first, expert testimony and documentary evidence of parallel pricing and, second, anecdotal testimony suggesting price fixing. Defendants argue that expert testimony and documentary evidence did not reflect that there was parallel pricing among them at all times. But, if the evidence reflects that the defendants entered **[*1466]** into a price-fixing conspiracy, the fact that they did not observe the conspiracy on all occasions for all types of gasoline does not defeat the charge of price fixing. What is critical is that the jury could, and apparently did, reasonably conclude from the evidence that the defendants engaged in parallel pricing for some of their gasoline products for substantial periods of time.

Defendants are correct, however, that ***HN10***[] mere parallel pricing does not, standing alone, establish the existence of a conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corporation, 346 U.S. 537, 541, 74 S. Ct. 257, 259-60, 98 L. Ed. 273 (1954)*; **[**19]** *Aviation Specialties, Inc. v. United Technologies Corporation, 568 F.2d 1186, 1192 (5th Cir. 1978)*. If persons acted similarly, but independently of one another, without any agreement or mutual understanding among themselves, then there would be no conspiracy. The Sherman Act is directed not against uniformity of prices or price levels charged, but against the determination of prices or price levels by agreement among competitors. Rather, parallel conduct is a factor "to be weighed, and generally to be weighed heavily." *Morton Salt Company v. United States, 235 F.2d 573, 577 (10th Cir. 1956)*. There must therefore be parallelism accompanied by *substantial additional evidence* to support a finding of an agreement necessary to establish a violation of *§ 1* of the Sherman Act. *Theatre Enterprises, 346 U.S. at 541, 74 S. Ct. at 259-60*. This substantial additional evidence may take many forms. Areeda, PP 1434a-1434e at 213-21 (1986).

The reason behind this requirement of substantial additional evidence is, as stated earlier, that the law should not be inadvertently **[**20]** used to condemn non-conspiratorial conduct. The requirement is intended to help assure that there is a reasonable basis to conclude that persons exchanged assurances of common action or otherwise adopted a common plan, albeit not necessarily through meetings, conversations, or exchanged documents.

Plaintiffs argue that they presented substantial additional evidence that this parallelism was so aberrant that it could not have been inadvertent but rather could only have resulted from a conscious agreement among defendants to fix prices. Admittedly, the plaintiffs' experts testified that the pricing activities of defendants in the Dothan market differed in significant respects from what could be reasonably expected in a comparable but fully price-competitive market. There were prolonged periods of identical pricing followed by almost simultaneous changes; prices did not vary over time and between competitors. Although, because of their name-recognition, major-brand dealers often charged more than other dealers, there was no price difference between major-brand dealers and other dealers in Dothan; indeed, in one instance, the non-major brand dealers beat the majors in raising their prices **[**21]** by ten cents a gallon. A drop in gasoline wholesale prices did not result in a corresponding drop in retail prices. And finally, when this lawsuit was filed in April 1990, defendants lowered their prices by five to six cents a gallon. A review of data gathered by defendants on 28 other Alabama towns reflected that, in all but two of these towns during this time, the prices were rising or staying the same and, in the two towns, the price dropped less than two cents.

However, this evidence could merely reflect lawful "interdependent conscious parallelism," that is, parallelism based upon the belief that "the profitability of [the firm's] decision depends upon rivals' reaction." Areeda, P 1434c at 214 (1986). Professor Areeda explains this concept in more detail as follows:

> "When [competing] firms are few in number--a so-called oligopoly--each is aware that its output variations are significant enough to affect market price. Each firm's pricing decision is *interdependent* with that of its rivals: each knows that his choice will affect the others, who are likely to respond, and that their responses will affect the profitability of his initial choice. Each knows that expanding his **[**22]** sales or lowering his price will reduce the sales of rivals, who will notice that fact, identify the cause, and probably respond with matching price reduction. Unless he can somehow conceal his price reduction, or unless his own position is improved by a lower **[*1467]** market price, he will hesitate to reduce prices at all.
> "A similar process can explain a price rise through oligopolistic price leadership. When one oligopolist raises his price, each of his rivals must decide whether to follow or not. Continuing the previous price would allow each of the others to increase his sales if the leader persists in charging a higher price. But each knows that the leader is likely to retract an increase that is not followed. Accordingly, each rival asks himself whether he is better off at the lower price when charged by all or at the higher price when charged by all. If the latter, as will often be the case, the leader's price increase is likely to be followed.

P 1410b at 65 (emphasis in original). Whether Professor Areeda's observations are always applicable to certain types of markets is a question this court need not answer; it is sufficient that "such pricing behavior *can* occur when the **[**23]** number of significant rivals in a market is sufficiently small." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d at 443* (emphasis added). Moreover, that interdependent conscious parallelism could occur in Dothan among defendants is especially evident. Because, relatively speaking, the community is small without a large number of retailers and because gas prices were placed on large signs for public viewing, it was easy, if not expected, for each retailer to know what the other was charging and to respond immediately to the other's changes.

Plaintiffs further argue that there were substantial additional evidence that defendants' parallel pricing was against their self interest. Admittedly, ***HN11***[] the fact that a firm's action is against its self interest could support a finding of a conspiracy. *Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 n. 30 (11th Cir. 1991)* ("it is well settled in this circuit that evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that, assuming there is no conspiracy, each defendant engaging **[**24]** in the parallel action acted contrary to its economic self-interest"); *Aviation Specialties, Inc., 568 F.2d at 1192* ("significant probative evidence . . . that the defendants engaged in (1) consciously parallel action, (2) which was contrary to their economic self interest so as not to amount to a good faith business judgment" could support a *§ 1* violation). But the concept of "action against self interest" is an ambiguous one and one of its meanings could merely constitute a restatement of interdependence. For example, refusing to raise or lower prices unless rivals do the same could be against a firm's self interest but it would constitute mere interdependence. Similarly, a firm's motivation, if the motivation is merely to meet rival places, would constitute only interdependence. Areeda, P 1434c at 214-215 (1986). Therefore, to satisfy the requirements of a conspiracy, the action that is against self interest must go beyond mere interdependence. An example given by Professor Areeda is "the act which would be against self interest unless rivals act the same but where individual action would be so perilous in the absence of advanced agreement that **[**25]** no reasonable firm would make the challenged move without such agreement." *Id.* at 215. Therefore parallel price fixing which would be so unusual that in the absence of advanced agreement no reasonable firm would engage without such an agreement could be sufficient to establish a conspiracy. In such a scenario, the conspiracy would not be based on parallel price fixing alone but on parallel pricing in conjunction with other background evidence which reflected that in absence of advance agreement the rival firms would not engage in such parallel conduct. [9] Plaintiffs here have not **[*1468]** shown that defendants acted to this degree against their self-interest.

[26]** The court is, however, convinced that plaintiffs' anecdotal evidence, in conjunction with their evidence of parallelism, supports the jury's finding of an illegal agreement to fix prices among all defendants except Sunshine-Jr. Stores. The evidence was substantial that Vernon Cannon, Rodney Parrish, Thomas Shirley and his son, and James Sheffield entered into one or more agreements to fix prices. Eugene Welch, a former employee of Cannon Oil, testified to the following: Vernon Cannon successfully predicted how others in Dothan were going to raise their gasoline prices. Cannon would also call Thomas Shirley and ask him to raise Home Oil Company prices, and Cannon would call Parrish and ask him to have Sunshine-Jr. Stores raise its prices. In his conversations with competitors, apparently to disguise the nature of the conversations, Cannon would often use the code words "eggs and oranges" when referring to gasoline prices. Cannon Oil and its competitors, with the exception of Sunshine-Jr. Stores, often moved their prices up in tandem or almost in tandem; Sunshine-Jr. Stores would, however, follow suit shortly after Cannon had contacted Parrish. The prices in the areas surrounding Dothan **[**27]** were significantly lower than those in Dothan, and when prices changed in Dothan they did not change in the surrounding areas.

Charles Vann Carter, one of the defendants' competitors, testified to the following: Over the years Parrish and Thomas Shirley's son often visited or telephoned Carter to inform him that "everyone" in the Dothan Area was about to increase gasoline prices and to ask Carter to change his prices to meet the changes. The prices would usually increase as predicted by Parrish and Shirley's son. Shirley's son stated to him that Cannon wanted everyone to "go along" with the price changes. On one occasion, Carter asked Parrish why Sunshine-Jr. Stores was later than the other companies in raising prices, and Parrish responded that "it just takes a little longer to get in touch with Sunshine Jr."

Marion D. Harmon, who was employed by Thrifty Petroleum, testified that, sometime prior to 1984, Vernon Cannon and Thomas Shirley came by Thrifty's Dothan store, and Cannon angrily complained to him that his prices were below Cannon Oil's. Harmon explained to him that his prices were below Cannon Oil's. Harmon explained to Cannon and Shirley that he did not control the prices **[**28]** and the prices were set by company officials in Montgomery.

Karen D. Bell, who worked for Parrish, testified to the following: Parrish often received telephone calls from his competitors, including Vernon Cannon, Thomas Shirley, and Shirley's son. Also, Shirley, his son, and other competitors often visited Parrish, and, during these visits, Bell heard them mention gasoline prices. After these visits there was often an increase in prices among competitors within a day or so. Indeed, immediately following

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[9] Early in this litigation, plaintiffs argued that unless a defendant's explanation for parallel conduct is "procompetitive," the court must find for the plaintiffs. The plaintiffs premised this argument on a statement by the Eleventh Circuit Court of Appeals in Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1574 (11th Cir. 1991), that, where a defendant can put forth a "plausible, procompetitive explanation for his actions," a court should be reluctant to find them circumstantial evidence that an antitrust violation has occurred. The plaintiffs have, however, twisted the quote from *Seagood.* The Appellate Court merely stated that, if the defendants' reason is procompetitive, and thus plausible, a court should not find a conspiracy. The court did not say, or intend, that procompetitiveness is a prerequisite for a finding that a conspiracy did not exist. Indeed, as shown above, an anticompetitive motive could very well result from nothing more than an effort to survive because of interdependence among the firm and its' rival.

these visits, in order to take advantage of current prices before the anticipated increase, Bell would fill up her own car with gasoline and would have her relatives do the same.

C. Diane Leach, who also worked for Parrish, testified to the following: Parrish received calls and visits from his competitors, including Vernon Cannon, Thomas Shirley, and Shirley's son. In the spring of 1988, shortly after a visit from Cannon, Shirley, and two other competitors, Leach overheard Parrish complain that "Tom [Shirley] hasn't raised his prices yet."

Stephen Spicer, who worked as a computer operator for Cannon Oil, testified to the following: In the mid-1980's, Spicer overheard Vernon Cannon **[**29]** talking over the telephone to James Sheffield about prices in Ozark, a small city about 25 miles north of Dothan. Cannon asked Sheffield "what the price was that day in Ozark," and Cannon said "I'll meet you at such and such in the morning." In their conversation the two men "agreed" to the prices. In addition, on other occasions, Spicer overheard "similar conversations" with "unidentified parties" regarding prices in Dothan.

James Ney, who worked for Cannon Oil, testified to the following: Ney overheard Vernon Cannon discuss price changes with individuals "Tom" and "Jimmy" over the telephone, and, after one of these calls, Cannon instructed Ney to change the prices listed on Cannon Oil signs. Shirley's first name was "Thomas," and Sheffield's first name was **[*1469]** "James." On one occasion, early in the morning, when Ney went to one of the Cannon Oil stations to change the sign prices, he noticed that the station across the street was changing its sign prices at the same time to match Cannon Oil's prices. On another occasion, in a morning meeting of some of Cannon Oil's employees to discuss gasoline prices, Cannon said to the employees "you know, we don't control any prices," and then **[**30]** Cannon looked at them "with a little smile."

To be sure, the mere fact that defendants met together or telephoned each other, while probative, would not support a finding by itself that they had engaged in an effort to fix prices. "Such proof satisfies the necessary precondition of any traditional conspiracy that the parties have the opportunity to conspire," Areeda, P 1417b at 97 (1986), but "it remains the plaintiff's burden to prove that the defendant succombed to the temptation and conspired." *Id.* Here, plaintiffs have shown through anecdotal evidence, in conjunction with the evidence of parallel pricing, that Vernon Cannon, Rodney Parrish, Thomas Shirley and his son, and James Sheffield did just that--meet and conspire to fix prices. To be sure, the evidence gives us only a peek here and there, but when the many peeks are all put together, along with the evidence of substantial parallel pricing, a full picture emerges and that picture is one of a conspiracy among these men to fix and control gasoline prices in the City of Dothan. There may have been no formal or written agreement among them; but, to establish an illegal antitrust conspiracy a plaintiff need not show that defendants **[**31]** entered into any express, formal, or written agreement or that they directly stated what their object or purpose was, or the details of it, or the means by which they would accomplish their purpose. Areeda, P 1401 at 7, P 1404 at 19-20 (1986). ***HN12***[] All that plaintiff must prove is that defendants in some way came to an agreement or mutual understanding to accomplish a common purpose; a "gentlemen's agreement" will do. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 179, 60 S. Ct. 811, 825, 84 L. Ed. 1129 (1940)*. All the evidence, both anecdotal and expert, shows that Cannon, Parrish, Shirley, Shirley's son, and Sheffield entered into just such a mutual understanding. *See, e.g., United States v. Container Corp. of America, 89 S. Ct. 510, 393 U.S. 333, 21 L. Ed. 2d 526 (1969)*; *Socony-Vacuum Oil Co., supra.* [10]

[32]** The court cannot reach the same conclusion as to Sunshine-Jr. Stores. Although there was evidence that Parrish contacted Sunshine-Jr. Stores about its prices, this evidence consisted only of out-of-court statements by Parrish denied by him at trial; there was no evidence that any employee or acknowledged agent of Sunshine-Jr. Stores took any step to become a member of a price-fixing conspiracy among the other defendants. These out-of-court statements by Parrish are inadmissible as proof against Sunshine-Jr. Stores. *Rule 801(d)(2)(E) of the Federal Rules of Evidence* ***HN13***[] provides that a statement is not hearsay if it is offered against a party and was made

[10] Although it could perhaps be argued that the anecdotal evidence alone would not support a conclusion of price fixing on the part of all these defendants--the evidence is admittedly stronger as to some defendants and weaker as to others--the anecdotal evidence when considered with all other evidence substantially supports the conclusion that all these defendants engaged in price fixing.

"by a coconspirator of a party during the course and furtherance of the conspiracy." "These statements are admissible, however, only if a preponderance of the evidence shows: (1) the existence of a conspiracy; (2) the participation of the defendant and the declarant in the conspiracy; and, (3) that the declarant made the statement during the course and in furtherance of the conspiracy." United States v. Beale, 921 F.2d 1412, 1422 (11th Cir.), *cert. denied,* U.S. , , , *112 S. Ct. 99, 100, 264 (1991)*. **[**33]** In Bourjaily v. United States, 483 U.S. 171, 181, 107 S. Ct. 2775, 2781, 97 L. Ed. 2d 144 (1987), the Supreme Court permitted the trial court to examine the out-of-court statements themselves "in making a preliminary factual determination under Rule 801(d)(2)(E)," but did not address whether the trial court could rely on these statements alone in making a finding that a defendant participated in the conspiracy and thus that, assuming all other requirements of the rule are met, the statements are inadmissible. Here, assuming that the court can rely solely on Parrish's out-of-court statements, the **[*1470]** court does not believe that this evidence is sufficient to find that Sunshine-Jr. Stores was a member of the other defendants' conspiracy. [11]

[34]** In any event, that Parrish contacted Sunshine-Jr. Stores as he allegedly said he did would not support a finding that Sunshine-Jr. Stores was a member of the conspiracy. It is unclear from this evidence whether Parrish was merely complaining to Sunshine-Jr. Stores or was actually fixing prices with the company. ***HN14***[] Evidence that one dealer complained to another about prices would be insufficient proof of a conspiracy; the proof must show that the dealer sought and obtained an agreement to maintain a certain price. *Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1319 (8th Cir. 1986)*. Moreover, of all the defendants, the evidence of parallel pricing was weakest as to Sunshine-Jr. Stores. Rather than acting in tandem with the other defendants, Sunshine-Jr. Stores usually raised its prices a period of time after the others, strongly indicating that Sunshine-Jr. Stores was acting interdependently, if not fully independently. *See, e.g., Orval Sheppard Real Estate Co. v. Valinda Freed & Assoc., Inc., 608 F. Supp. 354, 357 (M.D. Ala. 1985)* (Thompson, J.), *aff'd, 800 F.2d 265 (11th Cir. 1986)* (table). **[**35]** [12]

III. PLAINTIFFS' MOTION FOR TREBLING OF DAMAGES

As stated, § 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained." *15 U.S.C.A. § 15 (West Supp. 1993)*. Plaintiffs are correct that the ***HN15***[] trebling of damages under this provision is mandatory. *Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974)*, **[**36]** *cert. denied, 420 U.S. 929, 95 S. Ct. 1128, 43 L. Ed. 2d 400 (1975)*.

In *Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)*, the Supreme Court observed that ***HN16***[] "nominal damages" constitute more a "recognition" of an important right than an actual monetary recovery under

[11] There was evidence that Parrish and an employee of Sunshine-Jr. Stores, Jim Burkhalter, were friends and had met on one or more occasions in Panama City, Florida. However, both men denied discussing gas prices, and the mere fact that they met is insufficient to support a finding that they fixed prices, even in the face of evidence of independent and interdependent of parallel pricing. There was also evidence that Burkhalter was friends with and had met other defendants. However, as stated, the mere fact that defendants met together or telephoned each other, while probative, would not support a finding by itself that they had engaged in an effort to fix prices. Areeda, P 1417b at 97 (1986).

Plaintiffs also suggest that Burkhalter gave false testimony before and during the trial. Burkhalter's false testimony would merely serve to impeach him and to discredit his denial of involvement in the other defendants' conspiracy; it cannot, however, be the basis for an affirmative finding of his involvement without any affirmative evidence to that effect. In other words, if there were other credible and substantial evidence of Burkhalter's (and, by implication, Sunshine-Jr. Stores') involvement in the price-fixing conspiracy, then Burkhalter's denial of involvement could be discredited by his false testimony, and a jury could reasonably find that he was a part of the conspiracy; but in such case the finding of his involvement would be based on the other credible and substantial evidence.

[12] The evidence suggests that, after this lawsuit was filed, defendants abandoned their parallel pricing. This evidence, by itself, would merely reflect that, perhaps out of fear of this litigation, defendants abandoned, not any agreement to fix prices, but rather their interdependent conscious parallel pricing. Nevertheless, this evidence, in conjunction with the evidence of the pre-litigation parallel pricing and the anectodal evidence, supports the conclusion that all defendants, except Sunshine-Jr. Stores, fixed prices.

the right. The Court wrote that, "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury." *Id. at 266, 98 S. Ct. at 1054*. Therefore, if a plaintiff's nominal damages recovery constituted merely a recognition of a violation of his rights then it could be argued that he was not "injured in his business or property" as required for treble damages under *§ 4*.

However, without objection from the parties, the court in its instructions to the jury defined **[**37]** nominal damages as follows:

> **[*1471]** "However, if you find that the Plaintiffs have established by a preponderance of the evidence that the Defendants violated *Section 1* of the Sherman Act and that, as a result, the Plaintiffs have sustained damages but not in a substantial amount, then you may return a verdict for the Plaintiff class in some nominal sum such as one dollar."

Therefore, in order to award nominal damages in this case, the jury had to have found that the plaintiffs sustained some damages. The jury's nominal damages award reflected not only a recognition of a violation of *§ 1* of the Sherman Act, but also a finding of actual injury to the property of the plaintiffs, as required for relief under *§ 4* of the Clayton Act. Nevertheless, the nominal damages award, while reflecting actual damages, did not reflect the amount. Under these circumstances, a trebling would be meaningless. [13]

[38]** IV. PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Plaintiffs also seek prospective injunctive relief pursuant to *§ 16* of the Clayton Act. *15 U.S.C.A. § 26 (West Supp. 1993)*. [14] Admittedly, the plaintiffs recovered only nominal damages and it appears that defendants ceased their illegal conduct after the filing of this litigation. However, these circumstances do not preclude the issuance of an injunction if the evidence and circumstances otherwise warrant such.

[39]** In *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969)*, the Supreme Court rejected as "unsound" the notion that the "failure to prove the fact of injury barred injunctive relief." The Court found that, ***HN18***[] even in the absence of actual past and current injury, "threatened injury" and "the necessities of the public interest" may independently still warrant a prospective injunction. The Court wrote:

> "*[Section] 16* of the Clayton Act, *15 U.S.C. § 26*, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of 'threatened' injury. That remedy is characteristically available even

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[13] Defendants appear to suggest that nominal damages are neither appropriate under nor authorized by the Sherman and Clayton Acts. However, because none of the parties objected to the court's instructions on nominal damages or otherwise contended that the instructions were an incorrect statement of law, it is now too late for them to complain that nominal damages--at least, as specifically defined in the court's instructions--are not a type of relief which a jury may award under the antitrust laws.

[14] *Section 16* provides in part:

> ***HN17***[] "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including *sections 13*, *14*, *18*, and *19* of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."

> though the plaintiff has not yet suffered actual injury; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur."

> "Moreover, ***HN19***[] the purpose of giving private parties treble-damage and injunctive remedies **[**40]** was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *Section 16* should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.'"

Id. at 130-31, 89 S. Ct. at 1580 (citations and footnotes omitted).

Here, the threat of resumption of the conspiracy remains real. First, the defendants--that is, Cannon, Parrish, Shirley, and Sheffield and their employees--ceased their illegal price-fixing activity only after this lawsuit was filed. It was this litigation alone **[*1472]** that brought an end to their illegal conduct. The court is convinced, however, that once this litigation is over the defendants will more likely than not resume their illegal conduct. Second, the defendants and some of their employees not only have failed to **[**41]** acknowledge their wrong-doing, they have willfully testified falsely that they did not engage in price fixing and that they acted innocently. Their false testimony actually impeded and obstructed this litigation. *Cf. U.S.S.G. § 3C1.1* (1992) ("providing materially false information to a judge or magistrate" constitutes obstructing or impeding the administration of justice, warranting a higher sentence for a criminal defendant). This obstructionist conduct, which the court believes was also conspiratorial and by agreement among defendants, leads the court to believe that defendants are far from having abandoned their illegal ways; indeed, in a very real way, the conspiracy--in that it now manifests itself in false testimony--continued throughout the trial and continues today. Defendants' obstructionist conduct, in conjunction with their conspiracy to fix prices, convinces the court that the likelihood of recidivism on their part is not only likely it is great.

The court is further convinced that the continued operation of the conspiracy poses a "significant threat of injury." *Zenith Radio Corp., 395 U.S. at 130, 89 S. Ct. at 1580*. **[**42]** First, as previously shown, the nominal damages as defined in this case and as awarded by the jury represented a finding of actual injury to the plaintiffs. Second and in any event, defendants' continued and future illegal activity, if unrestrained by this court, poses the probability of substantial damages. As the Supreme Court recognized in *United States v. Trenton Potteries Co., 273 U.S. 392, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*, price-fixing may, and quite often does, result in reasonable prices. But the danger is that a reasonable price fixed by agreement today may through economic and business changes become unreasonable tomorrow. Indeed, ***HN20***[] it is because it is so difficult to determine whether a fixed price is unreasonable at one point in time that price fixing is a per se violation of the Sherman Act. As the Supreme Court has explained,

> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed **[**43]** today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions."

Id. at 397, 47 S. Ct. at 379.

Finally, even in the absence of a threatened injury, "the necessities of the public interest" would still warrant a prospective injunction. That a defendant's illegal price-fixing activity may not in the past have resulted in unreasonable prices and may not even result in the future in unreasonable prices does not mean that the public does not need protection. The *HN21*[] injury to the public is merely in the individual acquiring "The power to fix **[**44]** prices." *Trenton Potteries Co., 273 U.S. at 397, 47 S. Ct. at 379*. It does not matter whether that power is "reasonably exercised or not." *Id.* [15]

[45]** **[*1473]** The court cannot, however acquiesce in the entire wording of the injunction proposed by plaintiffs. First, plaintiffs' proposed injunction is open ended; it has no sunset. This litigation must eventually come to an end. The court believes that a three-year injunction, which would keep the threat of this litigation over defendants for an additional three years, would be sufficient. Second, plaintiffs' proposed injunction is too vague and covers conduct that is not only clearly legal but could conceivably be procompetitive. For example, the proposed injunction prohibits the defendants from "engaging in any conduct or in any other communications which tend to facilitate the fixing of the retail price of gasoline in Dothan, Houston County, Alabama." The court agrees, however, that the injunction should include language, as suggested by plaintiffs, which prohibits defendants from "agreeing, directly or indirectly, to fix the retail price of gasoline in Dothan, Houston County, Alabama." The injunction should also require that defendants take affirmative steps to undo their price-fixing conspiracy. The affirmative steps could include educating defendants' employees about the Sherman Act's **[**46]** prohibition on price-fixing and adopting personnel policies and procedures to help assure that defendants and their employees do not engage in price-fixing in the future.

The court will enter an injunction today prohibiting defendants Cannon Oil Company, Thomas Shirley, Home Oil Company, James Sheffield, Sheffield Oil Company, and Rodney Parrish from agreeing, directly or indirectly, to fix the retail price of gasoline in Dothan, Houston County, Alabama. [16] However, in order to give adequate consideration to the other concerns discussed above, the court will give these defendants an opportunity to propose to the court supplemental language to be included in the injunction.

An appropriate order and injunction will be entered.

DONE, this the 19th day of November, 1993.

Myron H. Thompson

UNITED STATES DISTRICT JUDGE

ORDER AND INJUNCTION

In accordance with the memorandum opinion entered this day, it is the ORDER, JUDGMENT and DECREE **[**47]** of the court:

(1) That the following motions filed by defendants are denied: Metha Jean Cannon and Cannon Oil Company's motion for judgment as a matter of law, filed on June 4, 1992; Thomas Shirley and Home Oil Company's motion for judgment as a matter of law, filed on June 8, 1992; James Sheffield and Sheffield Oil Company's motions for judgment as a matter of law, filed on June 1, 1992; and Rodney Parrish's motion for judgment as a matter of law, filed on June 3, 1992;

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[15] *In re Corrugated Container Antitrust Litigation, 756 F.2d 411 (5th Cir. 1985)*, and *United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988)*, relied upon by defendants, do not warrant denying injunctive relief in this case. First of all, in *Corrugated Container,* the jury did not find, as did the jury in the instant case, that plaintiffs had suffered actual antitrust damages. In *National Football League,* plaintiffs did not appeal from the trial judge's finding that the illegal antitrust activity was not likely to continue or reoccur, and the appellate court otherwise found that injunctive relief was not appropriate under the antitrust laws. But second and more importantly, whether injunctive relief is appropriate should be determined on a case-by-case basis. The specific factual circumstances presented to this court, for the reasons given, warrant such relief against defendants Cannon Oil Company, Thomas Shirley, Home Oil Company, James Sheffield, Sheffield Oil Company, and Rodney Parrish.

[16] Because Vernon Cannon is now deceased, he will not be included in the injunction.

(2) That defendant Sunshine-Jr. Stores' motion for judgment as a matter of law, filed on June 3, 1992 is granted, that the judgment entered on May 22, 1992, is vacated as to defendant Sunshine-Jr. Stores, and that judgment is entered in favor of defendant Sunshine-Jr. Stores and against plaintiffs;

(3) That plaintiffs' motion to amend to reflect treble damages, filed on May 29, 1992, is denied;

(4) That plaintiffs' motion for a permanent injunction filed on May 29, 1992, is granted;

(5) That defendants--Cannon Oil Company, Thomas Shirley, Home Oil Company, James Sheffield, Sheffield Oil Company, and Rodney Parrish--their officers, agents, servants, employees, and those persons in active concert or participation with **[**48]** them who receive actual notice of this injunction by personal service or otherwise, are each ENJOINED and RESTRAINED from agreeing, directly or indirectly, to fix the retail price of gasoline in Dothan, Houston County, Alabama;

(6) That defendants are DIRECTED to file with the court by December 8, 1993, supplemental language to be included in the injunction; and

(7) That the injunction entered this date shall expire on November 19, 1996.

[*1474] It is further ORDERED that the United States Marshal for the Middle District of Alabama or his representative shall personally serve a copy of this order and injunction on defendants Cannon Oil Company, Thomas Shirley, Home Oil Company, James Sheffield, Sheffield Oil Company, and Rodney Parrish.

It is further ORDERED that the clerk of the court shall issue a writ of injunction.

DONE, this the 19th day of November, 1993.

Myron H. Thompson

UNITED STATES DISTRICT JUDGE

U.S. Anchor Mfg. v. Rule Indus.

United States Court of Appeals for the Eleventh Circuit

November 23, 1993, Decided

No. 91-8854.

Reporter
7 F.3d 986 *; 1993 U.S. App. LEXIS 30124 **; 1993-2 Trade Cas. (CCH) P70,426; 7 Fla. L. Weekly Fed. C 1005

U.S. ANCHOR MFG., INC., Plaintiff, Counterclaim defendant, Appellee, Cross-Appellant, v. RULE INDUSTRIES, INC., Defendant-Appellant, Cross-Appellee, Tie Down, Inc., a/k/a Tie Down Engineering, Inc., Defendant, Counterclaim plaintiff, Appellant, Cross-Appellee, William Chapman, Counterclaim defendant.

Subsequent History: [**1] Certiorari Denied June 20, 1994, Reported at: *1994 U.S. LEXIS 4715*.

**Prior History: **Appeals from the United States District Court for the Northern District of Georgia. (No. 1:86-cv-2447-JTC). Jack T. Camp, Judge.

Disposition: REVERSED and JUDGMENT RENDERED in part and QUESTIONS CERTIFIED.

Core Terms

Anchor, prices, conspiracy, generic, predatory, market share, monopolization, brand, sales, district court, customers, fluke, restraint of trade, contends, factors, monopoly power, manufacturers, products, damages, parties, season, relevant market, state law claim, probability, costs, probability of success, consumers, submarket, cause of action, market power

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN1[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A predatory pricing claim requires proof that defendants attempted or conspired to drive a competitor out of the relevant market by pricing below some appropriate measure of cost.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Civil Procedure > Settlements > Releases From Liability > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN2[] **Procedural Matters, Jurisdiction**

Federal common law, not the state law of contracts, determines the effect of settlement agreements alleged to release federal antitrust claims.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN3[] **Standards of Review, De Novo Review**

The court reviews rulings on motions for judgment as a matter of law by applying de novo the same legal standards used by the district court. Both courts consider all the evidence, but all reasonable inferences must be drawn in the nonmovant's favor. If the jury verdict is supported by substantial evidence--that is, enough evidence that reasonable minds could differ concerning material facts--the motion should be denied. A mere scintilla of evidence in the entire record, however, is insufficient to support a verdict.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN4[] **Standards of Review, Abuse of Discretion**

Denial of a motion for a new trial is reviewed for clear abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN5[] **Standards of Review, Abuse of Discretion**

A district court's evidentiary rulings are not disturbed unless there is a clear showing of abuse of discretion.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Sherman Act, Claims

There are three essential elements of a claim alleging attempted monopolization under § 2 of the Sherman Act, 15 U.S.C.S. § 2. First, the plaintiff must show that the defendant possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct. Second, the defendant must in fact commit such anticompetitive conduct. Third, there must have existed a dangerous probability that the defendant might have succeeded in its attempt to achieve monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN7[] Monopolies & Monopolization, Attempts to Monopolize

To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN8[] Monopolies & Monopolization, Attempts to Monopolize

Monopoly power is the power to raise prices to supra-competitive levels or the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

International Trade Law > General Overview

HN9[] Monopolies & Monopolization, Attempts to Monopolize

The principal judicial device for measuring actual or potential market power remains market share, typically measured in terms of a percentage of total market sales.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN10[] Attempts to Monopolize, Elements

Defining the market is a necessary step in any analysis of market power and thus an indispensable element in the consideration of any monopolization or attempt case arising under § 2 of the Sherman Act, 15 U.S.C.S. § 2.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11[] **Regulated Practices, Market Definition**

The definition of the relevant market is essentially a factual question.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN12[] **Regulated Practices, Market Definition**

Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability--actual or potential--to take significant amounts of business away from each other.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN13[] **Regulated Practices, Market Definition**

The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN14[] **Regulated Practices, Market Definition**

In the case of product market definition, factors to consider may include whether the products and services have sufficiently distinctive uses and characteristics; whether industry firms routinely monitor each other's actions and calculate and adjust their own prices (at least in part) on the basis of other firms' prices; the extent to which consumers consider various categories of sellers as substitutes; and whether a sizeable price disparity between different types of sellers persists over time for equivalent amounts of comparable goods and services.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Monopolies & Monopolization, Attempts to Monopolize**

The likelihood of demand substitution, if proven, weighs strongly in favor of including the two categories of product within a single market for antitrust analysis. This is so because the very purpose of defining the relevant market under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, is to determine whether a monopolist, cartel or oligopoly in that market would be able to reduce marketwide output simply by cutting its own output, and thereby raise marketwide prices above competitive levels.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN16[] **Regulated Practices, Market Definition**

Although interbrand competition generally restrains the pricing behavior of individual brand sellers, customer brand loyalty may constitute an impediment to competition and thus an aid in the exercise of market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN17[] **Regulated Practices, Market Definition**

A single branded product may, in rare cases, constitute its own relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN18[] **Regulated Practices, Market Definition**

The understanding that brand loyalty may facilitate monopolization is consistent with the general proposition that the ability to discriminate against a distinct group of customers by charging higher prices for otherwise similar products demonstrates the existence of market power with respect to that group. The existence of such market power may, as a practical matter, remove the higher priced product from the broader market composed of its functional substitutes.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN19[] **Regulated Practices, Market Definition**

Regardless of which party bears the ultimate burden of persuasion, the broader economic significance of a submarket must be supported by demonstrable empirical evidence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN20[] **Monopolies & Monopolization, Attempts to Monopolize**

The principal measure of actual monopoly power is market share, and the primary measure of the probability of acquiring monopoly power is the defendant's proximity to acquiring a monopoly share of the market. Thus, a sufficiently large market share may alone create a genuine dispute over whether the defendant possessed a dangerous probability of successfully monopolizing a market despite the existence of other facts tending to make monopolization unlikely, thereby precluding summary judgment for the defendant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN21[] **Monopolies & Monopolization, Attempts to Monopolize**

When assessing market shares for the purpose of ascertaining market power the appropriate measure of a firm's share is the quantity of goods or services actually sold to consumers.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN22[] **Monopolies & Monopolization, Attempts to Monopolize**

Although revenues are often relied upon as a surrogate for quantity, actual unit sales must be used whenever a price spread between various products would make the revenue figure an inaccurate estimator of unit sales.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN23[] **Monopolies & Monopolization, Attempts to Monopolize**

Market share estimated with reasonable confidence to fall between 60 and 657 suffices to raise a jury question concerning dangerous probability of success.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN24[] **Conspiracy to Monopolize, Elements**

The elements of a conspiracy to monopolize under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, are (1) an agreement to restrain trade, (2) deliberately entered into with the specific intent of achieving a monopoly rather than a legitimate business purpose, (3) which could have had an anticompetitive effect, and (4) the commission of at least one overt act in furtherance of the conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN25[] **Antitrust & Trade Law, Sherman Act**

The elements of a conspiracy to restrain trade under *§ 1* of the Sherman Act, *15, U.S.C.S. § 1*, are (1) an agreement to enter a conspiracy (2) designed to achieve an unlawful objective. The plaintiff must also prove (3) actual unlawful effects or facts which radiate a potential for future harm to competition.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN26[] Antitrust & Trade Law, Sherman Act

There is no requirement that a conspiracy under either *§ 1* or *§ 2* of the Sherman Act, *15 U.S.C.S. §§ 1*, *2*, have a dangerous probability of successfully achieving its objectives.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN27[] Antitrust & Trade Law, Sherman Act

A plaintiff under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, need not prove an intent on the part of the co-conspirators to restrain trade or to build a monopoly. So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under *§ 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN28[] Conspiracy to Monopolize, Elements

A claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, and a conspiracy to monopolize claim under *§ 2*, *15 U.S.C.S. § 2*, require the same threshold showing--the existence of an agreement to restrain trade.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN29[] Monopolies & Monopolization, Conspiracy to Monopolize

Federal ***antitrust law*** requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN30[] Monopolies & Monopolization, Conspiracy to Monopolize

It is not unlawful to slash prices in an attempt to obtain more sales, even if the result is that a competitor happens to be driven out of business.

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN31[] **Commercial Interference, Business Relationships**

Georgia law provides a cause of action for tortious interference with the business relationships between a plaintiff and its customers, suppliers or representatives. To be held liable the defendant must have (1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) caused plaintiff to suffer some financial injury.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN32[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

The doctrine of pendent jurisdiction gives the district court power to decide claims arising under state law as to which there was no independent basis for federal jurisdiction but which share a common nucleus of operative fact with federal claims. The court also has discretion not to hear such state law claims.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN33[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

While the doctrine of pendent jurisdiction is a flexible one according great leeway to the court, the United States Court of Appeals for the Eleventh Circuit has found an abuse of discretion in failing to dismiss a case when the federal claims were resolved early in the proceedings and the state law claims posed issues of first impression.

Counsel: For Appellant: TIE DOWN, Harold T. Daniel, Jr., Webb & Daniel, Laurie Webb Danie, N.W., Atlanta, GA., RULE INDUSTRIES, Charles M. Shaffer, jr., J. Kevin Buster, Sean R. Smith, Atlanta, GA.

For Appellee: J. Alexander Porter, Simuel F. Doster, Jr., PORTER & BARRETT, Atlanta, GA.

Judges: Before COX and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

Opinion by: DUBINA

Opinion

[*989] DUBINA, Circuit Judge:

This is an appeal from a jury verdict imposing civil liability for alleged predatory pricing in violation of the antitrust laws. More specifically, appellants Rule Industries, Inc. ("Rule") and Tie Down Engineering, Inc. ("Tie Down"), defendants below, appeal the district court's denial of their motions for judgment notwithstanding the verdict on claims by U.S. Anchor Manufacturing, Inc. ("U.S. Anchor") that Rule and Tie Down attempted and conspired to monopolize the United States market for light weight fluke-style anchors for small boats by means of below-cost pricing intended to drive out competition. U.S. Anchor cross-appeals the district court's order of a directed verdict on its state law claims arising from the same allegations. We reverse the denial of defendants' motions concerning the federal claims. With respect to the state law claims, we certify the dispositive issues for authoritative resolution by the Supreme Court of Georgia.

I. FACTS

This **[**2]** case involves several manufacturers and suppliers of light weight anchors for ultimate retail purchase by owners of recreational boats and small commercial fishing craft. As the district court observed in denying cross-motions for summary judgment,

> anchors and other marine industry products are generally sold by suppliers to wholesale distributors, who in turn sell the anchors to boat dealers, marinas, and other retailers for ultimate resale to the consumer, the boat owner. The supplier may either manufacture its own anchors, as does U.S. Anchor, or purchase them from another domestic manufacturer, as [Rule] does from Tie Down, or import them from abroad.

U.S. Anchor Mfg. v. Rule Indus., 717 F. Supp. 1565, 1568 (N.D.Ga.1989).

Within the general category of fluke anchors are four distinct product groups recognized in the industry: (1) expensive premium anchors, (2) the "Danforth Standard" brand line of anchors sold only by Rule, (3) so-called "generic" versions of the Danforth Standard, and (4) inexpensive economy anchors used primarily for lake boating.

Rule is a diversified Massachusetts firm that sells an assortment of marine, hardware and automotive **[**3]** products to wholesale distributors. It entered the fluke anchor industry in 1983 when it obtained the rights to sell the Danforth brand line of anchors. Prior to 1985, Danforth anchors were manufactured for Rule exclusively by the Jacquith Company ("Jacquith") in New York. Tie Down is a smaller manufacturing firm in Georgia that began selling generic and economy fluke anchors in the late 1970s under the "Hooker" brand name. In May 1985 Rule obtained the Hooker trademark and the exclusive right to purchase and distribute Tie Down's anchor production in a transaction that U.S. Anchor has characterized as a "merger." After it sold the right to market its own anchors, Tie **[*990]** Down agreed to manufacture both generic/economy and Danforth brand anchors for Rule. Tie Down's only role in the fluke anchor industry since 1985 has been as one of Rule's suppliers.

U.S. Anchor is a Georgia company founded in 1985 by William Chapman ("Chapman"), the immediate past president of Tie Down whose responsibilities there had recently ended. U.S. Anchor both manufactures and distributes generic and economy fluke anchors under the "Sentinel" brand name. Between August 1985 when it first sent out price lists **[**4]** and December 31, 1990, its market share increased to between 45 and 687, depending on how the relevant product market is defined and measured.

Shortly after U.S. Anchor entered the market in August 1985, on the eve of the 1985-86 marine products season, [1] Rule and U.S. Anchor engaged in a price war. Following publication of U.S. Anchor's August price list, Rule published prices in September that were approximately 11 to 187 higher than U.S. Anchor's. Thus, U.S. Anchor's prices were 10 to 157 lower than Rule's. (R30-27; *compare* USTX 343 *with* USTX 345.) [2] In October, after U.S. Anchor had received substantial orders from Rule customers, Rule cut its prices by 207, *i.e.,* to levels 6 to 127 below U.S. Anchor's August prices. (R49-28; RTX 584.) U.S. Anchor then matched Rule's October prices. In a written report to Rule, USTX 683, Tie Down's president Charles MacKarvich ("MacKarvich") estimated U.S. Anchor's costs of production and hypothetical projected sales for a twelve-month period. He theorized that if Rule lowered its prices further and offered extended credit terms to customers, U.S. Anchor would be forced to adopt even more attractive terms in order to compete. From **[**5]** his estimates of cash flow and net revenue derived from these cost and sales projections, he predicted that such terms would subject U.S. Anchor to a negative cash flow and an actual net loss over the 1985-86 marketing year. Rule implemented price reductions consistent with MacKarvich's report in November 1985. In December, U.S. Anchor merely matched Rule's prices and did not

[1] The annual marine products selling season begins each September with a trade show.

[2] U.S. Anchor's trial exhibits will be cited as "USTX _," Rule's trial exhibits as "RTX _" and Tie Down's trial exhibits as "TDTX _."

attempt to undercut them. (R30-39-40, USTX 351, 353, 543.) U.S. Anchor contends that Rule's first price cut in October was predatory and that all subsequent sales at or below that level were also predatory.

After the pricing conduct at issue in this case began, distributors' prices for generic brands in the smaller, popular sizes ranged between $ 3 and $ 14 depending on weight, and prices for Danforths were spread 50 to 967 **[**6]** higher. [3] Among the more expensive, larger anchors the spread between Danforth and generic brands was even greater. Excluding premium anchors, [4] annual unit sales of fluke anchors in the United States during the time relevant to this case has varied from 232,000 to 347,000. (USTX 479.)

[7]** At trial the parties noted differing possible measures of Rule's share of the relevant product market after the acquisition of Tie Down's anchor line in May 1985, four months before the close of the 1984-85 marine season at the end of August. This dispute encompassed two aspects of market share: whether to define the product market as including the high priced Danforth anchors or only the less expensive generic and economy models, and whether to measure market shares in terms of unit sales or dollar revenues. Including the Danforth line and measuring market shares in revenue, U.S. Anchor asserts that Rule and Tie Down together **[*991]** controlled 90.5% of the fluke anchor market during the 1984-85 season, the last year before Rule's alleged predation began and the last year before the merger with Tie Down, and that Rule possessed 60.07 of the market during the 1985-86 selling year. (USTX 467.) Using Rule's most favorable calculation, which measures share in units and excludes Danforths from the market, Rule contends that the combined Rule/Tie Down market share in 1984-85 was only 61.57, (RTX 674), and that Rule's aggregate 1985-86 share was 30.17, (*id.;* RTX 675 at 1). [5] Rule also submitted **[**8]** evidence that its 1985-86 unit market share, including Danforths, was 43.17. (RTX 675 at 1.) Notably, all of these figures encompass an entire season and none of them attempts to pinpoint Rule's share at the exact date when the alleged predation began in October 1985, several months after U.S. Anchor entered the market. The evidence shows, and the parties agree, that the Rule/Tie Down market share consistently decreased after August 1985 when U.S. Anchor first began to solicit orders. The parties also agree that the relevant geographic market was the United States.

[9]** II. PROCEDURAL HISTORY

In November 1985 Rule filed suit against U.S. Anchor for various violations of state and federal law not involving predatory pricing. The suit was settled on March 19, 1986, when U.S. Anchor and Rule executed an agreement releasing each other from liability for all events occurring prior to the date of the release. Tie Down was a party to neither the litigation nor the ensuing release.

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[3] (USTX 372 (Rule's 1989-90 price list; 50.4 to 96.27 spread); USTX 368 (Rule's 1988-89 price list; 49.7 to 96.27 spread); USTX 362 (Rule's 1987-88 price list; 73.4 to 91.77 spread); USTX 355 (Rule's 1986-87 price list; 61.0 to 76.17 spread); *see also* USTX 371 (U.S. Anchor's 1989-90 price list); USTX 367 (U.S. Anchor's 1988-89 price list); USTX 365 (U.S. Anchor's 1987-88 price list).) U.S. Anchor repeatedly opened the marine season with prices higher than Rule's, only to reduce its prices when Rule failed to follow U.S. Anchor's pricing strategy.

[4] The parties have treated this appeal as though premium fluke anchors were irrelevant. They have also ignored other types of anchors designed for holding on different bottom conditions (fluke anchors are most useful on sandy bottoms and least effective in gripping grassy bottoms). We do the same.

[5] Although neither party adduced direct evidence of the combined Rule/Tie Down unit market share in 1984-85 with Danforths included, the jury must have concluded that the firms' combined unit share for that season with the higher-priced anchors included was somewhat greater than the 61.57 unit share they garnered in the non-Danforth market because only Rule marketed the Danforth line. U.S. Anchor's USTX 467 indicates that Rule itself had no 1984-85 revenues in the non-Danforth market. But Rule's RTX 674, which appears to represent the non-Danforth unit market (*compare* RTX 674, col. 1985-86 *with* RTX 675 at 1, rows 1985-86), shows Rule with 12.67 of that market in 1984-85. We assume that RTX 674 attributes to Rule the non-Danforth production of Tie Down following the Rule-Tie Down transaction in the final quarter of the 1984-85 season.

On November 13, 1986, U.S. Anchor sued Rule and Tie Down, alleging that Rule had attempted to monopolize the fluke anchor market in violation of *section 2* of the Sherman Act [6] beginning in October 1985 by engaging in predatory pricing. U.S. Anchor also alleged that Rule and Tie Down had conspired to restrain trade in violation of *section 1* of the Sherman Act [7] and conspired to attain a monopoly in violation of *section 2*, by agreeing to charge predatory prices, also beginning in October 1985. U.S. Anchor also asserted an illegal tying arrangement by Rule, whereby its newly patented and supposedly revolutionary "Deepset" anchors allegedly were sold only to distributors who abstained from buying generic fluke anchors from suppliers other than Rule, in violation of *section 1* of **[**10]** the Sherman Act and section 3 of the Clayton Act, as amended by the Robinson-Patman Act. [8] U.S. Anchor further alleged that Rule and Tie Down had conspired to restrain trade in violation of Georgia law.

[11]** **[*992]** The district court denied the parties' cross-motions for summary judgment. *717 F. Supp. 1565*. A jury trial followed during which the defendants moved for directed verdicts [9] as to all claims. The court granted their motions on the state law claims because it concluded that Georgia law did not permit damages to be recovered for a conspiracy in restraint of trade. The jury found Rule solely liable for attempted monopolization and jointly liable with Tie Down on both conspiracy counts. The verdict exonerated Rule of illegal tying. (R10-321.) The jury set damages for each of the three violations at $ 1,638,028, which the court trebled to $ 4,914,084. Tie Down and Rule both moved for judgment notwithstanding the verdict on liability and for a new trial on the issue of damages. (R11-348, 349.) The district court denied these motions, awarded U.S. Anchor statutory attorney fees in the stipulated amount of $ 800,000 and entered judgment accordingly. (R14-382.) Rule and Tie Down appealed, and U.S. Anchor cross-appealed with respect to the state law tort claims. U.S. Anchor does not appeal the judgment on the tying claim.

[12]** III. CONTENTIONS OF THE PARTIES

Rule contends that it engaged in no predatory conduct and disputes U.S. Anchor's showing of Rule's and Tie Down's costs of producing the anchors. ***HN1***[] Since a predatory pricing claim requires proof that defendants

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[6] *Section 2* provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…." *15 U.S.C. § 2*.

[7] *Section 1* provides in relevant part: "Every contract, combination …, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*.

[8] Section 3 of the Clayton Act provides in relevant part:

> It shall be unlawful for any person engaged in commerce … to lease or make a sale or contract for sale of goods …, whether patented or unpatented, for use, consumption, or resale within the United States … on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods … of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition … may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14. Among other possible differences between the Sherman Act and Robinson-Patman Act tying provisions is that the Sherman Act prohibition extends to arrangements affecting the sale of services and realty as well as goods. *See, e.g., Tic-X-Press, Inc. v. Omni Promotions Co., 815 F.2d 1407 (11th Cir.1987)* (tying arrangement conditioning the lease of coliseum theater space upon the employment of a ticket-selling agency affiliated with the lessor); *see generally Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1574-79 (11th Cir.1991), cert. denied, __ U.S. __, 113 S. Ct. 295, 121 L. Ed. 2d 219 (1992)*.

[9] A motion for directed verdict is now deemed a motion for judgment as a matter of law, and motions for judgment notwithstanding the verdict are now renewed motions for judgment as a matter of law. *See Fed.R.Civ.P. 50*.

attempted or conspired to drive a competitor out of the relevant market by "pricing below some appropriate measure of cost," the issue of which costs to count may be vital. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 n. 8, 106 S. Ct. 1348, 1355 n. 8, 89 L. Ed. 2d 538 (1986)* (noting but not resolving debate over which costs are "relevant"), *on remand, In re Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44 (3d Cir.1986)*, *cert. denied, 481 U.S. 1029, 107 S. Ct. 1955, 95 L. Ed. 2d 527 (1987)*. Rule advances numerous criticisms of U.S. Anchor's expert testimony on this point. Tie Down contends that U.S. Anchor failed to adduce any evidence that Tie Down's prices to Rule were below Tie Down's cost, that Tie Down had any knowledge of (or control over) Rule's other costs, or that it **[**13]** had any control over Rule's prices.

Rule also contends that it had no dangerous probability of successfully achieving a monopoly. The parties first dispute the existence of barriers to entry in the relevant market. Rule and Tie Down contend that without high barriers, a successful monopolist would not have been able to recoup the foregone profits inherent in below-cost pricing by charging supra-competitive prices following the end of the victim's competitive presence. [10] U.S. Anchor contends that there was sufficient evidence of entry barriers to permit the jury to find them and that in any case actual recoupment is not required as a matter of law before the jury may find an attempt or conspiracy to monopolize. Second, Rule points to U.S. Anchor's own success and Rule's declining fortunes in the anchor market as evidence that it could not have monopolized.

[14]** Rule and Tie Down also challenge the sufficiency of the evidence of unlawful conspiracy. The parties dispute the inference to be drawn from plaintiff's exhibit 683, the MacKarvich market report. U.S. Anchor contends that MacKarvich was proposing to drive the new entrant from the marketplace. Defendants offered expert testimony, corroborated by MacKarvich himself, that studies **[*993]** of competitors' costs and revenues are common in competitive industries and that a projected loss after the first year of operation is ordinarily not enough to drive any new entrant from the market, since start-up companies must generally expect early losses. In its cross-appeal U.S. Anchor challenges the district court's exclusion of certain evidence that allegedly supports the existence of a conspiracy.

Rule and Tie Down challenge the sufficiency of U.S. Anchor's proof concerning damages. They argue that at least some of their price cuts were instituted to meet competition from foreign fluke anchor manufacturers and any loss of sales by U.S. Anchor resulting from such reductions is not antitrust injury. Moreover, they contend, the base price from which U.S. Anchor's revenue losses were calculated should have **[**15]** reflected competitive levels as shown by Rule's and U.S. Anchor's early, allegedly non-predatory reductions rather than prices prevailing before U.S. Anchor's entry into the market.

Rule and U.S. Anchor dispute the scope and effect of their settlement agreement in the prior litigation. Rule contends that liability for all predatory sales before the date of the release was discharged. Moreover, Rule maintains that the alleged predatory scheme was ongoing at the time the contract was executed and therefore all post-release liability was discharged as well. U.S. Anchor contends that a general release is ineffective to discharge undiscovered antitrust liability as a matter of law and, moreover, that post-release damages were not waived. We do not reach this dispute as it applies to the federal antitrust claims. [11] As applied to the state law claims, we certify the question, along with the substantive issues of Georgia law, for resolution by the Supreme Court of Georgia.

[16]** In its cross-appeal U.S. Anchor also argues that the district court should not have granted a directed verdict on its state law claims because Georgia law allows private damage actions for conspiracies in restraint of trade. Rule and Tie Down disagree with U.S. Anchor's interpretation of Georgia law.

IV. STANDARD OF REVIEW

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[10] A predatory pricing scheme could be successful by driving the victim out of business or by coercing him to reduce output to levels consistent with profit-maximization by a firm or syndicate possessing monopoly power. Either result would eliminate the victim's competitive presence.

[11] ***HN2***[] Federal common law, not the state law of contracts, determines the effect of settlement agreements alleged to release federal antitrust claims. *Redel's Inc. v. General Elec. Co., 498 F.2d 95, 98 & n. 2 (5th Cir.1974)*.

HN3[] We review rulings on motions for judgment as a matter of law by applying de novo the same legal standards used by the district court. *Miles v. Tennessee River Pulp & Paper Co., 862 F.2d 1525, 1528 (11th Cir.1989)*. Both courts consider all the evidence, but all reasonable inferences must be drawn in the nonmovant's favor. If the jury verdict is supported by substantial evidence--that is, enough evidence that reasonable minds could differ concerning material facts--the motion should be denied. A mere scintilla of evidence in the entire record, however, is insufficient to support a verdict. *See Hessen ex rel. Allstate Ins. Co. v. Jaguar Cars, Inc., 915 F.2d 641, 644 (11th Cir.1990)*. ***HN4***[] Denial of a motion for a new trial is reviewed for clear abuse of discretion. *Id. at 644-45*. **[**17]** ***HN5***[] A district court's evidentiary rulings are not disturbed unless there is a clear showing of abuse of discretion. *Id. at 645*.

V. ATTEMPTED MONOPOLIZATION

HN6[] There are three essential elements of a claim alleging attempted monopolization under *section 2* of the Sherman Act. First, the plaintiff must show that the defendant possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct. Second, the defendant must in fact commit such anticompetitive conduct. Third, there must have existed a dangerous probability that the defendant might have succeeded in its attempt to achieve monopoly power. *Spectrum Sports, Inc. v. McQuillan,* __ U.S. __, __, *113 S. Ct. 884, 890, 122 L. Ed. 2d 247 (1993)*; *see McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1493 (11th Cir.1988)*, *cert. denied, 490 U.S. 1084, 109 S. Ct. 2110, 104 L. Ed. 2d 670 (1989)*; 3 Phillip Areeda & Donald F. Turner, ***Antitrust Law*** P 820 at 312 (1978) [hereinafter Areeda & Turner, ***Antitrust Law***]. We address these elements **[**18]** in reverse order.

[*994] A. *Dangerous Probability of Success*

HN7[] To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power. [12] ***HN8***[] Monopoly power is "the power to raise prices to supra-competitive levels or … the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market." *American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1581 (11th Cir.1985)*. Most attempts to measure monopoly power involve quantifying the degree of concentration in a relevant market and/or the extent of a particular firm's ability to control productive capacity in that market. In analyzing attempted monopolization's dangerous probability of success element, the estimate of market power is necessarily speculative to some extent because it requires an evaluation of future behavior by market participants, viewed at the time the alleged attempt began. We are not without guideposts, however.

[19]**

> Relevant determinants of the market power of a prospective predator in this regard include its absolute and relative market shares, and those of competing firms; the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment.

International Tel. & Tel. Corp., 104 F.T.C. 208, 412 (1984) (citation and footnotes omitted). ***HN9***[] Despite the seemingly broad array of factors employed by the Federal Trade Commission, the principal judicial device for measuring actual or potential market power remains market share, typically measured in terms of a percentage of total market sales. Thus, at the outset the appropriate market must be defined or identified. [13]

HN10[] Defining the market is a necessary step in any analysis of market power and thus an **[**20]** indispensable element in the consideration of any monopolization or attempt case arising under *section 2*. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 350, 15 L. Ed. 2d 247 (1965)*; *American Key, 762 F.2d at 1579*. Although the issue is fully developed in the fact section of Rule's brief, the argument section does not address the precise question of market definition. U.S. Anchor, in the fact section of its

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[12] The terms "monopoly power" and "market power" are synonymous and are used interchangeably in this opinion.

[13] This inquiry may be labelled more appropriately as "market estimation." *See* Herbert Hovenkamp, *Economics and Federal* ***Antitrust Law*** 59 (1985).

brief, contends that the question of market definition is not appropriately before us because Rule does not argue the point. (U.S. Anchor's Br. at 3 n. 1.) We must consider the question nevertheless before passing on the legal significance of evidence concerning Rule's potential market power. As the issue of Rule's dangerous probability of success has been preserved through argument, the subsidiary question of market definition is also preserved because it is set forth fully in the fact section of Rule's brief. [14] **[**21]** The issue was fully argued before the district court. [15]

HN11[] The definition of the relevant market is essentially a factual question, so the precise issue we first must address is whether U.S. Anchor introduced sufficient evidence to raise a jury question on the inclusion of Danforths. *See, e.g., Yoder Bros. v. California-Florida **[*995]** Plant Corp., 537 F.2d 1347, 1366 (5th Cir.1976), cert. denied, 429 U.S. 1094, 97 S. Ct. 1108, 51 L. Ed. 2d 540 (1977).* [16]

1. Defining the Market

"Defining ***HN12***[] a relevant product **[**22]** market is primarily "a process of describing those groups of producers which, because of the similarity of their products, have the ability--actual or potential--to take significant amounts of business away from each other.' " *General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 805 (8th Cir.1987)* (quoting *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063* (3d Cir.), *cert. denied, 439 U.S. 838, 99 S. Ct. 123, 58 L. Ed. 2d 134 (1978))*. ***HN13***[] The reasonable interchangeability of use or the cross-elasticity of demand [17] between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 1523, 8 L. Ed. 2d 510 (1962)*.

> Within this broad market, well-defined submarkets may exist which, **[**23]** in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors…. The cross-elasticity of production facilities may also be an important factor in defining a product market….

Id. at 325 & n. 42, *82 S. Ct. at 1523-24* & n. 42 (citations and footnotes omitted). As the Supreme Court's language itself suggests, defining a "submarket" is the equivalent of defining a relevant product market for antitrust purposes. *International Telephone & Telegraph* adequately summarizes our view of the relevant proof:

> Reliable measures of supply and demand elasticities provide the most accurate estimates of relevant markets. However, it is ordinarily quite difficult to measure cross-elasticities of supply and demand accurately. Therefore,

[14] *See* ***Fed.R.App.P. 28(a)(4)*** (brief shall include "a statement of the facts relevant to the issues presented for review, with appropriate references to the record"); *cf. Harris v. Plastics Mfg. Co., 617 F.2d 438, 440 n. 1 (5th Cir.1980)* (per curiam) (brief that merely stated an issue, without providing any argument or facts, deemed to waive it). For instance, the plaintiff's brief in *American Key* raised the question of market definition but failed to raise, *inter alia,* the existence of monopoly power. Although the omission technically "abandoned" the issue of market power, the court addressed it anyway. *762 F.2d at 1579-81*. We believe Rule's brief puts this case closer to *American Key* than cases in which a brief merely stated an issue without fact and argument, or actually ignored an entire claim or defense. *Cf. Joe Regueira, Inc. v. American Distilling Co., 642 F.2d 826, 833 n. 16 (5th Cir. Unit B April 1981)*; *In re Municipal Bond Reporting Antitrust Litig., 672 F.2d 436, 439 n. 6 (5th Cir.1982)*.

[15] (*See* R10-301-4, Memo at 28-30 (Rule's Motion for Directed Verdict and Memorandum in Support); R9-299 Br. at 3-6 (Tie Down's Motion for Directed Verdict and Brief in Support).)

[16] Decisions of the former Fifth Circuit rendered before October 1, 1981, are binding upon panels of this court. *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981)* (en banc).

[17] Also known as "demand substitution."

> it is usually necessary to consider other factors that **[**24]** can serve as useful surrogates for cross-elasticity data.… ***HN14***[] In the case of product market definition, these factors may include
>
> whether the products and services have sufficiently distinctive uses and characteristics; whether industry firms routinely monitor each other's actions and calculate and adjust their own prices (at least in part) on the basis of other firms' prices; the extent to which consumers consider various categories of sellers … as substitutes; and whether a sizeable price disparity between different types of … sellers … persists over time for equivalent amounts of comparable goods and services.

104 F.T.C. at 409 (quoting *Grand Union Co., 102 F.T.C. 812, 1041 (1983))* (footnotes omitted).

We note that Danforth brand anchors are functionally interchangeable with their equivalent counterparts among the generic brands. Indeed, among smaller sized anchors the Hooker and Danforth anchors have always been virtually identical. (R30-131-33; R33-129-31.) This interchangeability suggests a likelihood that consumers of generic brands would willingly switch to Danforths in the event of significant price **[**25]** increases among generics. Similarly, Danforth customers might switch to generic brands if Rule implemented a significant increase in the price of Danforths. ***HN15***[] The likelihood of demand substitution, if proven, weighs strongly in favor of including the two categories of product within a single market for antitrust analysis. This is so because the very purpose of defining the relevant market under *section 2* is to determine whether a monopolist, cartel or oligopoly in that market would be able to reduce marketwide output simply by cutting its own output, and thereby **[*996]** raise marketwide prices above competitive levels. *United States v. E.I. du Pont de Nemours & Co. (The Cellophane Case), 351 U.S. 377, 395, 76 S. Ct. 994, 1007, 100 L. Ed. 1264 (1956)*; *Satellite Television & Associated Resources, Inc. v. Continental Cablevision, Inc., 714 F.2d 351, 356 (4th Cir.1983)*, *cert. denied, 465 U.S. 1027, 104 S. Ct. 1285, 79 L. Ed. 2d 688 (1984)*. [18]

[26]** We hold, however, that the relevant market in this case constituted light weight generic and economy fluke anchors. Four of the *Brown Shoe* factors weigh strongly in favor of excluding Danforths from the relevant market: distinctly higher prices, a distinct group of customers, strongly inelastic demand and limited substitution of supply. Moreover, the higher prices charged for Danforths are evidence that a distinct group of customers was unwilling to switch away from the prestigious branded product in response to price increases above competitive levels. The fact that this group remained loyal to Danforths despite prices 50 to 967 and more above prices for functionally interchangeable alternative products shows inelastic demand and limited demand interdependence. More importantly, U.S. Anchor showed no reasonable possibility that a significant number of consumers would have switched to Danforths, many of which were offered at nearly double the price of their generic substitutes, in response to more modest increases in generic prices. And as more fully discussed below, there is no evidence that Rule had (or would have) varied its output of Danforths in response to price changes **[**27]** in the broader market. We hold, therefore, that the record provides no support for finding significant cross-elasticity of demand or supply between Danforths and generic anchors.

First, U.S. Anchor's evidence was insufficient for a reasonable juror to conclude that there was a significant cross-elasticity of demand. U.S. Anchor's evidence demonstrated that an increase in the spread between prices for Danforths and other anchors had coincided with lower sales of Danforths. During the period from September 1985 until August 1990, sales of Danforths fell by 61.57 while the spread between the prices of Danforths and other anchors increased by 9.17. (USTX 638; R40-106.) (According to the exhibit, Danforth prices rose while Sentinel and Hooker prices fell). Although we recognize that correlation is often relied upon to infer causation, *see, e.g., Cellophane,* 351 U.S. at 400, 76 S. Ct. at 1010, we do not believe that this aggregation of sales data over five years provided a sufficiently close correlation between changes in demand and price to justify the inference that consumers were willing and able to switch away from Danforths **[**28]** *because of* increasing price differences. The exhibit wholly fails to take account of factors other than price (or quality) which may have affected demand for

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[18] *See also, e.g.,* Richard A. Posner, ***Antitrust Law****: An Economic Perspective* 125-26 (1976); Hovenkamp, *supra* at 59.

Danforths. If changes in relative prices had been more closely correlated in time with shifting purchases then it might have been reasonable to infer that the demand shifts were caused by the price differences. As the evidence stands, however, the datum aggregating demand behavior from 1985 to 1990 fails to provide any basis from which the jury could have inferred that the demand shifts were caused by prices instead of other factors. Those non-price, non-quality factors might well have included consumers' increased awareness of the similarities between Danforths and other brands (perhaps caused by U.S. Anchor's successful promotion of its own products), changing attitudes concerning thrift and the value of money, the decline in demand for fluke anchors generally after the 1987-88 season, (*see* USTX 479), or competition from Rule's own more expensive premium Deepset line. Over time the shape of a demand curve changes independently of variations in the pricing and quality of particular substitute products. Aggregate (or **[**29]** average) evidence of demand over too long a period of time provides no support for inferring that changes apparently correlated with substitute price movements represent shifts in the curve caused by those variations in prices. Given the changes in the behavior of competitors that occurred over the five years in **[*997]** question, namely the development of fierce price competition between Rule and U.S. Anchor in the generic and economy market and the introduction of Deepsets, we conclude that the average Danforth sales statistic was insufficient evidence from which the jury could have inferred demand cross-elasticity in October 1985 or thereafter. *Cf. Yoder Bros., 537 F.2d at 1367-68*. This conclusion is buttressed by the more precise sales data provided by USTX 508. Comparing the 1985-86 and 1986-87 seasons, which are the two closest in time to the date when the alleged predation began in October 1985 for which data were offered, the exhibit shows that unit sales of Danforths fell 5.4% [19] despite a price reduction of 0.57 and a simultaneous increase in the prices of generic anchors of 0.87. *Id.* at 2. Danforths suffered this decline while the overall demand **[**30]** for fluke anchors jumped 197, from 273,000 to 325,000 in annual unit sales. (USTX 479.) [20]

Just as an increase in Danforth prices might have been expected to drive customers away from Rule and into the arms of generic manufacturers, an increase in prices for generic brands would likely cause some otherwise price-sensitive customers to prefer the more expensive Danforths. Nonetheless, the present record provides no basis other than guesswork for concluding that a shift away from generics **[**31]** would have been significant in magnitude; [21] the large spread in prices between generic anchors and Danforths tends to suggest that the shift would not have been great. Thus, we conclude that the record provides no support for finding significant cross-elasticity of demand between Danforths and generics.

Second, the evidence was insufficient for a reasonable juror to find a significant cross-elasticity of supply. The jury could not reasonably have found that the manufacturing capacity used to make Danforths likely would have been switched to making generic anchors in response to moderate price increases by a sole seller of the lower priced products. To be sure, the productive processes employed in manufacturing Danforths were virtually identical to **[**32]** those used for generics. (R33-145-50.) Yet it defies logic to suggest that a rational supplier [22] would switch from selling branded products at high prices to selling equally costly equivalent products at lower prices, even assuming that the lower prices would yield significant supranormal profits. Put another way, it would be unreasonable to expect Rule to lower the price of Danforths and abandon its ability to discriminate against brand-conscious boaters solely to earn smaller profits. There was insufficient evidence of likely supply substitution from

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[19] U.S. Anchor's unit sales exhibit, USTX 479, shows an even more marked decrease in Danforth sales for the two seasons: a 7.87 drop from 56,431 in 1985-86 to 52,035 in 1986-87. This is only one example of inconsistency in the evidence offered by U.S. Anchor, but we assume that the jury credited the version least favorable to Rule.

[20] Faced with this evidence, we can only note that the absence of proof concerning changes in prices and sales before the Rule-Tie Down transaction is an especially prominent flaw in U.S. Anchor's case.

[21] By "significant in magnitude" we refer to a shift that is large enough to render unprofitable a monopolistic price increase in the broader market. Again, we defer the task of establishing criteria for testing the quantitative significance of changes in this variable.

[22] There is no evidence that Rule was irrational in its pricing strategies, although it may well have been misinformed or overly optimistic concerning U.S. Anchor's staying power in the market.

which to conclude that any portion of Danforth output would have served to constrain price increases among the generic anchors. [23]

[33]** Moreover, the record demonstrates that the Danforth line, although functionally equivalent to their counterparts, may have constituted its own market based on consumer brand loyalty. The fluke anchor industry presented the unusual circumstance of severe price discrimination against a distinct group of consumers based solely on brand preference. U.S. Anchor's expert, Dr. Willard F. **[*998]** Mueller, testified on direct examination that "people have gotten an attachment to the Danforth Standard in this case, it had kind of a mystique about it at one time, … what happens in one year, simply a price difference, doesn't result in an immediate kind of shift." (R40-106.) ***HN16***[] Although interbrand competition generally restrains the pricing behavior of individual brand sellers, *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n. 19, 97 S. Ct. 2549, 2558 n. 19, 53 L. Ed. 2d 568 (1977)*, *on remand, 461 F. Supp. 1046 (N.D.Cal.1978)*, *aff'd, 694 F.2d 1132 (9th Cir.1982)*, it is settled that customer brand loyalty may constitute an impediment to competition and thus an aid in the **[**34]** exercise of market power. *See, e.g., United States v. Pabst Brewing Co., 384 U.S. 546, 559-61, 86 S. Ct. 1665, 1672, 16 L. Ed. 2d 765 (1966)* (Harlan, J., concurring), *on remand, 296 F. Supp. 994 (E.D.Wis.1969)*. [24] ***HN17***[] A single branded product may, in rare cases, constitute its own relevant market. *Los Angeles Mem. Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1393* (9th Cir.), *cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984)*.

[35]** The understanding that brand loyalty may facilitate monopolization is consistent with the general proposition that the ability to discriminate against a distinct group of customers by charging higher prices for otherwise similar products demonstrates the existence of market power with respect to that group. *See United States v. Grinnell Corp., 384 U.S. 563, 574, 86 S. Ct. 1698, 1706, 16 L. Ed. 2d 778 (1966)*. [25] The existence of such market power may, as a practical matter, remove the higher priced product from the broader market composed of its functional substitutes. *See C.E. Services, Inc. v. Control Data Corp., 759 F.2d 1241, 1246* (5th Cir.), *cert. denied, 474 U.S. 1037, 106 S. Ct. 604, 88 L. Ed. 2d 583 (1985)* (holding that "a ubiquitous price differential of some 20-25%" between branded and unbranded services, combined with other *Brown Shoe* factors, could justify finding a separate market for the unbranded services and thus precluded summary judgment on the issue of market definition).

[36]** We do not suggest that the existence or hypothetical possibility of monopoly power over one product automatically excludes it from a broader market. "Submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." *United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 360, 90 S. Ct. 2035, 2041, 26 L. Ed. 2d 658 (1970)*. ***HN19***[] We do hold, however, that regardless of which party in the case bears the ultimate burden of persuasion, the broader economic significance of a submarket must be supported by demonstrable empirical evidence. Although perhaps difficult to come by, evidence that the dominant firm within a submarket costs of production were insensitive to changes in the quantity of goods sold, suggesting that its only rational response would be to increase output to satisfy the higher demand in the event of price increases above competitive levels in the broader market, might show that submarket production in fact disciplined price levels in the broader market. Especially if the submarket represents a premium-priced segment of the broader market, the relevance of proof regarding **[**37]** elasticity of supply would depend on the validity of the assumption that

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[23] Of course, Rule's exclusive control over the Danforth trademark also eliminated the possibility of supply substitution by other firms making Danforths. This observation by itself, however, would not be sufficient to show that Danforths and generics represented distinct markets.

[24] *See also Cellophane,* 351 U.S. at 392-93, 76 S. Ct. at 1005-06; *Ware v. Trailer Mart, Inc., 623 F.2d 1150, 1154 (6th Cir.1980)*; *cf. Justice Department Guidelines, supra* § 3.3 n. 33 (noting that ease or difficulty of long-term committed entry into a market may depend upon "the relative appeal, acceptability and reputation of incumbents' and entrants' products").

HN18[] -

[25] *See also, e.g., 2 Areeda & Turner, **Antitrust Law**, supra P 514*; Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 518.1d (Supp.1991) [hereinafter Areeda & Hovenkamp, ***Antitrust Law***]; Gregory J. Werden, *Market Delineation and the Justice Department's Merger Guidelines, 1983 Duke L.J. 514, 522, 529-30*.

significant numbers of consumers would switch in response to significant price increases in the broader market, an assumption that may or may not be supported by evidence or common experience. In the present case U.S. Anchor can rely upon neither evidence nor inference. Simpler evidence of supply and demand substitution, like proof that producers in the submarket had actually increased or decreased their sales in response to corresponding price **[*999]** changes in the broader market, would also suffice. As we have pointed out, however, U.S. Anchor failed to meet its burden of proving interdependent market behavior by this method as well.

Considering all the evidence in light of the factors identified by *Cellophane* and *Brown Shoe* and explained in subsequent decisions, we conclude as a matter of law that the relevant product market was light weight generic and economy fluke anchors.

2. Measuring Power in the Market

HN20[] The principal measure of actual monopoly power is market share, and the primary measure of the probability of acquiring monopoly power is the defendant's proximity to acquiring a monopoly share **[**38]** of the market. Thus, a sufficiently large market share may alone create a genuine dispute over whether the defendant possessed a dangerous probability of successfully monopolizing a market despite the existence of other facts tending to make monopolization unlikely, thereby precluding summary judgment for the defendant. *McGahee v. Northern Propane Gas Co., 858 F.2d at 1506*. ***HN21***[] When assessing market shares for the purpose of ascertaining market power the appropriate measure of a firm's share is the quantity of goods or services actually sold to consumers. ***HN22***[] Although revenues are often relied upon as a surrogate for quantity, actual unit sales must be used whenever a price spread between various products would make the revenue figure an inaccurate estimator of unit sales. *Brown Shoe, 370 U.S. at 341 n. 69, 82 S. Ct. at 1533 n. 69*.

In *McGahee* we noted in dicta that several factors may be relevant to whether a particular market share evidences a dangerous probability of success. *858 F.2d at 1505* (citing *McGahee v. Northern Propane Gas Co., 658 F. Supp. 189, 196-97 (N.D.Ga.1987)*, **[**39]** *rev'd, 858 F.2d 1487 (11th Cir.1988))*. In finding no dangerous probability of success the district court had relied upon the ease of entry by new firms and expansion from adjacent geographic markets, the number and size of alleged victims of the predation and the defendant's declining market share during the alleged attempt to monopolize. *658 F. Supp. at 196-97*. Nevertheless, we held:

> Without examining any factors to determine what market share would be necessary for Northern Propane's alleged predatory pricing to present a dangerous probability of success, we can say that a sixty or sixty-five percent market share is a sufficiently large platform from which such a scheme could be launched to create a genuine issue of material fact as to whether there was a dangerous probability that Northern Propane would succeed in achieving a monopoly.

McGahee, 858 F.2d at 1506. Finding it "undisputed" that the defendant possessed such a share, we reversed the district court's order of summary judgment for the defendant and remanded for further proceedings. ***HN23***[] Our holding in *McGahee* that market share **[**40]** estimated with reasonable confidence to fall between 60 and 657 suffices to raise a jury question concerning dangerous probability of success is binding circuit precedent. *Sherry Mfg. Co. v. Towel King, Inc., 822 F.2d 1031, 1034 n. 3 (11th Cir.1987)*. We do note, however, the tension between *McGahee* 's bright-line approach and *Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir.1969)*, in which the court noted that "one must be particularly wary of the numbers game of market percentage when considering an "attempt to monopolize' suit" under the dangerous probability standard. *417 F.2d at 207 n. 2*; *cf. United States v. Columbia Steel Co., 334 U.S. 495, 528, 68 S. Ct. 1107, 1124, 92 L. Ed. 1533 (1948)* ("the relative effect of percentage command of a market varies with the setting in which that factor is placed") (actual monopolization case). We believe the cases may be reconciled by requiring a careful definition of the relevant market (as mandated by *Walker Process* and *American Key*) [26] and an assessment of each firm's **[**41]** **[*1000]** ability to vary its

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[26] Notably, in *McGahee* itself the district court had observed that despite the defendant's concession for summary judgment purposes concerning the relevant product market, "there is, at the very least, an issue of fact as to whether propane constitutes a distinct product market." *658 F. Supp. at 192 n. 3* (citing *United States v. Empire Gas Corp., 537 F.2d 296, 303-304 (8th Cir.1976)*, *cert. denied,* ***429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977))***.

output in calculating the size of the market and attributing individual market shares. *See, e.g., United States v. General Dynamics Corp., 415 U.S. 486, 499-504, 508-10, 94 S. Ct. 1186, 1194-97, 1199-1200, 39 L. Ed. 2d 530 (1974)* (measuring power in market for coal in terms of possession or likely near-term acquisition of uncommitted reserves instead of overall sales, because most sales represented fulfillment of existing long-term requirements contracts).

[42]** In *Cliff Food Stores* the former Fifth Circuit stated that something more than 507 market share would be required to show *actual* monopoly, at least in the absence of collusive price leadership or tacit coordination in an industry. *417 F.2d at 207 n. 2*. The Second Circuit in *Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122* (2d Cir.), *cert. denied, 454 U.S. 968, 102 S. Ct. 512, 70 L. Ed. 2d 384 (1981)*, similarly suggested that the absence of *actual* monopoly power could be found as a matter of law when the defendant supplies only 507 of the market, "or even somewhat above that figure, [when] the record contains no significant evidence concerning the market structure to show that the defendant's share of that market gives it monopoly power." *651 F.2d at 129*. Despite these suggestions, we have discovered no cases in which a court found the existence of actual monopoly established by a bare majority share of the market. Nevertheless, a dangerous *probability* of achieving monopoly power may be established **[**43]** by a 507 share. For this reason, it is usually necessary to evaluate the prospects for monopolization as they existed when the alleged attempt began. As shown by the undisputed facts discussed *infra,* Rule never possessed a dangerous probability of success during the time for which U.S. Anchor seeks damages.

U.S. Anchor points to the combined market shares of Rule and Tie Down at the end of the 1984-85 season, immediately before the transaction that eliminated Tie Down as a supplier and transferred its production to Rule. Accepting *arguendo* the implicit contention that Tie Down's pre-transaction market share should be attributed to Rule, we conclude from the undisputed evidence that Rule's market share on August 31, 1985, the eve of the 1985-86 season, was 61.57, (RTX 674), and its aggregate (average) share over the entire season was 30.17, (*id.;* RTX 675 at 1).

Rule has argued that we should not attribute all of Tie Down's pre-transaction market share to it. After the transaction Tie Down had no need for its anchor sales representatives, many of whom found engagements with U.S. Anchor and employed their connections and reputation on behalf of the newcomer's selling efforts. **[**44]** Moreover, U.S. Anchor's Chapman was well known to customers from his days with Tie Down. Thus, according to Rule, U.S. Anchor stepped into Tie Down's shoes and inherited at least some of Tie Down's pre-transaction market share, presumably that portion which U.S. Anchor had the productive capacity to satisfy. This argument is persuasive, although it may be subject to rebuttal on at least two grounds. *Cf. American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1321-22 (7th Cir.1991)*. First, the depth of Rule's product line and the expertise of its own sales force conferred competitive advantages which might have induced some of Tie Down's former customers to stay with the Hooker line. Second, the anchor industry was highly concentrated and customers had few alternative sources of supply, a factor that is especially important in view of Rule's effort to link purchase of the Deepset anchors to exclusive dealing arrangements with distributors. We need not reach the merits of Rule's contention, however, because even if we consider Rule to have had 61.57 of the market on August 31, 1985, there was insufficient evidence from which the jury could **[**45]** have found a dangerous probability of monopolization in October.

As we have outlined above, Rule's *average* market share for the 1985-86 season was 30.17, a fact which strongly indicates that Rule's share declined sharply from 61.57 after U.S. Anchor's entry into the market in August. For the month of October, U.S. Anchor's sales of generic and economy anchors exceeded Rule's by 5.77. (RTX 675 at 15). Prior to October U.S. Anchor had no sales at all, but the firm was accepting orders **[*1001]** during this time and apparently possessed the capacity to fill them. Thus, Rule was never able to maintain a majority position in the market during the 1985-86 season. *Cf. General Dynamics, 415 U.S. at 501-02, 94 S. Ct. at 1196*. Accordingly, because Rule possessed less than 507 of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success in October 1985 as a matter of law.

3. Recoupment

Rule argues that the district court should have granted its motion for judgment notwithstanding the verdict based on its contention that there can **[**46]** be no dangerous probability of successful monopolization by predatory pricing unless it is shown that the defendant would have recouped the foregone revenues associated with its price-cutting strategy. [27] Our disposition of this case, however, makes it unnecessary to address Rule's recoupment argument.

B. *Anticompetitive Conduct, Specific Intent and Damages*

Our conclusion that U.S. Anchor failed to show a dangerous probability of success makes it unnecessary for purposes of resolving its attempt claim to evaluate the evidence of Rule's and Tie Down's costs, as would be required to classify its pricing conduct as anticompetitive. *See* *Matsushita, 475 U.S. at 585 n. 8, 106 S. Ct. at 1355 n. 8*; *International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714, 723-25 (5th Cir.1975)*. **[**47]** The same is true with respect to the evidence of specific intent to achieve monopoly power by unlawful conduct, although we note that such intent may sometimes be inferred from predatory conduct itself. *Spectrum Sports,* __ U.S. at __, 113 S. Ct. at 892; *International Tel. & Tel.,* 104 F.T.C. at 401-02; *see also* McGahee, 858 F.2d at 1503-04. Nor must we decide whether to parse this evidence for the precise level during each season at which Rule's prices unlawfully dropped below its costs in order to assess U.S. Anchor's proof of damages, as requested by Rule. *See* *MCI Communications Corporation v. American Telephone and Telegraph Company, 708 F.2d 1081, 1162, 1165 (7th Cir.1983)*.

VI. CONSPIRACY

U.S. Anchor's conspiracy claims are distinct from its attempted monopolization claim. ***HN24***[] The elements of a conspiracy to monopolize under *Section 2* are (1) an agreement to restrain trade, (2) deliberately entered into with the specific intent of achieving a monopoly rather than a legitimate business purpose, (3) which could have had an anticompetitive **[**48]** effect, and (4) the commission of at least one overt act in furtherance of the conspiracy. *Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1576 (11th Cir.1991)*. ***HN25***[] The elements of a conspiracy to restrain trade under *Section 1* are (1) an agreement to enter a conspiracy (2) designed to achieve an unlawful objective. *Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 820* (11th Cir.), *cert. denied, 495 U.S. 924, 110 S. Ct. 1960, 109 L. Ed. 2d 322 (1990)*, *appeal after remand,* *980 F.2d 1381 (11th Cir.1993)*. The plaintiff must also prove (3) "actual unlawful effects [or] facts which radiate a potential for future harm" to competition. *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 622, 73 S. Ct. 872, 888, 97 L. Ed. 1277 (1953)*.

HN26[] There is no requirement, however, that a conspiracy under either provision have a dangerous probability of successfully achieving its objectives. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984)*. **[**49]** ***HN27***[] Moreover, "[a] *section 1* plaintiff … need not prove an intent on the part of the co-conspirators to restrain trade or to build a monopoly. So long as the purported conspiracy has an anticompetitive effect, the plaintiff has made out a case under *section 1*." *Bolt, 891 F.2d at 819-20* (citations omitted). ***HN28***[] We have said, however, that "a *section 1* claim and a *section 2* conspiracy to monopolize **[*1002]** claim require the same threshold showing--the existence of an agreement to restrain trade." *Seagood, 924 F.2d at 1576*.

U.S. Anchor points to evidence of the unlawful intent necessary to create such an agreement. We have reviewed this evidence and find it sufficient to show an intent to achieve an unlawful objective on Rule's part, namely the use of predatory means to monopolize the fluke anchor market. Nevertheless, there is insufficient evidence linking Tie Down to Rule's efforts to support a finding of conspiracy between them. ***HN29***[] Federal ***antitrust law*** requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately. *Bolt, 891 F.2d at 819*; **[**50]** *see also* *Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 764, 104 S. Ct. 1464, 1470, 79 L. Ed. 2d 775 (1984)*. U.S. Anchor did not meet this heightened standard of proof. *Cf.* *Boczar v. Manatee Hosps. & Health Sys., Inc., 993 F.2d 1514, 1518-19 (11th Cir.1993)* (finding sufficient evidence when

[27] If we accepted Rule's argument we could simply remand for a new trial with directions to instruct the jury concerning this "element" of the plaintiff's case, or we could evaluate the record to see whether the jury could have found the element proven.

defendant's supposed legitimate reasons for acting were shown to be fabricated and contrived). [28] The MacKarvich market report, USTX 683, for instance, does not show that Tie Down desired to employ predatory means to drive U.S. Anchor from the market. Rather, it merely shows the prices at which it would be possible to inflict losses on the newcomer. It says nothing about Rule's costs, and U.S. Anchor does not dispute that Tie Down had no knowledge of Rule's costs other than the price paid for anchors. Tie Down's experts and MacKarvich himself testified that such studies are common in competitive industries and consistent with legitimate competition based on price. MacKarvich's recommendation to set prices low enough to inflict losses on U.S. Anchor merely shows a desire to win on the basis of efficiently **[**51]** producing a product and selling it at a lower price than less efficient rivals. ***HN30***[] It is not unlawful to slash prices in an attempt to obtain more sales, even if the result is that a competitor happens to be driven out of business. *Ball Mem. Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338-39 (7th Cir.1986)*. Moreover, to suffer a loss in the first year of operation is common in competitive industries, and for MacKarvich to anticipate that U.S. Anchor would be temporarily unprofitable does not necessarily show a desire or expectation that the firm would be driven from the marketplace. In short, we have examined the record closely and find there is insufficient evidence linking Tie Down with Rule's scheme to constitute a conspiracy under the substantive proof requirements of federal ***antitrust law***.

[52]** Without Tie Down, there was no one with whom Rule could have conspired. Hence, its unilateral conduct was not actionable as a conspiracy under federal ***antitrust law***. The district court erred in denying judgment as a matter of law for Rule and Tie Down on the Sherman Act conspiracy claims.

VII. CLAIMS UNDER GEORGIA LAW

U.S. Anchor's complaint alleged violations of *article III, § VI, P 5 of the Georgia constitution* and *O.C.G.A. § 13-8-2(a)(2)*, which invalidate certain contracts in restraint of trade. (R1-1, PP 60-62.) U.S. Anchor concedes that these provisions merely render such agreements unenforceable and provide no cause of action for damages to those who are parties thereto, *see* *E.T. Barwick Indus. v. Walter E. Heller & Co., 692 F. Supp. 1331, 1349 (N.D.Ga.1987)*, but argues that Georgia recognizes a common law tort action in favor of third parties who are injured by a conspiracy in restraint of trade. We agree with U.S. Anchor that its complaint stated a valid claim for damages as a result of a conspiracy in restraint of trade. *See* *Blackmon v. Gulf Life Ins. Co., 179 Ga. 343, 175 S.E. 798, 802-03 (1934)* **[**53]** (holding that allegations of predatory **[*1003]** pricing conspiracy with intent to monopolize stated a cause of action); *Atlanta Association of Fire Ins. Agents v. McDonald, 181 Ga. 105, 181 S.E. 822, 828 (1935)* (awarding nominal damages and injunction for group boycott); *see also Harrison Co. v. Code Revision Comm'n, 244 Ga. 325, 260 S.E.2d 30, 34 (1979)*. The district court erred in failing to perceive "the distinction between a contract or agreement merely in restraint of trade as between the parties, and a combination or contract to stifle competition, or a conspiracy to ruin a competitor." *Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 41 S.E. 553, 556 (1902)* (suit for damages and injunction). Although we have found insufficient evidence of a conspiracy under federal law standards, this does not answer the question of whether Georgia courts would find sufficient evidence of conspiracy under their substantive law. *Cf.* *Sachdeva v. Smith, 167 Ga. App. 80, 306 S.E.2d 19, 20 (1983)*.

HN31[] We have previously held that Georgia **[**54]** law provides a cause of action for tortious interference with the business relationships between a plaintiff and its customers, suppliers or representatives. To be held liable the defendant "must have (1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) [caused] plaintiff [to] suffer[] some financial injury." *DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1518 (11th Cir.1989)* (quotation omitted), *cert. denied, 494 U.S. 1081, 110 S. Ct. 1813, 108 L. Ed. 2d 943 (1990)*, *appeal after remand,* *990 F.2d 1186 (11th Cir.1993)*, *amended,* *997 F.2d 1340 (11th Cir.1993)* (per

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[28] We have considered U.S. Anchor's contention that the district court abused its discretion by excluding certain evidence that Rule's customers perceived an attempt by Rule to eliminate U.S. Anchor from the market, a perception based upon reported statements made by a Rule employee. (*See* USTX 206.) This evidence has such little bearing on the existence of an agreement between Rule and Tie Down that its exclusion on hearsay grounds, even if erroneous, *see* *United States v. Pendas-Martinez, 845 F.2d 938, 942-43 (11th Cir.1988)*; *Southern Stone Co. v. Singer, 665 F.2d 698, 703 (5th Cir. Unit B Jan. 1982)*, was harmless. *Fed.R.Evid. 103(a)*. We see no abuse of discretion.

curiam); *see also* NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816, 822 (1965), *cert. dismissed,* 384 U.S. 118, 86 S. Ct. 1306, 16 L. Ed. 2d 409 (1966). The defendant may show that competitive **[**55]** conduct is privileged by establishing that it used no improper means. *Integrated Micro Sys., Inc. v. NEC Home Elecs. (USA), Inc., 174 Ga. App. 197, 329 S.E.2d 554, 559 (1985)*, *cert. denied,* No. 69405 (Ga. Apr. 24, 1985).

U.S. Anchor's complaint adequately pleads a claim for relief under this theory to present it for adjudication by the district court. Count V gave full notice to the defendants that U.S. Anchor sought recovery under Georgia law for "Unfair Methods of Competition and Unfair Acts and Practices," including conduct which was "inequitable, unfair, unscrupulous, in violation of public policy and unconscionable and tending to defeat or lessen competition…." (R1-1 PP 59-60.) The fact that paragraph 60 of the complaint also refers to the constitutional and statutory provisions which U.S. Anchor concedes confer no independent damages remedy does not by itself deprive the defendants of "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir.1983)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957))*; **[**56]** *see* Fed.R.Civ.P. 8(a)(2). The issue of whether the tort theory is applicable to the facts of this case was adequately argued to the district court in connection with U.S. Anchor's requested jury instructions, (R28-136-45), and thus preserved for appellate review. *Cf. Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1519 (11th Cir.1991)*.

The novel questions presented are whether below-cost pricing can satisfy the improper action element of the tort and whether low prices, standing alone, can constitute a prohibited inducement of the plaintiff's customers. *Cf. Parks v. Atlanta News Agency, Inc., 115 Ga. App. 842, 156 S.E.2d 137, 140 (1967)* (holding that solicitation of competitor's customers is not itself tortious, even when combined with "preferential" prices), *cert. denied,* No. 42624 (Ga. July 14, 1967). We regard it as unclear whether tortious interference with business relations under Georgia law may be established by a showing of predatory pricing and, if so, what sort of pricing conduct would be deemed predatory. We also have some doubt as to whether intentional interference with business relations **[**57]** is a distinct cause of action from the tort of conspiracy in restraint of trade, or whether there is only a single theory of relief, so that proof of a conspiracy to interfere with the plaintiff's business relations **[*1004]** would be actionable as U.S. Anchor's sole remedy for the alleged joint conduct of Rule and Tie Down. *Compare Cook v. Robinson, 216 Ga. 328, 116 S.E.2d 742 (1960) with Jacobs Pharmacy, 41 S.E. at 554-57* (quoting *Doremus v. Hennessy, 176 Ill. 608, 52 N.E. 924 (1898))*; *see also Overstreet, 142 S.E.2d at 822*. This is not a matter of mere semantics, for while it appears settled that predatory pricing by a group or conspiracy is actionable, we have found no Georgia authority addressing predation by a single defendant acting unilaterally.

Another issue affecting the outcome of U.S. Anchor's state law claims is the validity and effect of its settlement agreement with Rule, executed on March 19, 1986. The agreement provided that each party would release the other

> from any and all actions, demands, **[**58]** claims or causes of action whatsoever, which now exist or which may arise in the future, as a result of events which occurred prior to the execution of the Settlement Agreement, including, without limitation, any claims which were or could have been presented by way of complaint or counterclaim in Civil Action Number C85-4466A.

(RTX 457.) Because the predatory pricing scheme allegedly began in October 1985, Rule contends that the settlement agreement operated as a release of U.S. Anchor's cause of action. U.S. Anchor contends that its predatory pricing claims were undiscovered at the time the release was executed and therefore were not intended to be released. In addition, it contends that injuries caused by predatory conduct occurring after the release would not have been discharged even if they arose as a result of a scheme or conspiracy that was ongoing when the release was signed. [29] The district court concluded that the federal predatory pricing claims were undischarged

[29] *Compare Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029, 1043-44 (5th Cir.1977)*, *cert. denied,* ***434 U.S. 859, 98 S. Ct. 185, 54 L. Ed. 2d 132 (1977)***, *Poster Exchange, Inc. v. National Screen Serv. Corp., 517 F.2d 117, 127 (5th Cir.1975)*, *cert. denied,* ***423 U.S. 1054, 96 S. Ct. 784, 46 L. Ed. 2d 643*** *and* ***425 U.S. 971, 96 S. Ct. 2166, 48 L. Ed. 2d 793 (1976)***, *appeal after remand,* 542 F.2d 255 (5th Cir.1976) (per curiam), *cert. denied,* ***431 U.S. 904, 97 S. Ct. 1697, 52 L. Ed. 2d***

because the agreement unambiguously applied only to causes of action related to the prior litigation. It also relied on Chapman's oral testimony concerning his intent at the time he signed the agreement and **[**59]** on *Covington v. Brewer, 101 Ga. App. 724, 115 S.E.2d 368, 372-73 (1960)*, in which the court held that the scope of a release as intended by the parties could not be presumed to encompass rights respecting a subject matter not clearly referred to in the body of the agreement. *But cf. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1311-12 (5th Cir.1983)*.

[60]** The doctrine of pendent jurisdiction as outlined in *United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*, gives the district court power to decide claims arising under state law as to which there was no independent basis for federal jurisdiction but which share a common nucleus of operative fact with federal claims. The court also has discretion not to hear such state law claims.

> Under *Gibbs,* a federal court should consider and weigh, in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline to exercise its jurisdiction by dismissing the case without prejudice.

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 619, 98 L. Ed. 2d 720 (1988) **[**61]** (footnote ***HN33***[] omitted). While the doctrine is a flexible one according great leeway to the court, *see id. at 350 n. 7, 108 S. Ct. at 619 n. 7*, we have found an abuse of discretion in failing to dismiss a case when the federal claims were resolved early in the proceedings **[*1005]** and the state law claims posed issues of first impression. *See Hardy v. Birmingham Bd. of Educ., 954 F.2d 1546 (11th Cir.1992)*.

In the present case, the federal claims have survived through trial and have only been resolved on appeal. Thus, the parties have already tried the state law claims in federal court, although the district court's ruling prevented the jury from considering them. The legal issues have been decided by the district court and are now properly before us for review, so that judicial economy and convenience weigh in favor of retaining jurisdiction. On the other hand some of the state law issues are novel, and comity between federal and state judicial systems weighs in favor of determination by state courts. Moreover, a ruling by this court in favor of U.S. Anchor's position would require a new federal trial in **[**62]** which only state law claims would be put in issue. Fairness to U.S. Anchor, however, prevents us from dismissing the state law claims. Dismissal would require the plaintiff to re-file its action in state court more than eight years after the allegedly tortious conduct began, thereby losing a substantial portion of its rights (if any) by application of Georgia's four-year statute of limitations. [30] **[**64]** We might have reached a different result under

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388 (1977), *and Redel's Inc. v. General Elec. Co., 498 F.2d 95, 99 (5th Cir.1974) with Record Club of Am., Inc. v. United Artists Records, Inc., 611 F. Supp. 211, 217 & n. 8 (S.D.N.Y.1985)*.

HN32[] -

[30] The mechanics of Georgia's statute of limitations have been explained as follows:

> The test to be applied in determining when the statute of limitations begins to run against an action sounding in tort is in whether the act causing the damage is in and of itself an invasion of some right of the plaintiff, and thus constitutes a legal injury and gives rise to a cause of action. If the act is of itself not unlawful in this sense, and a recovery is sought only on account of damage subsequently accruing from and consequent upon the act, the cause of action accrues and the statute begins to run only when the damage is sustained; but if the act causing such subsequent damage is of itself unlawful in the sense that it constitutes a legal injury to the plaintiff, and is thus a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, however slight the actual damage then may be.

Fox v. Ravinia Club, Inc., 202 Ga. App. 260, 414 S.E.2d 243, 244 (1991) (quotation omitted), *cert. denied, No. Fox v. Ravinia Club, 1992 Ga. LEXIS 91* (Ga. Feb. 4, 1992). As we understand the test, U.S. Anchor's cause of action (if any) the Judicial Improvements Act of 1990, Pub.L. No. 101-650, § 310, 104 Stat. 5089, 5113-14, *codified at* 28 U.S.C. § 1367. Under 28 U.S.C. § 1367(d), the statute of limitations would be tolled while the claims were pending until 30 days after an order of dismissal, thus allowing the plaintiff time for filing a new action in state court without a lapse of its rights. But the present case was commenced before the statute's effective date on December 1, 1990, and § 1367 is not retroactive. Yanez v. United States, 989 F.2d 323, 327 n. 3 (9th Cir.1993). In view of the fact that the case may be certified to the Supreme Court of Georgia for interlocutory **[**63]** resolution of the state law issues, we conclude that the balance of factors involved in the discretionary decision to retain pendent jurisdiction weighs clearly against dismissal. [31]

Accordingly, we respectfully certify the following questions of law to the Supreme Court of Georgia and the Honorable Justices of that Court.

Questions for Certification

1. DOES A GENERAL RELEASE UNDER GEORGIA LAW DISCHARGE LIABILITY FOR INJURY CAUSED BY SUBSEQUENT ACTS IN THE COURSE OF A SCHEME OR CONSPIRACY THAT WAS ONGOING AT THE TIME THE RELEASE WAS EXECUTED BUT UNKNOWN TO THE RELEASING PARTY?

2. DOES A GENERAL RELEASE UNDER GEORGIA LAW DISCHARGE LIABILITY FOR INJURY CAUSED BY TORTIOUS CONDUCT ALREADY COMMITTED THAT WAS UNKNOWN TO THE **[*1006]** RELEASING PARTY AT THE TIME THE RELEASE WAS EXECUTED?

3. DOES THE TORT OF INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS ENCOMPASS PREDATORY PRICING BELOW SOME MEASURE OF THE DEFENDANT'S COSTS?

4. IF THE ANSWER TO QUESTION 3 IS YES, THEN IN A CASE OF ACTIONABLE PREDATORY PRICING BELOW SOME MEASURE OF COST BY A CONSPIRACY OR A SINGLE DEFENDANT, WHAT IS THE **[**65]** APPROPRIATE MEASURE OF THE DEFENDANTS' COSTS?

Our statement of the questions is not designed to limit the inquiry of the Supreme Court of Georgia. Instead, the Supreme Court has the widest possible latitude to consider the problems and issues involved in this case as it perceives them to be. Martinez v. Rodriquez, 394 F.2d 156, 159 n. 6 (5th Cir.1968), *conformed to certified answer,* 410 F.2d 729 (5th Cir.1969). To assist the Supreme Court, the entire record in this case and copies of the parties' briefs are transmitted herewith.

VIII. CONCLUSION

The judgment of the district court is reversed with respect to all federal law causes of action and judgment is rendered in favor of the defendants thereon. Dispositive questions of law respecting the plaintiff's state law causes of action are certified to the Supreme Court of Georgia.

REVERSED and JUDGMENT RENDERED in part and QUESTIONS CERTIFIED.

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continued to accrue with each predatory sale, and would be time-barred under O.C.G.A. § 9-3-31 with respect to each transaction occurring more than four years before commencement of the new action in state court. *See* Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1094 (N.D.Ga.1975) (citing Georgia Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520 (1933)); *accord* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 806, 28 L. Ed. 2d 77 (1971) (federal ***antitrust law***).

[31] We need not decide whether § 1367 would allow the court of appeals to decide the propriety of exercising supplemental jurisdiction or whether such discretion is vested in the district court alone.

Teleconnect Co. v. U.S. West Communications

Supreme Court of Iowa

November 24, 1993, Filed

No. 379 / 92-1460

Reporter

508 N.W.2d 644 *; 1993 Iowa Sup. LEXIS 236 **

TELECONNECT COMPANY, Appellant, v. U.S. WEST COMMUNICATIONS, INC., a Colorado corporation, f/k/a Northwestern Bell Telephone Company, Appellee.

Prior History: [1]** Appeal from the Iowa District Court for Linn County, Van D. Zimmer, Judge. Interlocutory appeal and cross appeal from rulings in dispute between telephone companies.

Disposition: REVERSED ON THE CROSS APPEAL AND REMANDED; APPEAL MOOTED.

Core Terms

file a tariff, tariff, customers, district court, competitor, rates, local service, antitrust, terms, summary judgment motion, public utility, regulation, telephone, courts

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Summary Judgment, Supporting Materials**

For purposes of the review of a motion for summary judgment, a court will render judgment for the movant if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c). No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN2[] Filed Rate Doctrine, Public Utilities & Telecommunications Carriers

Iowa Code § 476.1 (1993) delegates to the utilities board the authority to regulate the rates and services of public utilities. Under this regulatory scheme, every public utility must file with the board tariffs showing the rates and charges for its public utility services, and every public utility shall keep copies of its tariffs open to public inspection under such rules as the board may prescribe. Iowa Code § 476.4. These tariffs contain the terms of service that the parties would ordinarily put into private contracts. These publicly filed tariffs thus ensure uniformity of utility rates and prevent the discrimination of price and service that once pervaded utilities industries.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Commercial Law (UCC) > ... > Filing > Financing Statements > Requirements

Energy & Utilities Law > Utility Companies > Rates > General Overview

Commercial Law (UCC) > Secured Transactions (Article 9) > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN3[] Filed Rate Doctrine, Public Utilities & Telecommunications Carriers

The filed tariff doctrine conclusively presumes that both a utility and its customer know the contents and effects of published tariffs. Under Iowa Code § 476.5, just as under the Interstate Commerce Act and other statutes that establish a tariff system to replace private contracting, neither the customer's ignorance nor the utility's misquotation of the applicable tariff provides refuge from the terms of the tariff. Thus, a customer of a utility has no cause of action against a utility for alleged negligent or intentional misquotation of a tariffed service. Similarly, any contract or agreement to provide a tariffed service on terms other than those set forth in the tariff is void. To allow otherwise would give a preference to and discriminate in favor of the customer who received the representation. Iowa Code § 476.5. Under the doctrine, the relevant regulatory agency retains primary enforcement authority over utility disputes in which, absent the tariff scheme, contract or tort law would ordinarily govern.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN4[] Filed Rate Doctrine, Public Utilities & Telecommunications Carriers

Any person dissatisfied with a decision of a utility board may file a petition for rehearing. Iowa Code § 476.12. Judicial review of the board's decision is provided in Iowa district court. Iowa Code § 476.13.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN5[] **Filed Rate Doctrine, Public Utilities & Telecommunications Carriers**

The filed tariff doctrine prohibits a customer of a utility from suing that utility in contract or tort over terms governed entirely by publicly filed tariffs.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Common Carriers

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

Energy & Utilities Law > Utility Companies > Contracts for Service

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN6[] **Filed Rate Doctrine, Common Carriers**

The filed tariff doctrine prohibits discrimination based on service as well as price.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN7[] **Filed Rate Doctrine, Public Utilities & Telecommunications Carriers**

Regulatory agencies, not the courts, have primary responsibility for determining the reasonableness of utilities rates or practices.

Counsel: Thomas M. Collins, Kevin H. Collins, and Mark L. Zaiger of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellant.

Kasey W. Kincaid of Faegre & Benson, Des Moines, and George A. Carroll of U.S. West, Des Moines, for appellee.

Judges: Considered by McGiverin, C.J., and Larson, Lavorato, Neuman, and Andreasen, JJ.

Opinion by: McGIVERIN

Opinion

[*645] McGIVERIN, C.J.

The controlling question here is whether the "filed tariff" doctrine bars one utility's contract and tort claims against another utility when the terms of the disputed service are regulated by tariffs filed publicly with a regulatory agency.

With our permission, plaintiff Teleconnect Company (Teleconnect) appeals the district court's ruling denying its demand for a jury trial and its motion to disqualify defendant's counsel. Defendant U.S. West Communications, Inc. (or U.S. West, formerly Northwestern Bell or Bell) cross appeals the district's court's denial of its motion for summary judgment based on the "filed tariff" doctrine. **[**2]** We reverse the district court's denial of U.S. West's motion for summary judgment. That decision renders the other issues on this appeal moot. We remand the case to the district court with directions that it enter an order sustaining defendant's motion for summary judgment and dismissing plaintiff's petition.

I. *Background facts and proceedings.* The events leading to this appeal occurred over a decade ago. In the early 1980s Teleconnect had emerged, in the wake of the governmental breakup of the telephone monopoly held by American Telephone & Telegraph, as a successful long distance company. It wanted to expand into local service. Therefore, in the spring of 1983, Northwestern Bell and Teleconnect began negotiations over Bell's sale of local telephone service to Teleconnect for resale to corporate and institutional customers. On May 26, 1983, Clark McLeod, the president and founder of Teleconnect, received a letter from a Bell sales manager who stated Bell's support of Teleconnect's proposed resale of local service to **[*646]** be purchased from Bell. A month later, however, Bell's general manager for sales wrote McLeod to inform him that an Iowa utility regulation (or "tariff") prohibited **[**3]** Bell from selling Teleconnect the type of service it wanted.

Teleconnect then sued Bell in Iowa district court under a variety of theories. The ensuing litigation was removed to federal district court, then remanded back to Iowa district court, then removed to federal court, and remanded to Iowa district court once again. Teleconnect's present petition asserts claims against Bell (now U.S. West) for (1) breach of contract; (2) fraud and fraudulent representation; (3) negligence; (4) breach of fiduciary relationship; and (5) tortious interference with business relations.

The district court denied defendant U.S. West's motion for summary judgment based on the "filed tariff" doctrine, granted U.S. West's motion to strike Teleconnect's jury demand, and denied Teleconnect's motion to disqualify U.S. West's counsel from proceeding further in the case. We granted the parties' applications for interlocutory appeal on all three rulings but only need to address one of them. We will provide further details regarding the facts and proceedings in the course of our analysis.

II. *Filed Tariff Doctrine.* U.S. West cross appeals the district court's denial of its motion for summary judgment based **[**4]** on the theory that the "filed tariff" (or "filed rate") doctrine barred Teleconnect's claims. U.S. West points to a 1979 tariff filed with and approved by the Iowa State Commerce Commission that prohibited new carriers from purchasing the service Teleconnect wanted. U.S. West asserts that under the filed tariff doctrine, Teleconnect has no claim under its various contract and tort theories because the published tariff constructively notified Teleconnect that it did not qualify to purchase the service. Neither party disputes that such a tariff was on file with the Iowa State Commerce Commission at the time the alleged actions in this dispute occurred, nor does either party question the validity of the tariff.

HN1[] For purposes of this review of the district court's ruling against U.S. West's motion for summary judgment, we will render judgment for the movant "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c). No fact question exists if the only dispute concerns the legal **[**5]** consequences flowing from undisputed facts. *Ottumwa Housing Auth. v. State Farm Fire & Cas. Co., 495 N.W.2d 723, 726 (Iowa 1993)*.

Before we can explain our ruling on whether the filed tariff doctrine bars Teleconnect's claim, we must explain the tariff system itself. The Iowa Utilities Board (formerly the Iowa State Commerce Commission) regulates the telecommunications industry and other public utilities through tariffs, or regulations of utility rates and services. ***HN2***[] *Iowa Code section 476.1 (1993)* delegates to the utilities board the authority to "regulate the rates and services of public utilities." Under this regulatory scheme, every public utility must "file with the board tariffs showing the rates and charges for its public utility services," and every public utility "shall keep copies of its tariffs open to public inspection under such rules as the board may prescribe." *Iowa Code § 476.4*. These tariffs contain the terms of service that the parties would ordinarily put into private contracts. These publicly filed tariffs thus ensure uniformity of utility rates and prevent the discrimination of price and service that once pervaded utilities industries. **[**6]** *See generally* *Southern Pac. Transp. Co. v. Commercial Metals Co., 456 U.S. 336, 344, 102 S. Ct. 1815, 1821, 72 L. Ed. 2d 114, 121 (1982)*.

Because of this tariff regime, Bell offered technologically similar services under different tariffs. Until 1979 Bell sold local service to large, institutional customers through the PBX, CENTREX, and CENTRON systems. The University of Iowa, for example, used CENTREX for its old dormitory phones, which all had a 353 prefix. In 1979, pursuant to a tariff, Bell began to phase out its CENTREX service, limiting its use to existing customers.

[*647] Meanwhile, as Teleconnect's business grew, it wanted to participate in the local service market by purchasing local service from Bell and then reselling the service to its own customers. Teleconnect needed Bell's CENTREX service, however, if it expected to make a profit. CENTRON, although functionally identical to CENTREX, would have cost Teleconnect more money because of its pricing system.

In early 1983 Teleconnect presented a proposal to Bell to purchase local service. In a May 26, 1983 letter to Teleconnect, a Bell representative stated that its Iowa **[**7]** tariffs "do indeed allow you to share Centrex/Centron service with other telephone users in Iowa." Teleconnect, apparently relying on this interpretation, concluded that it could resell local service under the cheaper CENTREX tariff.

Teleconnect claims that in reliance on Bell's letter, it solicited additional customers, purchased a building, and hired personnel. In a June 28, 1983 letter, however, Bell clarified its prior communication, explaining: "As the tariff states, 'CENTREX is obsolete effective *March 26, 1979* and grandfathered to *existing* customers . . . .' Under that provision, Centrex is not available for the use that you are proposing." (Emphasis added in letter.) Bell indicated, however, that it would support Teleconnect's use of the CENTRON system. Although the May 1983 assurance from Bell failed to distinguish between CENTREX and CENTRON and although Bell retracted a month later any assurance that first letter may have contained, Teleconnect contends that Bell breached a contract with it and intentionally and recklessly caused it substantial injury in these dealings, entitling it to compensatory and punitive damages.

A. This brings us to U.S. West's defense under **[**8]** the "filed tariff" doctrine. U.S. West contends that the filed tariff doctrine insulates it from tort or contract liability in its dealings with Teleconnect because published tariffs determined the terms of Teleconnect's proposed local service offering.

HN3[] The filed tariff doctrine conclusively presumes that both a utility and its customer know the contents and effects of published tariffs. *Maislin Indus., U.S. v. Primary Steel, Inc., 497 U.S. 116, 127 n.9, 110 S. Ct. 2759, 2766 n.9, 111 L. Ed. 2d 94, 109 n.9 (1990)*; *Missouri Pac. R.R. v. Rutledge Oil Co., 669 F.2d 557, 559 (8th Cir. 1982)*. Under *Iowa Code section 476.5*, just as under the Interstate Commerce Act and other statutes that establish a tariff system to replace private contracting, neither the customer's ignorance nor the utility's misquotation of the applicable tariff provides refuge from the terms of the tariff. *See* *Maislin, 497 U.S. at 120, 110 S. Ct. at 2763, 111 L. Ed. 2d at 104*.

Thus, a customer of a utility has no cause of action against a utility for alleged negligent **[**9]** or intentional misquotation of a tariffed service. *Id. at 127 n.9, 110 S. Ct. at 2766 n.9, 111 L. Ed. 2d at 109 n.9*. Similarly, any contract or agreement to provide a tariffed service on terms other than those set forth in the tariff is void. *Sheldon v. Chicago B. & Q. R. Co., 184 Iowa 865, 870, 169 N.W. 189, 190 (1918)*. To allow otherwise would give a preference to and discriminate in favor of the customer who received the representation. *See* *Iowa Code § 476.5* ("No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs."); *cf.* *Iowa Elec. Light & Power Co. v. Wendling Quarries, Inc., 389 N.W.2d 847, 849 (Iowa 1986)*(observing argument that utility undercharges, whether intentional or unintentional, "would be to grant a preferential rebate to a customer in violation of [the] statutory mandate of nondiscriminatory rates").

Under the doctrine, the relevant regulatory agency retains primary enforcement authority over utility disputes in which, **[**10]** absent the tariff scheme, contract or tort law would ordinarily govern. *See* *Elk Run Tel. Co. v. General Tel. Co. of Iowa, 160 N.W.2d 311, 315 (Iowa 1968)*; *compare Reiter v. Cooper,* 507 U.S. , , *113 S. Ct. 1213, 1220, 122 L. Ed. 2d 604, 618 (1993)*("Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed."); *Taffet v. Southern Co., 967 F.2d 1483, 1490 **[*648]** (11th Cir. 1992)*("The filed rate doctrine recognizes that where a legislature has established a scheme for utility rate making, the rights of the rate-payer in regard to the rates he pays are defined by that scheme."). ***HN4***[] Any person dissatisfied with a decision of the utility board may file a petition for rehearing. *Iowa Code § 476.12*. Judicial review of the board's decision is provided in Iowa district court. *Iowa Code § 476.13* (providing for judicial review under Iowa Code chapter 17A).

The filed tariff doctrine applies squarely to the alleged **[**11]** agreement between Teleconnect and Northwestern Bell. Teleconnect never asserts that Bell violated the terms of the CENTREX tariff. If it did, it might have had a remedy before the Iowa Utilities Board that would be reviewable in Iowa district court. Instead, however, Teleconnect bases its claims entirely on contract and tort theories. If we allowed Teleconnect to sue U.S. West on these theories, Teleconnect would have the same telephone service as all other Iowa customers (including its competitors), plus a de facto rebate from U.S. West in the amount of any money judgment representing the value to Teleconnect of resold CENTREX service. *See* *Iowa Elec. Light & Power Co., 389 N.W.2d at 849* (noting that a common carrier must charge its tariff rates and any agreement to the contrary is unlawful and void).

We refuse to grant Teleconnect preferential treatment under the otherwise uniform tariff regime that the Iowa legislature and the utilities board have established. ***HN5***[] The filed tariff doctrine prohibits a customer of a utility from suing that utility in contract or tort over terms governed entirely by publicly filed tariffs. *See* *Maislin, 497 U.S. at 126, 110 S. Ct. at 2765-66, 111 L. Ed. 2d at 108*. **[**12]** Because the filed tariff doctrine bars Teleconnect's suit based on contract and tort allegations and reliance damages based thereon, it appears that U.S. West is entitled to judgment as a matter of law.

B. Teleconnect argues and the district court held that Northwestern Bell's conduct falls outside the control of the filed tariff doctrine in part because its alleged misrepresentation of the CENTREX offering affected only the service Teleconnect would receive from Bell, not the price it would pay. Because the filed tariff doctrine provides no defense against recovery of damages suffered from acts unrelated to rates, Teleconnect argues, U.S. West cannot raise it as a defense against its refusal to sell CENTREX to Teleconnect.

We believe this rate/service distinction elevates form over substance. The only significant difference between CENTREX and CENTRON, as Teleconnect itself points out, lies in the pricing of the two packages. The only breach in this alleged May 1983 agreement occurred when Bell refused to sell Teleconnect local service at the price Teleconnect claims Bell promised. Therefore, we must reject Teleconnect's claim that a rate/service distinction applies to this case.

[13]** Even if a genuine difference other than price existed between CENTREX and CENTRON, Teleconnect's claim would still fail. We have previously observed that ***HN6***[] the filed tariff doctrine prohibits discrimination based on service as well as price in *Sheldon, 184 Iowa at 869, 169 N.W. at 190*. In *Sheldon,* the shipper paid the tariffed rate for transport of goods between Percival, Iowa and Fort Morgan, Colorado, but entered into a contract with the carrier for additional service, namely, to make two intermediate unloading stops in Brush and Akron, Colorado. *Id.* The railroad failed to make the intermediate unloading stops and the goods were damaged. *Id.* We held, however, that the contract for additional service was "nugatory rather than valid." *Id. at 869-70, 169 N.W. at 190*.

Teleconnect makes the same allegations that the shipper made in *Sheldon.* There, Mr. Sheldon alleged that the railroad promised but failed to make unloading stops in Brush and Akron; here, Teleconnect alleges that Bell promised but failed to provide CENTREX service for resale. Like the *Sheldon* court, we refuse to **[**14]** recognize agreements between utilities and customers that create prices or other terms beyond those set out in the applicable tariffs.

C. Teleconnect further urges us to agree with the district court's refusal to apply the **[*649]** filed tariff doctrine to Teleconnect on the ground that Teleconnect sued as a competitor of U.S. West, not as a customer. We decline to do so.

Some federal courts appear to have created a "competitor exception" to the filed tariff doctrine in cases in which a competitor of a regulated utility brought a claim under ***antitrust law*** alleging that the utility used its rate making power to squeeze out a competitor. For instance, in *City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1179 (8th Cir. 1982)*, on which the district court relied in this case, the court rejected Union Electric's claim that its discriminatory pricing against the city of Kirkwood, Missouri, a customer and competitor of Union Electric, was immunized from antitrust liability by the filed tariff doctrine. The court observed that the doctrine, which "ensures conformity of rates as between customers[,] should not give an unfair advantage to a utility in its dealings **[**15]** with its competitors." *Id.*

The United States Supreme Court's most recent guidance on the application of the filed tariff doctrine in the antitrust context appeared in *Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 423, 106 S. Ct. 1922, 1930, 90 L. Ed. 2d 413, 426 (1986)*. In that case, the Court held that the filed tariff doctrine insulated defendant motor carriers from liability for price fixing under the federal antitrust laws. The plaintiffs in *Square D,* however, were not competitors with the defendants, and the federal courts remain split on whether the competitor exception exists. *Compare* *In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1161 (3d Cir. 1993)*(applying competitor exception to filed rate doctrine to allow Sherman Act claim) *with* *Pinney Dock & Transp. Co. v. Penn Central Corp., 838 F.2d 1445, 1457* (6th Cir.), *cert. denied, 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988)*(applying filed tariff doctrine to insulate defendant from antitrust liability and rejecting competitor exception).

In the present case, **[**16]** the federal district court dismissed Teleconnect's antitrust claims with prejudice, leaving only its contract and tort claims for disposition in state court. Given this posture, the concerns driving any competitor exception to the filed tariff doctrine do not exist under the present pleadings of this case. Unlike the defendant in *City of Kirkwood,* there is no evidence in this case that U.S. West has placed a price squeeze on Teleconnect that renders U.S. West's local service any cheaper than Teleconnect's would have been. U.S. West invokes the filed tariff doctrine to shield itself from contract and tort claims, not antitrust liability. To the extent that a competitor exception exists, it serves to avoid the potential anticompetitive conduct that can occur when utilities file tariffs in a predatory or discriminatory manner. Absent any threat to competition under the antitrust laws, to apply in this case a competitor exception to the filed tariff doctrine would only encourage other customers of utilities to seek preferential rates below those set by publicly filed tariffs.

D. Teleconnect raises two other exceptions to the filed tariff doctrine, neither of which we believe contain **[**17]** any merit.

Teleconnect first contends that the filed tariff doctrine prohibits only "unreasonable" discrimination and that courts may decide whether the proposed deviation from the tariff remains reasonably faithful to its basic terms. We reject this contention. ***HN7***[] Regulatory agencies, not the courts, have primary responsibility for determining the reasonableness of utilities rates or practices. *See* *Maislin, 497 U.S. at 119, 110 S. Ct. at 2762, 111 L. Ed. 2d at 104*. In 1983 the Iowa State Commerce Commission had primary responsibility for determining whether granting a particular service to a customer constituted a reasonable advantage or preference within the meaning of *Iowa Code section 476.5*. Thus, "if the present action is predicated on a claim that defendant's rates were unreasonable, plaintiff does not have a case here." *Oliver v. Iowa Power & Light Co., 183 N.W.2d 687, 690 (Iowa 1971)*.

Nor do we agree with Teleconnect's argument that the court should hear its claim because it raises no questions that require agency adjudication. We agree that its allegations of breach of contract, fraudulent **[**18]** misrepresentation, and other claims are not ones **[*650]** over which the Iowa Utilities Board has jurisdiction. Merely because the utilities board has no jurisdiction over such claims, however, does not automatically entail that the district court should let the case go to trial. "'Unless and until [the utility suspends or sets aside a tariff], this rate is made, for all purposes, the legal rate . . . . The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the [utility].'" *Maislin, 497 U.S. at 126, 110 S. Ct. at 2765-66, 111 L. Ed. 2d at 108* (quoting

Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 163, 43 S. Ct. 47, 49, 67 L. Ed. 183, 187 (1922)(Brandeis, J.)).

We therefore conclude that the filed tariff doctrine precludes Teleconnect's contract and tort claims against U.S. West. The district court erred in not granting U.S. West's motion for summary judgment on those claims.

III. *Disposition.* We reverse the district court's denial of U.S. West's motion for summary judgment on Teleconnect's claims of breach of contract, **[**19]** fraud and fraudulent representation, negligence, breach of fiduciary relationship, and tortious interference with business relations. Because we hold that the district court should have granted summary judgment for defendant U.S West, we do not reach the issues raised in Teleconnect's appeal. We remand the cause to the district court with directions to enter an order granting summary judgment for U.S. West and dismissing plaintiff Teleconnect's petition.

REVERSED ON THE CROSS APPEAL AND REMANDED; APPEAL MOOTED.
